CVL2015
LAW OF PERSONS

The European Law Students' Association

MALTA

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The Law of Persons

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Introduction

The law of persons is often as peculiar as persons themselves. The law of persons is called as such because the first book of the Civil Code is the book of persons. The Civil Code is divided into persons and things and the former deals with the rights and obligations of persons, physical and/or legal. The law of persons started in 1873 when Sir Adriano Dingli published the Ordinance of Persons. Prior to that the law of persons was somewhat regulated by the *Code de Rohan.* The laws where then consolidated in 1942 with the publication of the first proper civil code.

The law of persons is influenced by society as it is moulded around the society it serves. Take for example the changes made in 2004 removing the distinction between those children born in and out of wedlock.

I. Maintenance

Maintenance covers, amongst other things, food, education, health, accommodation. Maintenance amongst spouses is almost unheard of today, due to the fact that today it is more common for spouses to be financially independent from one another, another instance of the law of persons adapting to changing social realities. Maintenance is defined in article 19 of the Civil Code as: "(1) *Maintenance shall include food, clothing, health and habitation,* (2) *In regard to children and other descendants, it shall also include the expenses necessary for health and education".* It is worth noting that at no point is the word *"adequate"* defined in the law. Maintenance is typically paid on a monthly basis. However, article 54(5)[1] includes the possibility of paying maintenance as a lump sum, which are encouraged for the maintenance of spouses to achieve what is known as a 'clean break'. However, when children are involved lump sum payments are discouraged, for two reasons: lump sum payments cannot be controlled once the payment is made, and because it maintains a connection between the paying spouse and his/her child/ren, thus allowing for continued involvement. Act XIV of 2011 emphasised the importance of education in maintenance and so in order to incentivise people to come to university and study, maintenance was increased potentially until the age of 23 (provided the child pursues a masters' degree).

Maintenance *pendente lite*

Article 46A of the Civil Code states that *"during the pendency of the action for separation, either spouse, whether plaintiff or defendant, may demand from the other spouse a maintenance allowance in proportion to his or her needs and the means of the other spouse, and taking into account also all other circumstances of the spouses".* Thus, *pendente lite* means pending litigation, making maintenance *pendente lite* an interim measure. It is the

[1] 54(5) *Notwithstanding any other provision of this Code, on separation being pronounced, the court may if it deems it appropriate in the circumstances, order the spouse liable to supply maintenance to pay to the other spouse, in lieu of the whole or part of such maintenance, a lump sum, which the court deems sufficient in order to make the spouse to whom maintenance is due financially independent or less dependent of the other spouse, as the case may be.*

opportunity to get recompense during the case as opposed to at the end of it. Family law cases may take years to be resolved and because spouses typically live separately during the proceedings, thus making maintenance *pendente lite* necessary to support the children during the interim. Maintenance *pendente lite* is given in proportion to the needs of the spouse and the means of the other spouse.

Article 25(1) specifies that maintenance given *pendente lite* is given *"for bare subsistence".* This is generally not applied because it would be too long a period of time to simply survive. This is done if the defendant is of sufficient means as to be liable to pay maintenance when the case concludes. Article 25(2) states that *"where in any such case the claim for maintenance is disallowed, the defendant shall be entitled to claim, from the plaintiff himself, or from the person bound to supply maintenance, to such plaintiff, the reimbursement of any amount he may have paid, together with interest thereon".*

In the case of *Il-Pulizija v. Carmelo Farrugia* (Court of Criminal Appeal)(23rd of January 1998) the Court in its judgement ruled that when the maintenance *pendente lite* period expires whilst proceedings are still ongoing the legal validity of the duty to pay maintenance shall continue to be upheld.

Maintenance *in kind*

Maintenance in kind is when a person takes someone else to live with him as opposed to paying maintenance in monetary form. Maintenance in kind is almost never used. It allows the parent to forgo paying maintenance by allowing habitation of the child instead. It is regulated by article 23 of the Civil Code which reads as follows:

> **23.** (1) The person bound to supply maintenance may not, without just cause, be compelled to pay a maintenance allowance if he offers to take and maintain into his own house the person entitled to maintenance.
>
> (2) Where maintenance is to be furnished out of the house of the person liable thereto, he may, on good cause being shown, supply such maintenance in kind instead of paying an allowance in money.

Duty to contribute towards needs of the family

Article 3 of the Civil Code states that *"both spouses are bound, each in proportion to his or her means and of his or her ability to work whether in the home or outside the home as the interest of the family requires, to maintain each other and to contribute towards the needs of the family".* This provision allows the spouse to contribute towards the family inside the home, meaning in the eyes of the law housework is considered as employment, although it is very often not quantified and instead the Court comes up with a figure.

Duty of spouse towards children

Article 3B of the Civil Code reads as follows:

> **3B.** (1) *Marriage imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children.*

> (2) *The obligation of the parents to provide maintenance according to sub-article* (1) *also includes the obligation to continue to provide adequate maintenance to children, according to their means, and where it is not reasonably possible for the children, or any of them, to maintain themselves adequately, who:*
>
> (a) *are students who are participating in full-time education, training or learning and are under the age of twenty-three; or*
>
> (b) *have a disability, as defined in the Equal Opportunities (Persons with Disability) Act, whether such disability is physical or mental.*
>
> (3) *The obligations provided in sub-article* (1) *also bind a person acting* in loco parentis *with regard to another person's child, by reason of the marriage of such person to a parent of that child, where the other parent of that child, shall have, at any time before or during the marriage, died or was declared as an absentee according to Title VII of Book First of this Code, or is unknown:*
>
> *Provided that the provisions of this sub-article shall be without prejudice to the obligations of the natural parents of the child and shall in any case be without prejudice to the provisions of article 149.*

With regards to a physical/mental impairment, there is no age at which maintenance stops being paid. Typically, it is paid until the child can financial support itself, naturally this is dependent on the extent of the disability. Article 3B (3) has yet to be interpreted by the courts.

Amount of maintenance

Article 20(1) states that *"maintenance shall be due in proportion to the want of the person claiming it and the means of the person liable thereto".* Thus, the law speaks not of a maximum or minimum, as well as the issue of proportionality. The scope of maintenance is to provide for the survival of those entitled to receive it, and therefore one cannot argue for a rise in the amount due.

Article 20(2) states that *"in examining whether the claimant can otherwise provide for his own maintenance, regard shall also be had to his ability to exercise some profession, art, or trade".*

Article 20(3) states that *"in estimating the means of the person bound to supply maintenance, regard shall only be had to his earnings from the exercise of any profession, art, or trade, to his salary or pension payable by the Government or any other person, and to the fruits of any movable or immovable property and any income accruing under a trust".*

Article 20(4) states that *"a person who cannot implement his obligation to supply maintenance otherwise than by taking the claimant into his house, shall not be deemed to possess sufficient means to supply maintenance, except where the claimant is an ascendant or a descendant".* That is to say, if the only way one can maintain a dependent is by taking them into one's own home, it cannot be claimed that one is capable of adequately maintaining said dependent.

Article 20(5) states that *"in estimating the means of the person claiming maintenance regard shall also be had to the value of any movable or immovable property possessed by him as well as to any beneficial interest under a trust".*

In Germany, they have what is known as the *Düsseldorfer Tabelle* which sets a standard maintenance amount depending on the salaries of the parties involved. The Maltese, less rigid, system of maintenance allows for discretion on the judge's part and added flexibility. It does not allow for the same level of certainty as the German system, but it is a system that generally benefits the children by allowing the judge to take into consideration all variables, something a rigid table is incapable of. It is precisely because even though the Maltese system is more flexible and therefore better for the child, in order to allow a lawyer to give advice to a client who asks for the amount of maintenance, the courts have created a custom which is that the minimum amount of maintenance which can be paid for a single child is that of €200 a month and half of health and educational expenses. Some judges believe that the amount should be increased to €230 a month.

Article 54 (*Obligation for maintenance*) reads as follows:

> 54. (1) *The spouse against whom the separation is pronounced shall not, as a result of such separation, be relieved from the obligation of supplying maintenance to the other spouse, where, according to the provisions of Sub-title I of this Title, such maintenance is due.*
>
> (2) *The amount of maintenance referred to in sub-article* (1), *and the maintenance due to children in the event of separation, shall be determined having regard to the means of the spouses, their ability to work and their needs, and regard shall also be had to all the other circumstances of the spouses and of the children, including the following:*
> (a) *the needs of the children, after considering all their circumstances;*
> (b) *any disability, as defined in the Equal Opportunities (Persons with Disability) Act, whether such disability is physical or mental;*
> (c) *circumstances of illness which are of such seriousness and gravity as to compromise the ability of the spouses or of the children to maintain themselves;*
> (d) *whether the ability of the party to whom maintenance is due to have earnings of whatever nature was diminished by reason of that party having, during the marriage, taken care of the household, the other party and the upbringing of the children of the marriage;*
> (e) *every income or benefit which the spouses, or any of them, receive according to law, other than social assistance that is not contributory which is paid to them under the Social Security Act:*
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> *Provided that for the purposes of this paragraph the disability pension payable in terms of article 27 of the Social Security Act shall be taken into consideration;*
> (f) *the accommodation requirements of the spouses and of the children;*

(g) *the amount which would have been due to each of the parties as a benefit, including, but not limited to, a benefit under a pension scheme, which by reason of the separation, that party will forfeit the opportunity or possibility of acquiring.*

(3) *The provisions of article* 381(2) *of the Code of Organisation and Civil Procedure shall apply mutatis mutandis provided that the said article shall be construed to mean that, even where no demand is made by a party to whom maintenance is due, either for that party or for the children, for the application of the provisions of that article, the court may apply the said article out of its own motion.*

(4) *In granting maintenance, the court may also provide for the manner in which the same may increase from time to time.*

(5) *Notwithstanding any other provision of this Code, on separation being pronounced, the court may if it deems it appropriate in the circumstances, order the spouse liable to supply maintenance to pay to the other spouse, in lieu of the whole or part of such maintenance, a lump sum, which the court deems sufficient in order to make the spouse to whom maintenance is due financially independent or less dependent of the other spouse, as the case may be.*

(6) *For the purposes of sub-article* (5), *the court shall, among the circumstances, consider the possibility of the person to whom maintenance is due, of receiving training or retraining in a profession, art, trade or other activity or to commence or continue an activity which generates an income, and order the lump sum for that purpose.*

(7) *The court may direct, according to circumstances, that the payment of a lump sum referred to in the previous sub-articles of this article, be made by equal or unequal instalments spread over a reasonable period of time.*

(8) *The court may also direct that in lieu of all or part of the lump sum referred to in sub-article (5), the spouse liable thereto shall assign to the other spouse property in ownership or in usufruct, use or habitation.*

(9) *Where there is a supervening change in the means of the spouse liable to supply maintenance or the needs of the other spouse, the court may, on the demand of either spouse, order that such maintenance be varied or stopped as the case may be. Where however, a lump sum or an assignment of property has been paid or made in total satisfaction of the obligation of a spouse to supply maintenance to the other spouse, all liability of the former to supply maintenance to the latter shall cease. Where instead, the lump sum or assignment of property has been paid or made only in partial satisfaction of the said obligation, the court shall, when ordering such lump sum payment or assignment of property, determine at the same time the portion of the maintenance satisfied thereby and any supervening change shall in that case*

> *be only in respect of the part not so satisfied and in the same proportion thereto.*

Note the following:

In article 54(2)(a) reiterates the long-held judicial belief that the amount of maintenance should always reflect the actual needs of the children, and everything should be taken into consideration when determining what precisely these needs are.

Article 54(2)(d) is a more recent innovation intended to address situations where, instead of working, one of the spouses took to raising the family and keeping up the house. Whilst, if the spouse in question is young enough, it may be possible for them to work, this rule recognises the difficulty of entering the workforce, particularly a profession, after a long period of being outside of it. To that end, the law now considers this one of the factors to be taken into account when maintenance is calculated.

Article 54(2)(e) notes that contributory social benefits (such as the State Pension) should be taken into account when calculating the amount of maintenance due.

Article 54(2)(g) is also a novel concept and shall include, as an example, insurance schemes paid into by one spouse which would have benefited both spouses had they remained married.

Article 54(3) authorises the Courts to order that the payment of maintenance be taken directly from the salary/allowance/bequest of the spouse ordered to pay maintenance as well as to inform any relevant parties to that effect. This is achieved through the issuance of garnishee orders (pursuant to article 381 of the COCP[2]).

Article 54(4) allows the Court to order that the amount owed for maintenance be increased periodically, this could be to allow said amount to keep up with inflation or for any purpose the Court deems fit.

Articles 54(5), (6), (7), and (8) allow for the maintenance to be paid as a lump sum and the Court, when determining the amount thereof, shall ensure that it is enough for the spouse to be financially independent from the other, or at the very least less dependent.

Supervening Change

Article 54(9) authorises the Court to suspend or alter the amount owed for maintenance should a supervening change occur in the life of the spouses ordered to pay it. Take, for example, a loss or change in employment. Alternatively, the supervening change may occur

[2]Article 381(2) COCP *"... in causes for maintenance, the court may, either in the judgment or in a subsequent decree upon an application to that effect by the creditor suing for maintenance, where such creditor is the spouse, or a minor or an incapacitated child, or an ascendant of the debtor, order that a specified portion of the salary, allowance or bequest mentioned in sub-article (1)(a), (b) and (d) or of the salary of any person, be paid directly to the creditor; the service of any such order on the person by whom the said salary, allowance or bequest is payable shall have the same effect as a garnishee order; and the person so served shall pay directly to the creditor the portion of the salary, allowance or bequest specified in the order."*

on the end of the receiving spouse, take, for example, said spouse entering into gainful employment.

With regard to maintenance paid in the form of a lump sum, should a supervening change occur after the lump sum has been paid there can be no refund. Alternatively, should such a supervening change occur in the life of the spouse liable to receive maintenance, the duty to pay it shall cease completely. To that effect, if the lump sum is being paid in instalments the Courts could order the cessation or reduction of such payments.

Beyond article 54(9) the notion of supervening change exists also in the general context of maintenance vis-à-vis other family members. Article 21 states that "(1) *Where the person supplying maintenance becomes unable to continue to supply such maintenance, in whole or in part, he may demand that he be released from his obligation, or that the amount of maintenance be reduced, as the case may be.* (2) *The same shall apply where the indigence of the person receiving maintenance shall cease, wholly or in part".*

Article 22 goes on to states that "(1) *Where maintenance has been furnished, no action will lie for the repayment of such part thereof as may have been furnished after the cessation of the cause for which maintenance was due.* (2) *Nor can the person to whom maintenance was due claim from the person liable, upon the latter becoming able to supply such maintenance, the amount thereof in respect of the time during which the person liable for maintenance did not furnish it for want of means".*

To that end, the spouse who is liable to pay maintenance cannot bring about a supervening change (take, for example, resigning from one's employment) purely to withhold maintenance and spite the spouse liable to receive it. See the following cases:

1. ***Rita Attard v. Raymond Attard* (06/02/1995):** Here, it was found that Mr Attard intentionally resigned from his employment with the scope of withholding maintenance from his ex-wife, and so the Court ordered that his duty to pay had not ceased.
2. ***Il-Pulizija v. Anthony Saliba* (Court of Appeal – 15/07/1998):** Here, the Court of Appeal ruled that should a person liable to pay maintenance find himself unemployed he must first urgently petition the Court to reduce the amount of maintenance owed or stop it altogether, as opposed to simply withholding the payment of maintenance directly, which is what Mr Saliba did in this particular case. As a means of discouraging this practice he was ordered to pay a fine (*ammenda*) of Lm5. It was made clear that Mr Saliba had absolutely no right to simply decide to stop paying maintenance, irrespective of his inability to pay it. Furthermore, the Court took into account the fact that the defendant resigned with considering his maintenance obligations.
3. ***Zahra Charmaine pro et noe v. Zahra Alfred* (27/06/2003) (First Hall, Civil Court):** Here, the Court held that: *"Id-dizokkupazzjoni ma hijiex per se` motiv biex tehles lir-ragel mill-obbligu tal- manteniment lejn martu u uliedu. Dan aktar u aktar imbaghad fejn, bhal f`dan il- kaz, id-dizokkupazzjoni tkun kolpuza".*
4. ***Francis X. Aquilina v. Carmela sive Lina Aquilina'* (05/10/2001) (Court of Appeal):** Here, Plaintiff petitioned the Court for a reduction in the amount owed in maintenance but it was decided that he lacked an appropriate basis to justify such a

reduction. Furthermore, based on the evidence submitted to it the Court deduced that Plaintiff only petitioned the Court for a reduction to spite his ex-wife.

When the obligation to pay maintenance ceases/Grounds for Refusal to Give Maintenance
Article 6 of the Civil Code (*cessation of duty to supply* maintenance) states that *"the duty of one spouse to maintain the other shall cease if the latter, having left the matrimonial home, without reasonable cause refuses to return thereto".* However this provision is very rarely cited.

Article 27 states that "(1) *The obligations of any person to supply maintenance to another shall cease if the person in whose favour such obligation is established, shall contract marriage, notwithstanding the opposition of the person liable as aforesaid, provided such opposition be made on good grounds, and the demand from the release from such obligation be made by the person objecting within the time of six months following the celebration of the marriage.* (2) *Such opposition shall only be operative if it is made by means of a judicial act to be served on each of the parties intending to contract the marriage, and filed in the registry of the civil court, in the island in which the person objecting, or either of the said parties, resides*". Here, the law speaks of how parents may cease maintaining their children when they contract marriage when the parent liable to pay maintenance opposes said marriage.

Article 28 states that *"for the purposes of the last preceding article, the want of the necessary means of subsistence, having regard to the position of the party to whom the opposition refers, or the bad character of the other party, shall be deemed to be a good ground of opposition to the proposed marriage".* Thus, the above-mentioned opposition should be on good grounds. To that end, the opposition must be made plain before the marriage is contracted through a judicial act to be served to each of the parties contracting marriage and filed in the registry of the Civil Court. After the marriage contracts the parents have six months to petition the Courts to be released from the obligation to maintain their child. Acceptable grounds on which a marriage may be opposed to include their child's marriage to a person of bad character or a person lacking the necessary means of subsistence.

Article 29 states that *"where the marriage has been celebrated with a total or partial dispensation from the previous publication of banns, and it is not shown that the person subject to the obligation mentioned in article 27, was aware of the proposed marriage at least fifteen days prior to its celebration, it shall be lawful for such person, even in default of the opposition referred to in that article, to demand, within the time of six months following the marriage, his release from the said obligation on any of the grounds on which such opposition would have been effectual".*

Article 32 states that *"besides the ground referred to in article 27, parents or other ascendants may refuse maintenance to children or other descendants on any of the grounds on which an ascendant may disinherit a descendant*". The provisions under which an heir can be disinherited are listed under article 623 of the Civil Code.

Article 48(1) lists the consequences that afflict a spouse if they are found to be responsible for the breakdown of a marriage. These are relatively mild but there is one in particular which, if applied, could be quite devasting (48(1)(*d*)).

Article 38 triggers article 48.

Article 41 triggers article 48.

When maintenance can be revised

Maintenance can be revised when the person supplying maintenance becomes unable to continue doing so. Article 21 states that: "(1) *Where the person supplying maintenance becomes unable to continue to supply such maintenance, in whole or in part, he may demand that he be released from his obligation, or that the amount of maintenance be reduced, as the case may be.* (2) *The same shall apply where the indigence of the person receiving maintenance shall cease, wholly or in part".* This provision caters for both the reduction of maintenance the termination of the payment thereof.

Article 54(9) speaks of supervening changes under which one may ask for the revision of maintenance: *"Where there is a supervening change in the means of the spouse liable to supply maintenance or the needs of the other spouse, the court may, on the demand of either spouse, order that such maintenance be varied or stopped as the case may be. Where however, a lump sum or an assignment of property has been paid or made in total satisfaction of the obligation of a spouse to supply maintenance to the other spouse, all liability of the former to supply maintenance to the latter shall cease. Where instead, the lump sum or assignment of property has been paid or made only in partial satisfaction of the said obligation, the court shall, when ordering such lump sum payment or assignment of property, determine at the same time the portion of the maintenance satisfied thereby and any supervening change shall in that case be only in respect of the part not so satisfied and in the same proportion thereto".*

Enforcing the obligation to pay maintenance

The most common way of enforcing maintenance is with the filing of a police report. Under article 338(z) it is a contravention against public order because of the importance attached to by society and those found guilty of not paying maintenance can be sentenced to a custodial sentence of not more than 3 months.

II. Parental Authority

The rights and obligations of parents towards their children. Maintenance is one of them. We shall be dealing with how it is acquired, lost, grown out of, and everything in between. One of the means by which parental authority may be lost if the parent is found guilty of any offence under Book IV of the Criminal Code (offences of a sexual nature). However, neglect (either by omission or commission) remains the main reason under which parental authority is lost. Education is taken extremely seriously under the Civil Code and the failure to ensure that one's children have adequate ones remains one of the key grounds for neglect. Jurisprudence is divided (unevenly) between those judges who believe that parental authority is given to those with custody over the child whereas the majority of judgements overwhelmingly argue that parental authority is granted to those with decision-making power of the child. Once the child reaches eighteen years of age, he grows out from under his parent's authority for all purposes except for those related to maintenance.

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Parental authority can be referred to as the rights and obligations the parents have over their children. It is almost impossible to outline everything which constitutes a right or obligation insofar as parental authority is concerned. There is an important distinction between parental authority and care and custody. In Malta there are two separate concepts: residence and custody. Whether they were actually intended to be separate concepts remains uncertain. First residence is determined (here in Malta we have what is known as a primary residence), then there is care and custody, which is typically joint. Here in Malta, care and custody is the right to take decisions and be informed insofar as the child is concerned. Furthermore, parental authority has been jointly exercised by both parents since the 1993 amendments which did away with the concept of *patria potestas*.

Child Subject to Parental Authority

Children are subject to parental authority which stems from a Roman Law concept. Today, the concept has become more relaxed with the terminology itself changing, meaning the term *parental responsibility* is now used. Under Roman Law the father had complete authority over the child and was even free to kill it if the need be. Article 131 of the Civil Code reads as follows:

> **131.** (1) A child shall be subject to the authority of his parents for all effects as by law established.
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> (2) Saving those cases established by law, this authority is exercised by the common accord of both parents. After the death of one parent, it is exercised by the surviving parent.
>
> (3) In case of disagreement between the parents on matters of particular importance, either parent may apply to such court as may be prescribed by or under any law in force from time to time indicating those directions which he or she considers appropriate in the circumstances.
>
> (4) The court, after hearing the parents and the child if the latter has reached the age of fourteen years, shall make those suggestions which it deems best in the interest of the child and the unity of the family. If the disagreement between the parents persists, the court shall authorise the parent whom it considers more suitable to protect the interest of the child in the particular case, to decide upon the issue, saving the provisions of article 149.
>
> (5) In the case of an imminent danger of serious prejudice to the child either parent may take such measures which are urgent and cannot be postponed.
>
> (6) With regard to third parties in good faith, each of the spouses shall be deemed to act with the consent of the other where he or she performs an act relative to parental authority relative to the person of the child.

This last provision (6) means that if a parent entrusts a third party with the child that person is deputised by said parent and is deemed to be in good faith.

Article 133 extends to the Courts the power to authorise the child to leave the parental home if he or she so requests. This is typically done in the best interests of the child should the child be under the parental authority of parents deemed unfit to care for the child by the Courts.

The Effects of Parental Authority on Minors

This provision is another remnant of Roman Law. It is regulated under article 132 which reads as follows:

> **132.** (1) A child shall obey his parents in all that is permitted by law.
>
> (2) Saving any other provision of law respecting enlistment in any disciplined force, it shall not be lawful for a child, without the consent of the parents, to leave the parental house, or such house as his parents may have appointed for him.
>
> (3) Where the child leaves the house without such consent, the parents shall have the right to recall him, and, if necessary, demand the assistance of the Police.

Article 132 stems from the concept of vicarious liability, that is to say if their child is a minor and causes any injury or liability to a third party, his or her parents shall be held liable for any losses incurred.

Power of the Court to Authorise child to be placed in alternative care

This regulated under article 134 which reads as follows:

> **134.** (1) It shall be lawful for the parents, if they are unable to control the child, to remove him from the family, assigning to him, according to the means of the parents, such maintenance as is strictly necessary.
>
> (2) In any such case, the parents may also, where necessary and upon obtaining the authority of such court as may be prescribed by or under any law in force from time to time, place the child, for such time as is stated in the decree, in some alternative form of care, which the court will according to circumstances consider suitable, to be, at the expense of the parents, cared for and treated in such manner as the court may deem conducive to the discipline and education of the child.
>
> (3) The demand for such authority may be made even verbally; and the court shall make the necessary order thereon without any formal proceedings, and without giving its reasons therefor.

This provision stems from the *Code de Rohan.* This provision is used in cases where the parents find themselves incapable of catering to their children's needs or controlling them. This does not relinquish the parent's liability to provide maintenance to the child. To that end, the cost of this alternative care shall be burdened by the parents. Should the child be aged 14 or elder, he has the right to be heard when considering the issue. In Malta there are two

programmes catering to such children, FEJDA for girls and FORMULA 1 for boys. Once a care order is issued,

Parents to be representative of the children
Article 135 states that *"the parents jointly represent their children, whether born or to be born, in all civil matters".* If two parents are unmarried until the child is born only the mother exercises parental authority.

Parents' powers of administration
Article 136 gives parents the power to administer the property of the child because children cannot administer their own. Article 136 states that: "(1) *The parents jointly administer the property of their children, whether born or to be born, except such as has devolved on such children on condition that it shall be administered solely by one of the parents or by third parties* (2) *Acts of ordinary administration may however be performed by either of the parents without the intervention of the other".*

Extraordinary acts of administration are written in a non-exhaustive list found in article 136(3)"

> (3) Acts of extraordinary administration which must be performed by the parents jointly include
>
> (a) the alienation of movables by nature, including motor vehicles for the object of profitably investing the proceeds thereof;
> (b) the collection of capitals that may become due;
> (c) the granting of personal rights of enjoyment over immovable property;
> (d) the acceptance of an inheritance, legacy or donation in the name of the child;
> (e) the partition of movables by nature;
> (f) acts which require the authorisation of the court in terms of sub-article (4) of this article.

The parents may not alienate immovables or movables by operation of law belonging to the child nor may they contract loans or other debt, on his behalf hypothecate or pledge his property, enter into a suretyship, enter into any compromise, or submit a dispute to arbitration except in case of necessity, or manifest utility and with the authority of the court and in any such case the court may, at the request of the parents, authorise one only of the parents to represent the child on the relative deed.

The acceptance of inheritance
Article 137 states that:

> **137.** (1) Any inheritance devolving on the children, shall be accepted by the parents with the benefit of inventory, unless such inventory is dispensed with by the court.
>
> (2) If one of the parents is unable or unwilling to accept such inheritance, the inheritance may be accepted by the other parent with the authority of the

> court. If both parents are unable or unwilling to accept such inheritance the court may, upon the demand of the child or of any of his relatives, authorise the acceptance thereof either by the child himself, if he has attained the age of fourteen years, or otherwise by a special curator to be appointed by the court.
>
> (3) Where the surviving spouse has filed the return in respect of property comprised in a chargeable transmission in accordance with the provisions of the Duty on Documents and Transfers Act, such spouse shall be deemed, for the purposes of this article, to have accepted the inheritance devolving upon the minor with the benefit of inventory with respect to such property as shall have been declared in the said return, which inventory shall be deemed to have been duly drawn up and published according to the said return, without the necessity of any further formality or authorization required by any law.

Should the parents contrive any of the above-mentioned rules one could petition the court for the act to be nullified with the plea for nullity being only able to be brought forward by a parent, child, heir, or other claiming to be under the child.

Conflicting interests

Article 139 states that *"in case of conflicting interests between the children, or between the children and either parent, the competent court shall, according to circumstances, appoint one or more special curators, provided that it shall be lawful for either parent to decline to represent any of the children against another or against the other parent".*

Parents to render accounts of administration

Article 140 states that:

> **140.** (1) The parents are bound to render to the child, on the latter attaining majority, an account of the property and the fruits of those things of which they have not the usufruct; and of the property only and of the administration thereof in regard to things of which they have the legal usufruct.
>
> (2) If parental authority ceases before the child attains majority the parents shall render the account on the date of such cessation.
>
> (3) Without prejudice to any liability of the parent, either parent may render such account on behalf also of the other parent.

Parents also enjoy usufruct over any property the child would have gained through succession, donation, or any other gratuitous title, including property derived from entail, except from property where:

- It was given to the child on condition that the parents or either of them should not have the usufruct,
- Property given to the child to undertake a career or art,
- Property given by inheritance, legacy or donation, which was accepted in the interest of the child against the wishes of the parents,

- Property by which the child has acquired with his own work.

The legal usufruct vested in the parents is subject to all obligations relative to usufructuaries. The legal usufruct enjoyed by the parents is also subject to the payment of any annuity or of any interest on capital fallen due before the commencement of the usufruct. It is also subject to the payment of funeral expenses and those expenses relative to the last illness of the person who previously had the property. This usufruct ceases on the death of the child, on the marriage of the parents, and in any other reason for which parental authority ceases. If one of the spouses dies, then the survivor as already said the parental authority shall vest in the surviving spouse and so is the usufruct of the property. If a spouse remarries, the new spouse shall be liable *in solidum* with the parent for such administration.

Cessation of parental authority

Parental authority either ceases or is forfeited. When parental authority ceases it dies a natural death. Forfeiture, on the other hand, is a punitive measure whereby the parent loses it as a consequence of his/her actions. Article 150 states that:

> **150.** Parental authority ceases *ipso jure* in each of the cases following:
>
> (a) on the death of both parents or of the child;
>
> (b) when the child attains the age of eighteen years;
>
> (c) on the marriage of the child;
>
> (d) if the child, with the consent of the parents, has left the parental home and set up a separate domestic establishment;
>
> (e) if the parents fail to make, in favour of the child, the registrations referred to in articles 2038 and 2039; so however that where only one parent has failed to make such registration, parental authority shall not cease in relation to the parent who has not so failed;
>
> (f) if the surviving parent remarries or, in the case of an adoptive parent, if after the adoption he marries or remarries, without having first made an inventory of the property of the child and obtained from the court the requisite leave to continue in the exercise of the rights of parental authority.

This is an exhaustive list with there being no other reasons under which parental authority may cease. The Court may reinstate parental authority under article 151 which reads as follows: *"In any of the cases referred to in paragraphs* (e) *and* (f) *of the last preceding article, it shall be lawful for the court, if it deems it expedient in the interest of the child, to reinstate the parent in the parental authority wholly or in part upon his performing that by reason of the omission of which he had forfeited such authority".*

When a parent may be deprived of parental authority

Article 154 reads as follows:

> **154.** (1) *Saving any other punishment to which he may be liable according to law, a parent may be deprived, by the said court, wholly or in part, of the rights of parental authority, in any of the cases following:*

(a) *if the parent, exceeding the bounds of reasonable chastisement, ill-treats the child, or neglects his education;*
(b) *if the conduct of the parent is such as to endanger the education of the child;*
(c) *if the parent is interdicted, or under a disability as to certain acts, as provided in articles 520 to 527 inclusive of the Code of Organization and Civil Procedure, and articles 189 and 190 of this Code;*
(d) *if the parent mismanages the property of the child;*
(e) *if the parent fails to perform any of the obligations set out in article 3B in favour of the child.*

(2) *If the interests of the child so require, the Court may order that only one of the parents shall exercise the rights of parental authority and the Court may also restrict the exercise of these rights and, in serious cases, exclude both parents from the exercise of these rights.*

(3) *The Court may also restrict the exercise of the aforementioned rights where one or both of the parents are charged with one or more of the offences listed in Title VII of Part II of Book First of the Criminal Code.*

(4) *Nevertheless, the court may, even in the cases mentioned in sub-article* (1)

Note that education is referred to twice at the beginning, emphasising its importance. Parents are capable of reacquiring their forfeited parental authority under article 154(4).

When minor carries on trade

Article 156 refers to emancipation and states that: "(1) *Where a minor, who has attained the age of sixteen years, has been authorized under article 9 of the Commercial Code, to trade, or, not being a trader, to perform certain acts of trade, such minor shall, in regard to all matters relating to his trade, or in regard to such acts, be considered as being of age.*(2) *Nothing in this Code shall affect all other provisions of the Commercial Code, relating to minors and to children subject to parental authority".*

III. Filiation

Filiation is an exercise in ascertaining parenthood, fatherhood to be exact (*mater semper certa est*). Filiation has become increasingly common over the years, despite the fact that there was a time during which it was taboo to speak of one's filiation. There was a major amendment in 2004 which eliminated the distinction between legitimate and illegitimate children (see *Carmen Zammit pro u Dr Renzo Porsella Flores et noe et v Wail Dadouch et*). There are two main presumptions:

- The child conceieved in wedlock is held to be the child of the spouses (*pater is est quem justae nuptiaedemonstrate*) article 67
- *Mater semper certa est,* article 68

Under Roman Law, those children born outside of wedlock were once deemed illegitimate, but this distinction has since been eliminated and at the international level we see article 2 of

the Universal Declaration on Human Rights stating that *"motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection",* as well as the introduction of the Convention of the Legal Status of Children Born out of Wedlock.

See the following ECHR judgements:

- ***Marckx v. Belgium* (1979):** Here, it was decided that the refusal of Belgian law to recognise the maternal affiliation of an illegitimate child upon birth, or to confer the same patrimonial rights to children of unmarried mothers as 'legitimate' children, violated both unwed mothers' and their children's rights to respect for family life, and were discriminatory, under Articles 8, 14 and Article 1 of Protocol 1 of the European Convention on Human Rights.
- ***Inze v. Austria* (1987):** The European Court of Human Rights held that an Austrian law that gave precedence to "legitimate" children over "illegitimate" children on rights to intestate succession was discriminatory in violation of Article 14 in conjunction with Article 1 of Protocol 1 of the European Convention on Human Rights.
- ***Kroon et noe v. Netherlands* (1994):** The European Court of Human Rights held that a Dutch law which permitted a married man to deny paternity of a child born to the marriage but did not permit a wife to do the same, violated Article 8 of the European Convention of Human Rights. The Court found that the Netherlands maintained a positive obligation under Article 8 to allow complete legal family ties to develop between a son and his natural father, even where the father is not married to the child's mother.

Natural Parentage

Article 70 concerns who has a right of action, it reads as follows:

> **70.** (1) *Any spouse, except for the spouse who gave birth to the child, may bring an action to repudiate a child born in wedlock:*
>
> (a) *if such spouse proves that during the time from the three hundredth day to the one-hundred-and-eightieth day before the birth of the child, such spouse was in the physical impossibility of cohabiting with the spouse who gave birth on account of being away from the said spouse, or some other accident; or*
>
> (b) *if such spouse proves that during the said time such spouse was de facto or legally separated from the spouse who gave birth:*
> *Provided that such spouse may not repudiate the child if there has been, during that time, a reunion, even if temporary between the spouses; or*
>
> (c) *if such spouse proves that during the said time such spouse was afflicted by impotency, even if such impotency was only an impotency to generate; or*
>
> (d) *if such spouse proves that during the said time the spouse who gave birth had committed adultery or that, that spouse had concealed the pregnancy and the birth of the child; or*
>
> (e) *if such spouse produces evidence of any other fact which may also be genetic and scientific tests and data that tends to exclude such parenthood.*

This states that even a child can bring an action for filiation. The action itself in practice is relatively simple. Until 2015 the Court of Appeal did not accept DNA tests in isolation. Today, once there is a DNA test it is sufficient to establish filiation.

Article 70A(2) states that *"on the application, mentioned in sub-article* (1)*, of a person entitled to clarify, the Civil Court (Family Section) may require any of the spouses, the child, and the alleged natural parent, as appropriate, to consent to a genetic test of parentage, and to acquiesce to the taking of a genetic sample appropriate for the test, which sample must be taken according to the current provisions of the law: Provided that where the said consent is not given by the parties, the Civil Court (Family Section) must substitute that consent that has not been given and order acquiescence in the taking of a sample".* What is being said here is that the Civil Court must substitute the individual's consent in the event that no consent is given for the taking of a DNA sample. If the party continuously refuses to give such a sample, the Court will draw inference from this act and essentially interpret this refusal as evidence that the person is the child's biological parent. There are scenarios where DNA testing may or may not be possible, such as where the parent has left the country and is no longer subject to the jurisdiction of the Maltese courts.

Article 70A goes on as follows:

> (3) In the absence of genetic and scientific evidence, the Civil Court (Family Section) may consider any other evidence presented which it deems to be relevant, including the drawing of inferences from the fact that a person did not provide a genetic sample, despite being ordered to do so.
>
> (4) The Civil Court (Family Section) shall dismiss the application if and as long as the clarification of the natural parentage would result in a considerable adverse effect on the best interests of the minor child, which would be unreasonable for the child, even taking into account the concerns of the person entitled to bring the action.
>
> (5) A person who has consented to a genetic test of parentage and has given a genetic sample may require the person entitled to bring the action who has had a parentage test made, to permit inspection of the genetic test of parentage report or to provide a copy. The Civil Court (Family Section) shall decide disputes arising from the claim under sub-article (1).
>
> (6) The action mentioned in sub-article (1) shall be decided by virtue of a decree, which decree may be appealed according to the procedure contemplated in article 229(2) of the Code of Organization and Civil Procedure.

If the child wishes to open proceedings for a claim of filiation that child has the right to do so but if the action may adversely affect the rights of the child then those rights prevail over the individual claiming filiation.

Article 78 states that "(1) *The filiation of children conceived or born in wedlock is proved by the act of birth registered in the Public Registry.* (2) *It may also be proved by the parochial registers."*

Article 79 states that *"in default of evidence as provided in the last preceding article, the continued possession of the status of a child conceived or born in wedlock shall be sufficient".*

Article 80 states that:

> **80.** (1) Such possession shall be established by a series of facts which, collectively, go to show the connection of filiation and relationship between an individual and the family to which he claims to belong.
>
> (2) Such facts are chiefly the following:
> (a) in the case of spouses who have contracted marriage before the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017* that the individual has always borne the surname of the father of whom he claims to be the child;
> (b) in the case of children born to spouses who have contracted marriage after the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017, that the individual has always borne the Family Name of the spouses of whom he claims to be the child;
> (c) that the parents have treated the child as their own, and have, as such, provided for the child's maintenance, education, and establishment in life;
> (d) that he has been constantly acknowledged as such in society;
> (e) that he has been acknowledged as such by the family.

Article 81 was also used in the past as the immovable object to the unstoppable force which is the DNA test. It states that "(1) *No person may claim a status contrary to that which is attributed to him by the act of birth as a child conceived or born in wedlock and the possession of a status in conformity therewith.* (2) *Likewise, it shall not be lawful to contest the status of a child conceived or born in wedlock in respect of a person who possesses a status in conformity with his act of birth.*"

See the following cases:

- ***Epifanio Vella v. Giuseppe Vella et*:** The declaration of a wife *"mhijiex bizzejjed biex tkun eskluza l-paternita` tar-ragel, ghaliex l-omm tista' tkun ispirata minn sentimenti wisq varji u diversi, intizi, forsi, anki biex jingannaw il-Gustizzja u jahbu l-verità".* The filiation of a child born in wedlock may also be impeached by any person interested if he proves that, during the time from the three-hundredth day to the one-hundred-and eightieth day before the birth of the child the husband was in the physical impossibility of cohabiting with his wife on account of his being away from her. Article 70(1)(a) and 77 talk about physical impossibility. This concept of physical impossibility one day was very strict, and for one to invoke it in court, the physical impossibility had to be of the applicant being abroad for a very long time before the birth, etc. Today

this has changed, extending physical impossibility to apply even when the two parties do not meet in the time that the child was conceived.

- ***Raymond Magro et v. Rita Magro et noe*****:** *"Wiehed jinnota li l-frazi "jew minhabba xi accident iehor" fl-Artikolu 70(1)(a) ma gietx riprodotta fl-Artikolu 77 tal-Kodici Civili. Apparti din id-differenza, id-dritt ta' azzjoni moghti lit-terz interessat fl-Artikolu 77 u d-dritt ta' azzjoni moghti lir-ragel ta' l-omm fl- Artikolu 70(1)(a) huma fis-sustanza identici, u salv dejjem il-kwistjoni taz-zmien li fih tista' tigi inizjata l-azzjoni skond l-Artikolu 73".* The court said that even if the parties were de facto separated, there wasn't a physical impossibility of the husband to cohabitate with the wife. The physical impossibility must make it certain that there's no way the child could be his son.
- ***Josianne Giusti Pro et Noe v. Pierre Giusti et*****:** The court held that *"Illi fil-meritu jirrizulta illi fiz-zmien li setghet tigi kkoncepita ttarbija l-attrici kellha relazzjoni mal-konvenut Vella fl-istess waqt li f'dak iz-zmien ma kellhiex x'taqsam mar-ragel taghha. Din il-Qorti kif presjeduta rriteniet illi din il-prova hija sufficjenti biex jigi sodisfatt il-kriterju stabbilit fl-Artikolu 77 tal-Kodici Civili). F'dan il- kaz, pero', hemm ukoll il-prova genetika ta' l-ezamijiet medici li jikkonfermaw lill- konvenut bhala l-missier naturali tal-minuri in kwistjoni fi grad ta' 99.99%. Finalment hemm l-ammissjoni ta' l-omm li minkejja li wahedha mhiex bizzejjed (Artikolu 70 (2) tal-Kodici Civili) mehuda ma' dawn ic-cirkostanzi l-ohra telimina kull dubbju f'mohh il- Qorti dwar il-paternita' ta' din it-tarbija."* By virtue of 70(3), the court can ask the parties to go through genetic tests in order to establish paternity.
- ***Joseph Vincenti v. Concetta Vincenti et noe*****:** *"Il-prova xjentifika jew genetika mhix xi prova assoluta li trid issir ghas-success ta' l- azzjoni. Fil-fatt il-ligi stess tissuggeriha bhala wahda fost "fatti ohra". U allura mhix prova esklussiva. Ghalkemm meta tintalab u jkun hemm rifjut il-qorti tista' tittragga' minn dan l-atteggjament il-konkluzjonijiet li jidhriilha gustifikati (Artikolu 70(3))."*
- ***Anna Zammit vs Carmelo Zammit et*****:** The court said that it is resting its decision to repudiate Carmelo's son on the basis of the biological test even if no other proof existed as to the son in question not being his son.
- ***Mizzi v. Malta* (*Civil Court First Hall (Constitutional) 6 December 1996 Const Court 15.1.2002 ECHR (app 2611/02) 12.1.2006*)****:** There may be a violation of human rights where *"a legal presumption is allowed to prevail over biological reality"* even where the State has an *"obligation to secure effective respect for private and family life"*. A husband must bring the action to disown the child in 6 months after the birth of the child if he's in Malta, if he's not, in 6 months after his return to Malta, or if he's frauded, after 6 months of him discovering. If the husband dies, his heirs may bring the action of disavowal in 6 months. If he's of age, the disavowal should be directed against the child if he is a major, and against his curator if he's a minor. The mother is a party to the suit.

Proving Filiation of those Children Born in Wedlock

The act of birth proves the child was born in wedlock. The possession of status is to be accompanied by a series of facts, which are the following:

- The individual had borne the surname of what he always called his father
- That his father had treated him as a child
- He was treated as born in wedlock by society
- He was treated such by the family

No person can claim a status contrary to that attributed to him by the act of birth. Proof to the contrary may be made by evidence tending to show that the claimant is not the child of the woman he alleges to be his mother, or, where the maternity is proved, that he is not the child of the mother's husband.

Of the Filiation of Children Conceived and Born Out of Wedlock

Of the two previously mentioned presumptions only the first still applies as we are no longer speaking of husbands and wives.

Article 86 states that *"a child conceived or born out of wedlock may be acknowledged by the father and the mother, either jointly or separately: Provided that where the person acknowledging himself to be the father of the child is a minor the acknowledgment is null".* If there is a child who has a child and the child is a male he will not be able to acknowledge his child and it will be null if he does so.

Article 86A speaks of the right of action and reads as follows: "(1) *The mother of a child conceived or born out of wedlock who is not acknowledged by the father, and that same child, may at all times make a judicial demand to establish the paternity of the child and for the court to order the registration of such paternity in the relative acts of civil status.* (2) *The judicial demand referred to in sub-article* (1) *may also be sought by the heirs or the descendants of the child if the same circumstances as those which are referred to in article 85 will exist"*.

Article 87 explains how this judicial demand is made, stating that: "(1) *The acknowledgment of a child conceived and born out of wedlock may be made in the act of birth, or by any other public deed either before or after the birth*. (2) *Any declaration of paternity or maternity made otherwise by either of the parents, or by both, or by a minor, can only be admitted as evidence of filiation in an affiliation suit".*

Article 89 concerns a child conceived and born out of wedlock of a spouse, born before or during a marriage, and states that *"a child conceived and born out of wedlock born to a spouse before or during marriage, and acknowledged during a marriage may not be brought into the matrimonial home, except with the consent of the other spouse, unless such other spouse has already given his or her consent to the acknowledgement".* This provision is somewhat archaic.

Article 90 concerns parental authority and reads as follows:

> **90.** (1) The parent who has acknowledged a child conceived and born out of wedlock shall have in regard to him all the rights of parental authority other than the legal usufruct.
>
> (2) If the interests of the child so require, the court may order that only one of the parents shall exercise the rights of parental authority;

> (3) The Court may also restrict the exercise of the aforementioned rights and, in serious cases, exclude both parents from the exercise of these rights.
>
> (4) The Court may also restrict the exercise of the aforementioned rights where one or both of the parents are convicted with one or more of the offences listed in Title VII of Part II of Book First of the Criminal Code.

Article 90(2) is often applied in cases of rape where a rapist is acknowledged as the father. It is possible for neither person to get rights of parental authority under articles 90(3) and (4). If a child has a father who is then proven not to be the father, the question arises as to whose surname the child will take.

According to article 101, *"where parents of children conceived and born out of wedlock subsequently marry, or where the court of voluntary jurisdiction so decrees, such children shall be deemed* iuris et de iure *to have always been conceived or born in wedlock".*

Article 110 states that: "(1) *Subject to the provisions of article* 92(6), *a child in whose favour there is a presumption in virtue of a decree of the court shall assume the surname of the parent upon whose demand he shall have been so presumed.* (2) *Where the presumption has taken place upon the demand of both parents, the child shall assume the surname of the father, to which may be added the surname of the mother: Provided that in the case of children born to spouses who have contracted marriage after the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017*, the surname to be adopted by the child presumed to have been conceived or born in wedlock shall be the Family Name adopted by the spouses in terms of article 4".*

Article 92(6) involves the best interests of the child and states that *"notwithstanding the previous provisions of this article or of any other article in this Code, where the paternity of a person has been acknowledged, the filiation of a person has been declared by the Court, or the presumption referred to in articles 101 to 112 has been made to apply, any person who in consequence of such acknowledgement, declaration or the application of the presumption is to assume a surname other than the surname used by such a person before such acknowledgement, filiation or application of the presumption, or his legitimate representative, may request the competent court by application against the Director of the Public Registry to be allowed to continue to use such other surname, and the Court if it is satisfied that third parties will not be prejudiced thereby and, where the application has been done on behalf of the minor, that such use shall be in the best interest of the minor, shall accede to such request".*

IV. Repudiation

The opposite of the exercise of filiation in the sense that paternity is being denied, as opposed to being established. This exercise is important for the intents and purposes of succession, maintenance, and parental authority. The Civil Code states that if there is no cause there is no obligation.

When the Husband May Not Repudiate

Article 69 reads as follows:

> **69.** The spouse who has not given birth cannot repudiate a child born before the lapse of one hundred and eighty days after the marriage in any of the following cases:
>
> (a) if, before the marriage, such spouse was aware of the pregnancy;
> (b) if such spouse has made the declaration required for the drawing up of the act of birth, acknowledging oneself to be the parent of the child;
> (c) if the child be declared not viable.

When the Husband May Repudiate

Article 70 states that:

> **70.** (1) Any spouse, except for the spouse who gave birth to the child, may bring an action to repudiate a child born in wedlock:
>
> (a) if such spouse proves that during the time from the three hundredth day to the one-hundred-and-eightieth day before the birth of the child, such spouse was in the physical impossibility of cohabiting with the spouse who gave birth on account of being away from the said spouse, or some other accident; or
> (b) if such spouse proves that during the said time such spouse was de facto or legally separated from the spouse who gave birth:
> (c) Provided that such spouse may not repudiate the child if there has been, during that time, a reunion, even if temporary between the spouses; or
> if such spouse proves that during the said time such spouse was afflicted by impotency, even if such impotency was only an impotency to generate; or
> (d) if such spouse proves that during the said time the spouse who gave birth had committed adultery or that, that spouse had concealed the pregnancy and the birth of the child; or
> (e) if such spouse produces evidence of any other fact which may also be genetic and scientific tests and data that tends to exclude such parenthood.
>
> (2) The declaration of the spouse who gave birth to the effect that the other spouse is not the natural parent of the child shall be given consideration in an action regarding the exclusion of the other spouse as parent.
>
> (3) When the action referred to in the sub-article (1) is brought, the Civil Court (Family Section) may require any of the spouses, the child, and the alleged natural parent, as appropriate, to consent to a genetic test of parentage, and to acquiesce to the taking of a genetic sample appropriate for the test, which sample must be taken according to the current provisions of the law:

> Provided that where the said consent is not given by the parties, the Civil Court (Family Section) must substitute that consent that has not been given and order acquiescence in the taking of a sample.
>
> (4) In the absence of genetic and scientific evidence, the Civil Court (Family Section) may consider any other evidence presented which it deems to be relevant, including the drawing of inferences from the fact that a person did not provide a genetic sample, despite being ordered to do so.
>
> (5) The Civil Court (Family Section) shall dismiss the application if and as long as the clarification of the natural parentage would result in a considerable adverse effect on the best interests of the minor child, which would be unreasonable for the child, even taking into account the concerns of the person entitled to bring the action.
>
> (6) A person who has consented to a genetic test of parentage and has given a genetic sample may require the person entitled to bring the action who has had a parentage test made, to permit inspection of the genetic test of parentage report or to provide a copy. The Civil Court (Family Section) shall decide disputes arising from the claim under sub- article (1).
>
> (7) The action mentioned in this article shall be decided by virtue of a decree, which decree may be appealed according to the procedure contemplated in article 229(2) of the Code of Organization and Civil Procedure.
>
> (8) Without prejudice to the provisions of the second proviso of article 73, if in its judgment the Civil Court (Family Section) declares that the spouse is not the natural parent of the child, it shall have effect to change the child's surname and that of his descendants to reflect the surname of the other spouse only, unless the Court, having regard to all the relevant circumstances, provides otherwise in its judgment.

In the case of *George Baldacchino vs Jane Baldacchino pro et noe et* (FHCC 1650/99 5 October 2001) the Court stated that *"in-necessita' tat-testijiet u provi genetici, li f'dan il-kaz ma sarux, huma kwazi imposti fejn l-azzjoni attrici tkun ibbazata fuq is-sub-inciz (c) ta' l-Artikolu 70 (1) tal-Kodici Civili. Mhux hekk invece s-subincizi (a) u (b) ta' dan l-Artikolu illi, jekk issir prova fir-rigward taghhom, tkun sufficjenti biex tirnexxi din l-azzjoni. Din l-istess Qorti, kif presjeduta, f'diversi sentenzi minnha moghtija ricentement iddikjarat illi l-kuncetti ta' "boghod" u "impossibbilita' fizika" kellhom jigu interpretati b'mod illi fejn, mill-provi, rrizulta illi l-partijiet kienu separati anke de facto u ma kellhomx relazzjonijiet intimi fil-perjodu msemmi fl-istess Artikolu 70 (1) (a) allura dawn l-elementi kienu sufficjenti in vista wkoll tal-fatt illi kien l-interess ta' kull persuna koncernata, inkluz persuni minuri, illi tkun maghrufha l-vera paternita' taghhom. Fil-fehma tal-Qorti r-rekwiziti ta' l-istess sub-incizi (a) u (b) ta' l-Artikolu 70 (1) gew ippruvati f'dan ilkaz. Di piu' hemm l-ammissjoni ta' omm it-tarbija u, nonostante, illi din wahedha ma hijiex sufficjenti bhala prova, [Artikolu 70 (2)] hija wkoll prova importanti u, mehuda ma' provi ohra, ghandha tinghata l-piz li jisthoqqilha".*

In the case of *Peter Zammit vs Maria Zammit et* (FHCC 11 March 1960) the Court stated that *"Ghal ragunijiet eminentement ta' ordni pubbliku, ir-ragel m'ghandux azzjoni ta' denegata paternita fil-kaz ta' adulterju tal-mara. Bhala eccezzjoni ghal din ir-regola, l-ligi taghti lir-ragel din l-azzjoni meta l-adulterju jkun akkumpanjat mic-celament lil tat-twelid. Bhala tali, din l-eccezzjoni hija ta' nterpretazzjoni rigoruza.*

Biex ir-rekwizit tac-celament ikun assodat irid jigi stabbilit inkontestabbilment li l-mara tkun adoperat ruhha biex zewha ma jkunx jaf bit-twelid. Kif gie stabbiliti mill-Qorti tal-Appell fil-kawza Sbezzo utrinque irid ikun hemm 'celamento volontario con intenzione positive di occultare la nascita […] e la mancanza partecipazione non importa per se il celamento contemplato dalla legge.'

F'dan il-kaz ma giex pruvat li l-konvenuta hbiet it-twelid tat-tarbija. Ghalkemm hija ma qaletx lill-attur bit-twelid, meta kienet gravida baqghet toqoghod fejn kienet qabel meta kienet mal-attur, distanza zghira minn fejn joqoghod l-attur; baqghet tohrog, kif rawha n-nies, minghajr ma hbiet il-gravidanza, tant li l-attur sar jaf biha; ma ppartorjatx f'xi post straman jew bil-habi imma fid-dar taghha; u hija stess iddikjarat it-tarbija kif jidher mic-certifikat tat-twelid".

Defendants
Article 75 reads as follows:

> **75.** (1)The action for disavowal shall be directed -
> (a) against the child if he is of age; or
> (b) if the child is a minor or under any disability to be sued, against a curator appointed by the court before which the action is brought:
> Provided that the court may depute the tutor already appointed to the child.
>
> (2) In all cases, the other spouse shall be made a party to the suit.

In the case of *Mizzi v. Malta* the husband sought to dispute the paternity of a child born after he had separated from his wife. Although it had eventually been established that the husband was not the father of the child, under Maltese law at the time, the husband's assumed paternity could not be legally challenged. Many years later, an amendment to the Maltese legislation permitted a spouse to challenge his assumed paternity, but only within certain time limits. The husband was significantly outside those time limits and remained unable to challenge the ruling of paternity. Initially, the Maltese court found that this constituted a breach of the husband's Art 8 rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, but this was overturned on appeal.

The European Court of Human Rights held there had been a breach of the husbands Art 6(1) right to access to the court, and of his Art 8 right to respect for his private and family life. The practical impossibility of the husband challenging paternity from the child's birth to the present day had impaired his right of access to the court. While time limits on challenges to paternity could be in the interests of children, such limits should not altogether prevent the use of the legal remedy in question.

The Court noted that at the time of Y's birth, any action which the applicant could have brought in order to deny paternity would have had little prospect of success, as he would not have been able to prove one of the elements required by former Article 72 § 1 of the Civil Code, namely that the birth of the child had been concealed from him. After the 1993 amendments, when, as noted above, the concealment requirement became only one of the alternative preconditions for bringing such an action, the applicant was time-barred from raising his claim before a court. In fact, in accordance with Article 73(a) of the Civil Code, a husband wishing to disavow a child had to bring his judicial claim within six months from the date of the birth). As Y was born on 4 July 1967, by 1993 this period had expired.

Mother's Decleration

Article 70(3) states that *"when the action referred to in the sub-article (1) is brought, the Civil Court (Family Section) may require any of the spouses, the child, and the alleged natural parent, as appropriate, to consent to a genetic test of parentage, and to acquiesce to the taking of a genetic sample appropriate for the test, which sample must be taken according to the current provisions of the law: Provided that where the said consent is not given by the parties, the Civil Court (Family Section) must substitute that consent that has not been given and order acquiescence in the taking of a sample".*

In the case of *AC vs Dr. Beppe Fenech Adami et noe* (Family Court 379/2006 27 June 2013) the Court stated that *"skond il-konvenuta G, ommha il-konvenuta B D kienet stqarret maghha li l-attur kien igeghla tipprostitwixxi ruhha. Semmitilha wkoll li kellha 'one night stand' ma' persuna bl'isem Spiru u li probabilment dan Spiru kien missierha u mhux l-attur. Fil-fehma tal-Qorti tali dikjarazzjoni tal-omm maghmula lill-bintha tissodisfa dak dispost fis-sub-inciz 2 tal-artikolu 70 appena citat fis-sens li dikjarazzjoni tal-omm li zewgha mhux missier it-tifel taghha "ghandha tinghata konsiderazzjoni" f'kawza ta' denegata paternita'. Ix-xhieda tal-konvenuta G dwar dak li qaltilha ommha hija l-prova li l-konvenuta D ikkommettiet adulterju fiz-zmien li gie konceputa l-konvenuta G".*

Surname

Article 70(8) states that *"without prejudice to the provisions of the second proviso of article 73, if in its judgment the Civil Court (Family Section) declares that the spouse is not the natural parent of the child, it shall have effect to change the child's surname and that of his descendants to reflect the surname of the other spouse only, unless the Court, having regard to all the relevant circumstances, provides otherwise in its judgment".*

Time Limits

Article 73 states that:

> **73.** Where it is competent for the spouses to bring an action to disown a child, they must bring such action:
>
> (a) within 6 months from the day of birth, if the spouse was then in Malta;
>
> (b) within 6 months of his return to Malta, if the spouse was absent at the time of the birth;
>
> (c) within 6 months of the discovery of the fraud, if the birth was concealed:

> Provided that, without prejudice to the provisions of article 70(4), the Family Court may, upon an application of any one of the spouses and, if possible, after having heard all the parties interested, and after having considered the rights of the applicant and of the child, at any time authorise the applicant to institute an action to disown a child born in wedlock to the other spouse:
>
> Provided further that where an action to disown a child is instituted by one of the spouses after the lapse of the periods stipulated in paragraphs (a), (b) or (c) in accordance with the first proviso to this article, any judgment whereby the child is disowned shall not have the effect of changing the surname of the child or of any other person who took his surname from the child unless the court, upon the demand of any of the parties made either in the sworn application whereby the action is commenced or in a separate application made during the action, provides otherwise.

Concealment

Baudry-Lacantinerie (Vol. IV. Delle Persone, Par. 490 pg. 420): *"Perche vi sia celamento della nascita bisognera che risulti dale circostanze che la moglio ha avuto l'intenzione di nascondere al marito la nascita del figlio. Poiche e soltanto allora che nella sua condotta si puo scorgere una confessione tacita della non paternita del marito".*

The concealment of pregnancy and birth *'puo risultare dal solo silenzio tenuto dalla moglie verso il marito. Non si puo certo farne una regola generale, perche il non annunciare la nascita non e neccessariamente il nasoncerla. Ma ben possono darsi tali circostanze che il silenzio tenuto dalla moglie equivale al celamento. E questione di fatto.'*

Grazio Mallia vs Av. Dr. Joseph Cassar Galea et noe **(FHCC Vol. XXXV, ii, 491):** *"Il-fatt tas-separazzjoni materjali tal-kontendenti […] akkopjat mal-fatt li l-attur qatt ma ghix u ghammar ma' martu ghal 300 gurnata qabel it-twelid tat-tarbija […] fil-fatt ma jistax iwassal ghac-celament tat-twelid tat-tarbija".*

Epifanio Vella vs Giuseppa Vella et **(COA 19 February 1940):** *"Ic-celament kontemplat mill-ligi ghandu jkun pruvat b'xi atti posittivi u mhux bis-silenzju tal-omm, ghaliex il-legislatur stess […] stabilixxa fl-ahhar paragrafu fi zmien tliet xhur wara li tkun mikxufa l-frodi; din il-kelma biss turi li l-legislatur stess bil-kelma 'celament' kien qieghed jipprevedi atti ta' frodi da parti tal-mara biex tahbi t-twelid lir-ragel".*

Antonio Borg vs Mary Borg noe et **(FHCC 28 April 1965):** *"Huwa dibattut fid-dottrina jekk ic-celament tat-twelid jikkonsisti fis-semplici silenzu tal-omm, specjalment meta l-omm tkun tghix separata minn zewgha, jew inkella jirrikjedix atti posittivi li bihom jigi mohbi lir-ragel it-twelid. Anke jekk wiehed jakkolji t-teorija […] illi c-celament tat-twelid jista' jirrizulta anki mis-silenzju tal-omm, wiehed m'ghandux id-dritt jikkunsidra dan is-silenzju isolatament mic-cirkostanzi l-ohra kollha.*

Il-fatt li l-vicini kollha kienu mhux jafu li l-konvenuta kellha t-tfal, imma li stednithom ghal festin tal-maghmudija, illi meta kienet incinta hija kienet tohrog, illi ftit granet wara t-twelid marret irregistrathom hija stess b'mod regolari, illi kienet toqoghod u tohrog il-Belt f'post

popolat, u illi z-zewgha l-attur li kien joqghod ftit mili l-boghod seta' facilment, li ried, ikun jaf kollox fuqha, specjalment gieli kellem waqt li kienu mifrudin lil ommha jew lit-tfal li kellhom qabel is-separazzjoni, juri bic-car li l-konvenuta, ghalkemm ma avzatx lil zewgha bit-tfal li kellha, ma hbietx it-twelid taghhom.

Presumibilment zewgha, li kif qal hu stess ma kienx jinteressah x'taghmel martu ma hassx il-bzonn li jsegwi l-passi taghha u tqanqal biss meta ra illi sejra tfittxu ghall-manteniment tat-tfal. Ghalhekk celament ma kienx hemm".

No Time Limit
ACT No. III of 2008: *"Provided that, without prejudice to the provisions of article 70(4), the Family Court may, upon an application of any one of the spouses and, if possible, after having heard all the parties interested, and after having considered the rights of the applicant and of the child, at any time authorise the applicant to institute an action to disown a child born in wedlock to the other spouse".*

Anthony Grima vs Josianne Grima pro et noe et **(COM (Superior Jurisdiction) 32/2010 30 June 2011):** *"Huwa evidenti li l-attur għamel din il-kawża bis-saħħa tal-proviso introdott flartikolu 73 tal-Kap. 16 wara s-sentenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem filkawża Maurice Mizzi vs Malta. Dik is-sentenza kienet irrikonoxxiet id-dritt tar-raġel li jimpunja l-filjazzjoni ta` wliedu, anke wara li jkunu skadew it-termini indikati fl-istess artikolu.*

Għalhekk, u kif hu aċċettat mill-ġurisprudenza lokali, din l-azzjoni hija waħda subordinata għall-artikolu 81. […] Infatti l-liġi tagħna wkoll tagħmel din il-presunzjoni fl-artikolu 67 tal-Kap. 16 : 'L-iben imnissel matul iż-żwieġ jitqies li hu bin żewġ ommu'.

81. (1) *"No person may claim a status contrary to that which is attributed to him by the act of birth as a child conceived or born in wedlock and the possession of a status in conformity therewith".*

Imma filkaż in eżami, apparti r-riżultat tal-eżamijiet bijoloġiċi li saru fuq l-attur, il-konvenuta martu u ż-żewġ minuri, li minnhom ħareġ indubbjament illi l-minuri mhumiex l-ulied naturali tal-attur, ma tressqu ebda provi oħra li jistgħu jindikaw illi dawn għandhom xi stat differenti minn dak li jidher fuq iċ- ċertifikati tat-twelid tagħhom.

Huwa ovvju f`tali cirkostanzi illi l-attur ma rnexxilux iwaqqa` b`mod sodisfaċenti biżżejjed il-preżunzjoni tal-liġi li toħroġ mill-artikolu 81 tal-Kap. 16, u konsegwentement it-talbiet tiegħu ma jistgħux jiġu milqugħa".

Anthony Grima vs Josianne Grima pro et noe et **(FHCC (Constitutional Jurisdiction) constitutional reference 36/2012 - 24 March 2015)** – Does the relevant legal presumption breach Article 6 (right to a fair hearing) and Article 8 (right to respect for private and family life) of the Convention?

On Article 8 – respect for his private and family life: *"Fil-kaz tal-lum, il-presunzjoni legali hija mera tar-realta` familjari u socjali ta` l-minuri Manwela u Marilyn Grima u l-presunzjoni naxxenti minn din ir-realta` m`ghandhiex tigi disturbata minhabba realta` biologika. Din il-*

Qorti hija tal-fehma li l-presunzjoni legali hija skond il-ligi ghaliex parti mhijiex prekluza milli tikkontesta l-paternita`. Il-presunzjoni legali ghandha skop legittimu ghaliex qeghda hemm sabiex tipprotegi d-drittijiet u libertajiet tal-minuri u ghalhekk qeghda tissalvagwarda l-ahjar interess taghhom. Il-presunzjoni legali hija wkoll mehtiega f`socjeta demokratika sabiex thares ic-certezza legali fir-relazzjonijiet familjari sabiex l-ahjar interess tat-ulied jipprevali. Ghaldaqstant din il-Qorti ma ssibx illi l-Art 67 u 81(2) tal-Kap 16 qeghdin jilledu d-drittijiet fondamentali ta` Anthony Grima skond l-Art 8 tal-Konvenjoni".

On article 6 – Right to a fair trial: *"Fl-ambitu tal-Art 81(2) tal-Kap 16, ma hemm l-ebda prekluzjoni jew ostakolu sabiex parti taccedi ghal qorti. Inoltre b`riferenza ghas-sentenza citata qabel tal-Qorti Civili (Sezzjoni tal-Familja) huwa car li meta l-qrati jigu biex jezaminaw kawza fil-kuntest tal-Art 81(2) tal-Kap 16, jiehdu kont tal-aspetti kollha ta` sitwazzjoni familjari b`referenza wkoll ghal Artikoli 80, 77 u 77A tal-Kap 16. Il-fatt li hemm il-presunzjoni legali m`ghandux ifisser li parti m`ghandhiex access ghal qrati. Ghalhekk din il-Qorti ma ssibx illi l-Art 67 u 81(2) tal-Kap 16 qeghdin jilledu d-drittijiet fondamentali ta` Anthony Grima skond l-Art 6(1) tal-Konvenzjoni".*

(Article 73 cont.): *"Provided further that where an action to disown a child is instituted by one of the spouses after the lapse of the periods stipulated in paragraphs (a), (b) or (c) in accordance with the first proviso to this article, any judgment whereby the child is disowned shall not have the effect of changing the surname of the child or of any other person who took his surname from the child unless the court, upon the demand of any of the parties made either in the sworn application whereby the action is commenced or in a separate application made during the action, provides otherwise"*

On surnames: **Paul Borg vs Anabel Borg pro et noe (COA 146/2011 27 February 2015):** *"Din il-Qorti taqbel mal-pozizzjoni li ha d-Direttur appellat. Ma hemmx dubju li t-talba qed issir fl-ahjar interess tal-minuri u l-akkoljiment taghha kif indikat fil-verbal tat-3 ta' Frar 2015 ma tista' taghmel hsara jew tkun ta' pregudizzju ghal hadd. Ta' min forsi jzid li anke qabel ma saru l-emendi illi ppermettew l-uzu ta' kunjom l-omm ma' dak tal-missier, kien hemm kazi fejn il-Qorti (fuq talba talattur jew attrici) awtorizzat annotazzjoni fil-margini tal-att tat-twelid; (vide s-sentenza John Zammit sive Zammit Pace v. Direttur tar-Registru Pubbliku, Qorti tal-Appell deciza fit-2 ta' Marzu 1994). Naturalment il-Qorti taqbel ukoll li ladarba l-appellanti qed taghmel din it-talba issa, u ma ghamlitiex fl-ewwel istanza, hija ghandha tbati l-ispejjez tal-appell ukoll".*

See also: AB vs CD et (Family Court 281/2013 28 May 2015)

Heirs

Article 74 states that *"where any one of the spouses dies without having brought the action for disavowal, but before the expiration of the time provided in article 73(a), (b) or (c), the heirs may bring such action within six months to be reckoned from the day on which the property of the deceased shall have passed into the hands of the child, or from the day on which the heirs shall have been by the child disturbed in the possession of such property".*

Action by Natural Father and Mother

Impeachment: Article 76 states that *"the filiation of a child born three hundred days after the dissolution or annulment of the marriage may be impeached by any person interested".* See: *A B vs Direttur tar-Registru Pubbliku* (333/2008 RGM) - 10.07.2013.

Article 77 concerns the husband's physical impossibility of cohabitation and reads as follows:

> **77.** Without prejudice to the provisions of article 81, the filiation of a child born in wedlock may also be impeached by any person interested:
>
> (a) if he proves that, during the time from the three- hundredth day to the one-hundred-and-eightieth day before the birth of the child, the husband was in the physical impossibility of cohabiting with his wife on account of his being away from her or some other accident; or
>
> (b) if he proves that, during the said time, the wife had committed adultery, and furthermore produces evidence of any other fact which may also be genetic and scientific tests and data that tends to exclude the husband as the natural father of the child.

Action of Natural Father

Article 77A reads as follows: *"without prejudice to the provisions of article 81, any person claiming to be the natural parent of a child born in wedlock, or that person's heirs if the person was deceased before the child is born, may proceed by sworn application before the competent court against the spouses and child, or their respective heirs if anyone of them is deceased, in order to be declared as the natural parent of the child, and only if that person produces evidence that during the time from the three-hundredth day to the one-hundred-and-eightieth day before the birth of the child, the spouse who gave birth had committed adultery with that person and furthermore produces evidence of any other fact which may also be genetic and scientific tests and data that tends to exclude one of the spouses as the natural parent of the child".*

AB vs Direttur tar-Registru Pubbliku et **(Family Court 333/2008 10 July 2013 – confirmed on appeal 28 February 2014):** *"Meta jikkonkorri l-elementi kontemplati flartikolu 81, il-ligi nostrana taghti valur notevoli lill-pussess ta` stat ta` wild imwieled minn koppja mizzewga [...] Mill-kumpless tal-provi imressqa il-Qorti hi tal-fehma illi l-attur ma rnexxielux iressaq provi sufficjenti sabiex jiskossa l-presunzjoni legali mahluqa permezz tal-att tat-twelid tat-tifel.*

Ghalkemm l-attur ressaq kwantita` enormi ta` provi dokumentarji kif ukoll xhieda sabiex juri li hu missier it-tarbija, il-prova krucjali f`kawzi ta` din ix-xorta ma hiex jekk l-attur hux il-missier naturali tal-minuri izda jekk il-minuri ghandux il-pussess ta` stat ta` iben imwieled fiz- zwieg jew inkella ghandux l-istat ta` tifel imwieled minn mara mizzewga minn relazzjoni extra-matrimonjali. Dawn kellhom ikunu il-provi rilevanti ghal din il-kawza biex tingheleb il-presunzjoni imwaqqfa bl-Artikolu 67".

Action by Mother

Article 77B states that: *"A judicial demand for a declaration of parenthood as mentioned in the previous article may also be exercised by the parent who gave birth by sworn application before the competent court against the other spouse, the natural parent and the child born in wedlock, provided that the applicant produces evidence that during the time from the three-*

hundredth day to the one-hundred-and-eightieth day before the birth of the child that parent had committed adultery with the person who the said parent is demanding to be declared as the natural parent and furthermore produces evidence of any other fact which may also be genetic and scientific tests and data that tends to indicate that person as the natural parent of the child".

Time Limit
Article 77C states that:

> **77C.** In the cases referred to in articles 77, 77A and 77B the person claiming to be the natural parent of the child born in wedlock, or the spouse who gave birth as the case may be, may proceed with the action for the declaration of parenthood if their sworn application is filed within six months from the birth of the child:
>
> Provided that the Civil Court (Family Section) may, after the sworn application of the person claiming to be the natural parent of the child born in wedlock or the spouse who gave birth and, if possible after having heard all the parties interested, and after having considered the rights of the plaintiff and the child, at any time authorise the person claiming to be the natural parent of the child born in wedlock, or the spouse who gave birth to institute an action for the declaration of parenthood as mentioned in articles 77A and 77B:
>
> Provided further that, when the filiation of a person has been declared by the court, any person who in consequence of such declaration is to assume a surname other than the surname used by such person before such declaration, or his legitimate representative, may request the competent court by application against the Director of the Public Registry to be allowed to continue to use such other surname, and the court if it is satisfied that third parties will not be prejudiced thereby and, where the application has been done on behalf of the minor, that such use shall be in the best interest of the minor, shall accede to such request and order the Director to make an annotation of its decision on the relevant act of birth of the person whose filiation has been so declared.

A[BA]C v. Direttur tar-Registru Pubbliku et **(Family Court 88/2011 30 April 2015):** *"L-attrici intavolat il-kawza ai termini tal-Artikolu 77. Tali azzjoni tista' biss tigi intavolata "minn min ghandu interess". Fil-fehma tal-Qorti l-azzjoni attrici tfalli wkoll anke fir-rigward ta' din il-konsiderazzjoni. X'interess ghandha omm li binha jispicca b'certifikat tat-twelid jiddikjara "missier mhux maghruf". Mill-atti irrizulta illi ir-ragel tal-attrici, il-konvenut C, sa issa ma ha l-ebda azzjoni ta' "denegata paternita'". Jirrizulta wkoll li f'xi zmien kien anke lest illi nonostante r-rizultanzi tad-DNA jahfer lill-attrici sabiex isalva izzwieg taghhom.*

F'sitwazzjoni fejn ir-ragel ta' omm it-tarbija ma jiehu l-ebda azzjoni sabiex jitnehha mic-certifikat tat-twelid bhala l-missier, jonqos fl-attrici l-interess guridiku li titlob dikjarazzjoni gudizzjarja li fuq ic-certifikat tat-twelid tal-minuri jigi kancellat zewgha u minflok jitnizzlu l-kliem "missier mhux maghruf".

Altrimenti f'azzjoni ta' denegata paternita' intavolata mill-omm jehtieg li wara li tkun ottjeniet l-awtorizzazzjoni 'a procedere', mankanti fil-kawza odjerna, tipprova ghas-sodisfazzjon tal-Qorti l-interess guridiku li jista' jkollha sabiex binha jispicca b'certifikat tat-twelid b'"missier mhux maghruf". Kundanna din li t-tifel ikun irid igorrha ghal ghomru kollu bil-konsegwenzi negativi kollha taghha"

A[BA]C v. Direttur tar-Registru Pubbliku et **(Family Court 88/2011 30 April 2015):** *"L-attrici naqset milli tottempera ruhha mal-Artikolu 77C tal-Kap. 16 qabel intavolat il-kawza odjerna. Il-kawza giet istitwita meta l-minuri kellu gia' tlett snin. L-attrici ma kellha l-ebda dritt illi tintavola din il-kawza minghajr qabel ma tottjeni l-awtorizzazzjoni tal-Qorti bil-mezz preskritt. Ezaminati l-provvidementi legali rilevanti l-Qorti tasal ghall-konkluzzjoni illi l-hsieb tal-Legislatur kien li l-istat ta' tifel imwieled fiz-zwieg ma jigiex facilment skussat u rovexxjat".*

Maintenance

Mother must refund maintenance paid by non-biological father after a successful action for denegata paternita by application of Article 1147 of the Civil Code (Kull hlas jissoponi dejn, u dak li jithallas bla ma jkollu jinghata, jista' jintalab lura), if relevant action is then brought by him before the FHCC:

Stephen Vella vs Adriana Vella **(FHCC 574/2012 15 November 2013):** *"Fis-sentenza hawn fuq citata [Mario Micallef vs Sandra Gravina FHCC 4 October 2011] l-qorti osservat li l-attur kien hallas il-manteniment ghaliex hekk kien obbligat jaghmel wara ordni tal-qorti; "L-attur ma setax jehles minn din lobbligazzjoni hlief wara pronunzjament tal-Qorti li tiddikjara li l-wild [A] ma kienitx bintu ergo l-hlas li sar qua manteniment, gie perecepit mill-konvenuta bla causa originarja tar-rapport li jwassal ghall-obbligu tal-hlas talmanteniment".*

Pero' wara li nghatat is-sentenza li biha gie determinat li Erica Decoda hi bint Mario Borg, il-konsegwenza naturali hi li qatt ma kienet tezisti obbligazzjoni pekunjarja li l-attur imantni lill-minuri. Mela l-obbligazzjoni li jmantniha u li assuma fil-kuntratt ta' separazzjoni, kienet bla causa. F'dan ir-rigward ma jistax jigi argumentat li meta l-attur hallas il-manteniment kien ghadu meqjus bhala l-missier naturali tat-tifla, ghaliex ladarba s-sentenza tal-qorti ddikjarat li l-missier naturali hu haddiehor, dak l-istat, li jiswa erga omnes, jmur lura ghall-gurnata tat-twelid ta' Erica Decoda. Ladarba gie deciz li l-attur m'huwiex il-missier naturali tat-tifla, dan listat japplika mid-data tat-twelid, u ma jaghmilx sens, diversament, li l-attur ikun meqjus biss li m'huwiex ilmissier naturali mid-data tas-sentenza. 'Il fatt li ma jezisti ebda obbligu ta' manteniment johrog mis-semplici fatt li m'huwiex missierha".

V. Child Protection

The main issues are the rights of the child under protection, care orders, the duty of the State, and the best interests of the child. Article 1 of the United Nations Conventions on the Rights of the Child defines a child as *"every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"*. Article 157 of the Civil Code states that *"a minor is a person of either sex who has not yet attained the age of eighteen years".* Custody and support, child abuse and neglect, violence against children, child prostitution, child pornography, sex tourism, child labour, and trafficking in children are just some of the issues that arise when discussing child protection. The main duty to protect the

child is in relation to maintenance given to the child by those with parental authority. Maintenance, as previously seen, includes food, clothing, health, habitation, and education. Moreover, parents have a duty to facilitate the development and wellbeing of their children. The parent-child relationship involves parental authority, what happens in the event of a marital breakdown or the child's placement in alternative care, and what happens in the event of abuse. This begs the question as to whether parental *responsibility* should be considered, as opposed to parental authority.

The United Nations Convention on the Rights of the Child states in article 3 the following points:

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
3. *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*

The CRC, although ratified by the Maltese State, is not part of Maltese law. The child is to receive wellbeing and protection forms part of this wellbeing. Those responsible for the child have a duty to ensure this takes place and the State has a duty to ensure that institutional services, facilities, and parents conform with standards established by law and that those responsible maintain their obligations to the child's wellbeing. Whilst the children are at school or any other co-curricular activity, at that point in time the supervisor is also responsible for the wellbeing and protection of the child. Article 9 of the UN CRC states that the removal of a child is only to be taken as an extreme measure when necessary. Furthermore, in article 19 it states that:

(a) *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

(b) *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

Article 20 makes reference to alternative care whilst stating that:

1. *A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*

2. *States Parties shall in accordance with their national laws ensure alternative care for such a child.*
3. *Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural, and linguistic background.*

The UN CRC is based on the 3 Ps: Protection, Prevention, and Participation. Fundamental to the understanding of the CRC is that the child has the right to protection, prevention from any harm, and participation in decisions.

Under articles 5 and 8 of the EHCR, care orders interfere with the child's right to liberty and security and both the child and parents' right to respect for private and family life and unless a care order is justified under a derogatory provision of these human rights, the care order will be quashed by the Courts. The European Court of Human Rights has established four general criteria that must be strictly followed in order for any executive action to interfere with any human rights. The court must first ensure that a particular human rights article has been engaged and whether there is an interference with such article. Apart from ensuring that the care order with fit the derogatory provision, the court may assess

Article 5 of the European Convention secures a person's right to liberty, but residential care is permitted for under sub-article 5(1)(d) which states that *"the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority".*

In R v Finland the ECtHR explained a number of issues concerning care orders:

I. **The aim of residential care:** *"The guiding principle whereby a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child".*
II. **The duty of residential care:** The court quoted K. and T. vs. Finland which held that the duty to facilitate family reunification will increase as from the commencement of the period of care, "subject always to its being balanced against the duty to consider the best interest of the child". The "best interest of the child" which here the court is referring to is the fact that the child may have rooted-up in his new family. Thus, moving the child back to the former family (whose conditions would have ameliorated to the point where they could raise children) might still not be in the child's best interest since moving families again puts moral pressure on children. In *K.A. v. Finland,* the Court is quoted as saying *"after a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited".*

Mandatory Reporting

Article 9 of the Minor Protection (Alternative Care) Act (Cap. 602 of the Laws of Malta) stipulates mandatory reporting and reads as follows:

9. (1) Any person who has reason to believe that a minor is suffering, or is at risk of suffering, significant harm, may report the circumstances according to which it holds such reason to the Director (Child Protection) or the Executive Police:

Provided that any reports received by the Executive Police shall be forwarded to the Director (Child Protection) without delay.

(2) Without prejudice to any other provision of any law and to his professional obligations which hold true notwithstanding this article, any professional who has knowledge of an act causing or which may cause significant harm on a minor as defined in sub-article (4) or which constitutes a criminal offense on a minor, or has knowledge that a minor is in need of care and protection shall immediately report to the Director (Child Protection) or the Executive Police and no such reporting made in bona fide may constitute a criminal offence or give rise to any right of action under any law whatsoever:

Provided that if a report is made to an entity or institution other than the Director (Child Protection) or the Executive Police, such entity or institution shall register such report in writing and shall, without delay, and in any case not later than twenty-four hours from the receipt of the report, refer the report to the Director (Child Protection) or the Executive Police.

(3) Where a report concerns a pregnant minor who is in need of care and protection, all efforts shall be made to keep mother and child together after birth, unless this is manifestly contrary to the safety and well-being of the baby.

(4) Any professional who omits to submit a report as mentioned in sub-article (2) shall be guilty of an offence and upon being found guilty shall be subject to imprisonment for a period of not less than three months and not more than nine months, or a to a fine (multa) of not more than five thousand euro (€5,000), or to both such fine and imprisonment.

(5) For the purposes of this article and other provisions of this Act, "significant harm" includes abuse, neglect, harassment, ill treatment, exploitation, abandonment, exposure, trafficking, fear of violence and female genital mutilation as defined and provided for in Book First of the Criminal Code. It also includes being a victim of domestic violence as defined and provided for in Gender-based Violence and Domestic Violence Act.

(6) All reports made according to this article and to whomever they might have been made, shall be deemed as if protected by professional secrecy, if not already so protected by any law, and notwithstanding any other provision of any law said reports shall not be made accessible to the public, whether in their entirety or in part.

Luca J. Camilleri

Parental Autonomy v. the State as *Parens Patriae*

The two extreme positions are: the authoritarian approach, where the state has a robust interventionist role in family life, and, at the opposite end of the continuum, the libertarian laissez-faire approach, where there is lack of state intervention in the family. The authoritarian approach presupposes state certitude about what is best for children and implies high levels of expertise, communication, and collaboration within the state. The laissez-faire approach, in contrast, presupposes parental certitude about what is best for children and implies that the interests of parent and child coincide within the sanctity of the parent–child relationship.

Care Orders

Sources

- Children and Young Persons (Care Orders) Act- Chapter 285 [REPEALED],
- Subsidiary Legislation 285.01 Children and Young Persons (Care Orders) Regulations,
- Legal Notice 49 of 1985, as amended by Legal Notices 43 of 1999 and 102 of 2005,
- Juvenile Court Act- Chapter 287,
- Refugees Act- Chapter 420,
- The Minor Protection (Alternative Care) Act – Chapter 602.

Care orders are issued under article 19 of The Minor Protection (Alternative Care) Act (Cap. 602 of the Laws of Malta) which reads as follows:

> **19.** (1) In those cases in which the Director (Child Protection) acts for the issuing of a protection order for a minor, the Court may authorise any one or more of the following orders:
>
> (a) (i) a welfare care order entrusting the care and custody of the minor to such person or entity that operates in social welfare which the Court deems appropriate when such minor has been deemed to have suffered or have been at risk of suffering significant harm or has been deemed to be in need of care and protection;
>
> (ii) a correctional care order when the minor exhibits very challenging behaviour that is or has been harmful to self or others or is in need of protection and control which the minor is unlikely to receive otherwise:
>
> Provided that when the minor's need for protection and control necessitates that the minor's freedom of movement is restricted, the Court shall review the circumstances and progress of the minor at least once a month, shall hear the professionals working with the minor and,or review their report, and may vary the conditions imposed as it deems appropriate.
>
> (b) a supervision order placing the minor under the supervision of the entity identified by the Director (Child Protection) for a period specified by the order and according to those conditions which the Court deems appropriate to impose, including the granting of parental responsibility or aspects thereof to such person or persons as the Court deems appropriate;

(c) a treatment order by which the parent or parents of the minor or the person caring for the minor or the minor are ordered to:
(i) receive treatment for the abuse of substances or alcohol abuse; or
(ii) follow programmes to address domestic violence; or
(iii) follow parenting skills training; or
(iv) receive inter-relational therapy; or
(v) receive psychiatric or psychological care; or
(vi) receive any other treatment or assistance which the Court deems appropriate after having heard experts in the fields; or;

(d) a removal order against the author of significant harm to the minor from the place of residence of the minor and, without prejudice to any other provision of any other law, such order may also provide for the protection of the minor.

(2) Before giving its decision, the Court shall consider, in so far as possible:
(a) the views of the minor, when deemed to have sufficient understanding;
(b) the views of the parent or parents of the minor depending on the circumstances of the case;
(c) the views of the tutor and, or curator;
(d) the capability of the parents to safeguard the well- being and harmonious development of the minor;
(e) the nature and quality of the attachment between the minor and his family;
(f) the harm that was suffered, that is being suffered or which may be suffered by the minor;
(g) the length of time during which the family of the minor has been receiving support and treatment services;
(h) the degree of vulnerability of the minor;
(i) the cultural, linguistic and religious background of the minor; and
(j) the relationships of the minor with his siblings.

(3) For the purposes of sub-article (1)(a), the Court shall consider:
(a) whether there are deficiencies in the everyday care of the minor or deficiencies in terms of the personal contact and security needed by a minor of his age and development;
(b) whether the minor who is ill, disabled or in need of special assistance is receiving the treatment or specialized care which he requires;
(c) whether the minor is at risk of being abandoned; and
(d) whether, generally, the minor is at risk of suffering significant harm.

(4) In all cases where provision is made for the assignment of any parental responsibilities to any person other than the parents of the minor, the Court shall give preference to the family of the minor, unless the Court holds that it is reasonably clear that it would be against the best interests of the minor.

Article 13 of the International Protection Act (Cap. 420 of the Laws of Malta) reads as follows:

> **13.** (1) A person seeking international protection in Malta may apply to the International Protection Agency in the prescribed form for a declaration and shall be interviewed by the International Protection Agency as soon as practicable.
>
> (2) An applicant for international protection shall have access to state education and training in Malta and to receive state medical care and services.
>
> (3) Any child or young person below the age of eighteen years falling within the scope of this Act who is found under circumstances which clearly indicate that he is a child or young person in need of care, shall be allowed to apply for international protection, and for the purposes of this Act, shall be assisted in terms of the Children and Young Persons (Care Orders) Act, as if he were a child or young person under such Act.
>
> (4) The International Protection Agency shall immediately inform the competent authorities once an unaccompanied minor makes an application for international protection.

Article 21 of Cap. 602 deals with unaccompanied minors and reads as follows:

> **21.** (1) Any person who comes in contact with any person who claims to be an unaccompanied minor shall refer that minor to the Principal Immigration Officer who shall thereupon notify the Director (Child Protection) so that the latter registers such minor and issues an identification document for such minor within seventy-two (72) hours:
>
> Provided that in the exercise of his functions in relation to unaccompanied minors according to this Act, the Director (Child Protection) shall require the co-operation of the Chief Executive Officer of the Agency for the Welfare of Asylum Seekers established according to regulation 3 of the Agency for the Welfare of Asylum Seekers Regulations:
>
> Provided further that such co-operation shall take place in accordance with an agreement which may be reached between the Director (Child Protection) and said Chief Executive Officer, which agreement may include a delegation of responsibilities and powers given to the Director (Child Protection) under this Act.
>
> (2) Immediately after the registration of the minor and the issuing of appropriate identification documents, the Director (Child Protection)) shall request the Court to provide any provisional measure in terms of article 18(3) in regards to the care and custody of the minor according to the circumstances of the case and in the best interests of the minor and shall appoint a representative to assist the minor in the procedures undertaken in terms of the International Protection Act.

(3) The person or entity that is entrusted with the care and custody of the minor and the Court appointed representative shall be responsible for assisting and supporting the unaccompanied minor and in particular they shall:

(a) identify the persons or entities which may be involved in the care, custody and protection of the minor;
(b) coordinate the efforts of such persons or entities as identified by them;
(c) ensure that the minor is offered care, accommodation, education and medical care, as appropriate and without delay and whenever possible the minor shall not be placed in detention or in accommodation with persons who are not minors;
(d) ensure that the minor has suitable legal and judicial representation and assistance with regards to his residence status, his request for asylum, or for any other legal or administrative procedures, including those for the administration of his estate;
(e) ensure that all decisions in relation to the minor are taken in his best interests;
(f) submit the views of the minor in any court or before any administrative authority;
(g) provide explanations to the minor on the procedures that would be underway and to provide the minor with any other relevant information; and
(h) accompany and, or represent the minor during the age assessment process done by the Agency for the Welfare of Asylum Seekers and any other investigations and evaluations carried out in terms of sub-article (4).

(4) The Director (Child Protection) shall refer the unaccompanied minor to the competent authorities so that the latter may undertake those investigations and evaluations as they deem appropriate to determine whether the minor is in fact an unaccompanied minor and to trace his family, should this be in the best interests of the minor and is not prejudicial to the fundamental rights of the same unaccompanied minor.

(5) Upon receiving the conclusions of the investigations and evaluations from the competent authorities and these establish that the applicant is in fact an unaccompanied minor, the Director (Child Protection) shall, by application, request the Court to issue a protection order according to this Act and shall prepare a care plan that shall be filed with the said application:

Provided that when the investigations and evaluations from the competent authorities establish that the applicant is not an unaccompanied minor, the Director (Child Protection) shall, by application, request the Court to revoke its first decree and to provide according to the circumstances of the case.

(6) If the Court is satisfied that the indicated minor is in fact an unaccompanied minor and is satisfied that the care plan is appropriate in the minor's circumstances, the Court shall authorise a protection order and may impose

> other conditions which the Court may deem appropriate including entrusting the minor in the care and custody of the Chief Executive Officer of the Agency for the Welfare of Asylum Seekers or such other competent authority or entity which the Court deems appropriate and this without the need to appoint a hearing.
>
> (7) If the Court is not satisfied that the indicated minor is in fact an unaccompanied minor or is not satisfied that the care plan is appropriate, it shall appoint the hearing of the application within ten (10) working days and in that same decree, the Court shall appoint curators in terms of article 930 of the Code of Organization and Civil Procedure to represent both parents. The procedure of issue of banns as required by article 931 of the Code of Organization and Civil Procedure shall not hinder the hearing:
>
> Provided that in that hearing the Court shall hear the application, the evidence in support of such application, the person or entity entrusted with the care and custody of the minor and the appointed representative, the curators ad litem and any other person or persons which the Court deems appropriate and shall then pass on to give a final decision on the protection order and may impose any other conditions which the Court may deem appropriate including entrusting the minor in the care and custody of the Chief Executive Officer of the Agency for the Welfare of Asylum Seekers or such other competent authority or entity which the Court deems appropriate.
>
> (8) Upon issuing a protection order as mentioned in sub-article (7), the Court shall thereupon refer the case to the Review Board for revision according to the provisions of this Act unless the care plan filed with the application provides for the relocation of the minor within the first four (4) months from the authorisation of the protection order:
>
> Provided that when the care plan provides for the relocation of the minor, the Director (Child Protection) shall, by not later than four (4) months from the authorisation of the protection order, file an application in court to request the Court either to revoke the protection order and authorize the relocation or else to refer the case to the Review Board for revisions according to the provisions of this Act:
> Provided further that when the case is referred to the Review Board according to the first proviso, the Review Board shall appoint the case for its first revision by not later than ten (10) working days.

Both the ECtHR and the Maltese Courts have held that the taking of a child into care should be regarded *"as a temporary measure to be discontinued as soon as circumstances permit and any measure of implementation of temporary care should be consistent with ultimate aim of reuniting the natural parent and the child."* (Cited from Johansen vs. Norway (Application No 17383/90) in Decelis vs. Attorney General,4th April 2009, First Hall Civil Court, per Justice Joseph R. Micallef). Here, Decelis instituted a case before the First Hall Constitutional Court alleging that the fact that there is no independent and impartial body that can review her

situation periodically violates articles 6 and 8 jointly of the European Convention. The court made the following observations:

- A care order is of a permanent nature and not of a temporary nature. Therefore, as long as there is no reason for it to cease to exist it only terminates when the child reaches the age of 18.
- In Malta a parent only has a 21-day period to have the case reviewed by an independent and impartial body.
- The machinery used to review care order, post to the 21-day period or review of the care order itself at any later stage (in case the order is sanctioned), designed by the legislator is internal in nature. The consultative board appointed by article 11 of chapter 285 is only there to advise the Minister and is subject to the Minister's regulations.
- Consequently, it can in no way be said that such board is an independent or impartial and it is not even empowered to determine such issues brought before it. The advice given by the board does not bind the Minister, even though the Minister should have very serious reasons to discard expert's opinion.

European Jurisprudence

In the case of ***Haase v Germany*** (Application No.34499/04, 12 February 2008, (2008) 46 E.H.R.R. SE20, February 12, 2008), the ECHR is quoted as saying *"The positive obligation to provide procedural safeguards against arbitrary treatment as a condition of justifying interference with Article 8 rights is also a feature of decisions to remove children from their parents in the interests of the children's welfare and to impose conditions upon the access of parents to their children who are in public care".* Here, Mrs Haase is the mother of 12 children. While she was married to her first husband, she gave birth to seven children, M, born in 1985, S, born in 1986, R, born in 1987, A, born in 1988, T, born in 1990, and the twins L and N, born in 1992. Following the spouses' separation, the four elder children stayed with their father, while Mrs Haase obtained sole custody of the three younger children T, L and N With her second husband, Mr Haase, she had five children. A-K was born in 1995, S-K in 1998, M-P in 2000, L-M in 2001, and A-J in 2003. By decisions of December 17, and December 18, 2001, the Münster District Court issued interim injunctions withdrawing Mr and Mrs Haase's parental rights over four of their children and three children of Mrs Haase's first marriage and prohibiting access to all the children. The children were taken from three different schools, a nursery and from home and were placed in three foster homes. The seven-day-old daughter, L-M, was taken from the hospital and since that time has lived with a foster family.

The case of ***Z and Others v. the United Kingdom*** [2001] 10 B.H.R.C. 384 (E Ct.H.R.) concerned the decision of the House of Lords in *X v. Bedfordshire County Council* finding that a local authority did not owe a private duty of care to children in need of protection, despite knowledge of abuse and gross neglect and the possibility that the decision not to intervene was so unreasonable that no reasonable authority could have made it (taking the decision outside the legitimate exercise of discretion). A majority of the European Court held that the decision on the duty of care did not violate the plaintiff's access to justice under Article 6, but that the plaintiffs' rights not to be subjected to torture and degrading treatment under Article 3 had been violated. It is argued that the retention of public authority 'immunity' for decisions not to intervene, alongside the House of Lords' rejection of any public authority immunity after the initial decision to take the child into care (*Barrett v. London Borough of Enfield*), will

make public authority intervention less likely, even in cases of gross negligence. Recognition that children's rights under Article 3 include a right to be protected from abuse and neglect through positive action (intervention) is an important protection for the human rights of young people.

In the case of ***M.D. and Others v. MALTA*** (Application no. 64791/10, 17 July 2012), MD is the mother of two minor children. On the 14th of July 2005 a care order was issued and subsequently confirmed by the Juvenile Court on the 17th of August of that same year. On the 16th of March 2006 the Criminal Court removed her parental authority. At the ECHR, the Government of Malta argued that a care order issued in the public interest for the protection of a minor was a public law matter and did not concern civil rights and obligations. In its judgement, the ECHR reiterated *"that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life; furthermore, the natural family relationship is not terminated by reason of the fact that the child has been taken into public care. Thus, an action to contest a care order which deprives a parent of care and custody rights is a matter of family law. On that account alone, it is "civil" in character… It is therefore indisputable that a dispute in respect of a care order falls under the civil limb of Article 6".* It went on to state that *"in the context of the present case, and bearing in mind that the law provided that any person could make an application for a curator and that the same court before which the action had been brought could appoint a curator ad litem, the domestic courts should have proprio motu appointed a curator or representative to act on behalf of the children, instead of limiting themselves to pointing out this failure".*

Furthermore, it found *"that is what the interests of justice and those of the children would have required. Such an action would also be in conformity with the message which the Council of Europe is promoting in this area, particularly in the light of the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice adopted in 2010 … In the Court's view, the automatic application of the measure as well as the lack of access to a court to challenge the deprivation of parental rights at a future date, fail to strike a fair balance between the interests of the children, those of the first applicant and those of society at large".*

Moreover, the Court stated that *"it follows that the measure at issue, in so far as it was automatically applied, perpetual and not subject to any periodic revision or at least to subsequent assessments following a request in that regard, was not "necessary in a democratic society" for the aforesaid aim … The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 8 of the Convention in respect of the first applicant".*

The Court considered *"that in order to redress the effects of the breach of the first applicant's rights, the authorities should provide a procedure allowing her the possibility to request an independent and impartial tribunal to consider whether the forfeiture of her parental authority is justified. However, nothing in this judgment should be seen as expressing a view on what the outcome of such an assessment should be".*

The Court noted *"that it has also found a violation of Article 6 § 1 on account of the lack of access to a court for persons who have been affected by a care order, such as the three applicants. Having regard to that finding, the Court recommends that the respondent State*

envisage taking the necessary general measures to ensure the effective possibility of such access to a court".

The Minor Protection (Alternative Care) Act

The Minor Protection (Alternative Care) Act (Cap. 602 of the Laws of Malta) came into force on the 1st of July 2020 with the exception of those provisions regulating mandatory reporting [articles 9(2), (3) and (4)], children's houses [article 15], and therapeutic and secure centres [articles 26 through 30]. Its preamble defines it as *"AN ACT to substitute the Child Protection (Alternative Care) Act, Cap. 569, to provide for protection orders for minors, for alternative care and for suitable protection for those minors deprived of parental care or in the risk of being so deprived, and for matters that are ancillary or incidental thereto or connected therewith".*

Article 1(2) states that *"the scope of this Act is to safeguard, protect and give priority to the best interest of minors and to ensure, in the least possible time, the permanence of the care given to minors".*

Article 2 states that "permanency which is relational, physical and legal" includes *"that the minor feels loved, protected, safe and supported by the persons with whom he lives, that there be stability in the physical surroundings in which he lives and in his connections with the community, as well as those legal arrangements related to his permanency and especially those relating to his care and custody".*

Article 22 concerns the validity of protection orders for minors and reads as follows:

> **22.** (1) A protection order shall remain in force until the minor reaches the age of eighteen years or is revoked by the Court.
>
> (2) The Court may revoke a protection order upon receiving a recommendation to do so, given by the Review Board in accordance with article 33(5) or as provided by other provisions of this Act.
>
> (3) Before revoking an order in accordance with the foregoing sub-article, the Court shall consider, as applicable:
>
> (a) the recommendation by the Review Board and the reasons given for it;
> (b) the views of the minor if considered to have sufficient understanding;
> (c) the views of the Children's Advocate;
> (d) the views of the the parent or parents depending on the circumstances of the case of the minor;
> (e) the capability of the parent or parents depending on the circumstances of the case of the minor to provide for an adequate level care for the minor and if they can provide stability, predictability and permanency to the minor which is relational, physical and legal; and;
> (f) the views of the alternative carer;
> (g) the views of the tutor and, or curator; and
> (h) the views of any other person which the Court deems appropriate.

(4) When the Court determines that there are sufficient reasons to revoke a protection order, it shall refer the case to the Review Board in order to prepare a reintegration plan, and for such purpose the provisions of article 35 shall apply mutatis mutandis.

(5) When the Court determines that there are insufficient reasons to revoke a protection order, it shall order that the revisions by the Review Board shall continue and it shall give the reasons why.

(6) For the purposes of sub-articles (4) and (5), the Court shall consider:

(a) the age of the minor;
(b) the wishes of the minor and the consideration it
(c) should give to such wishes in accordance with the level of maturity of the minor;
(d) the length of time the minor has been under the care of his current alternative carers;
(e) the bond of the minor with his parents and his current alternative carers;
(f) the capability of the parents of the minor to provide for an adequate level of care for the minor; and
(g) the risk of psychological harm which the minor may suffer if his current care arrangements are changed or revoked.

Article 25 creates the role of children's advocate and reads as follows:

25. (1) Without prejudice to the functions of the Children's Advocate under any other law, the Children's Advocate shall:

(a) provide legal assistance and advice to the minor;
(b) submit the views of the minor in any court or with
(c) any administrative body as relayed to him by the key social worker or by an expert on minor protection as appointed by the Court for said purpose;
(d) provide explanations to the minor on the possible consequences should they conform to his or her wishes; and
(e) provide the minor with any relevant information:
(f) Provided that the Children's Advocate shall provide the minor with all the relevant explanations and information as mentioned in paragraphs (b) and (c) only if the minor is deemed to have sufficient understanding.

(2) The Children's Advocate shall receive such relevant training so as to effectively represent and safeguard the views and wishes of the minor, as may be prescribed by regulations, from time to time, by the Minister responsible for justice:

Provided that when the Children's Advocate is to be engaged in relation to an unaccompanied minor the relevant Children's Advocate should also receive or

> have received training on the problems and issues affecting migrant children and migrant children seeking international protection.

Article 63 defines the rights of the minor in alternative care as follows:

> **63.** (1) A minor in relation to whom the provisions of this Act apply shall be cared for, maintained, instructed and educated according to his abilities, aspirations and natural inclinations.
>
> (2) The minor shall also, at any time, have regular access to the social worker who is taking care of his placement in alternative care.
>
> (3) Without prejudice to the generality of the rights mentioned in sub-articles (1) and (2), and to any other right of the minor, said minor shall in particular have the following rights:
>
> (a) to be consulted on any decision affecting him in a manner appropriate to his age and understanding;
> (b) to have access to information on the situation of his family members in the absence of contact with them;
> (c) to maintain personal relations and direct contact with his parents, and with any such other person close to him, unless it is contrary to the best interests of the minor;
> (d) to receive nutrition in accordance with the relevant nutritional standards, as well as with his religious beliefs;
> (e) to receive appropriate medical care and psychological support;
> (f) to have access to education;
> (g) to have his specific safety, health, nutritional,
> (a) developmental and other needs catered for;
> (h) to freely decide which religion to pursue and to have his religious and spiritual needs satisfied accordingly;
> (i) to have his privacy respected;
> (j) to have a positive, safe and nurturing relationship
> (b) with his alternative carers; and
> (k) the rights mentioned in the United Nations Convention on the Rights of the Child.
>
> (4) From time to time the Minister may update the rights mentioned in this article by regulations.

All this applies in the context of:

- The rights of the child under the UN Convention on the Rights of the Child
- The rights of the child to participate
- The rights of the child to decide
- The best interests of the child

Remember a care order is only issued where a child is in need of care, protection or control. Once done, alternative care must be identified by the State that takes over the parenting role.

VI. Alternative Care I - Adoption

Adoption is one of those options available to parents no longer capable of exercising parental authority. It involves the complete breakdown of parental authority and the substation of another parent. The original parent cannot or will not care for the child, so another parent will. Adults cannot be adopted unless they have been fostered past the age of eighteen. Roman Law adoption was simply about leaving someone to carry on the family name and maintain the estate. Until relatively recently an adult could have been adopted in Malta and within the stevedore industry it enjoyed popularity as the job itself was inherited in a linear fashion. Adoptions from abroad have been decreasing. In 2018 there was the stoppage of Ethiopian children from being adopted by Maltese families after the Ethiopian Parliament stopped the practice. The Ministry for Families has introduced a one thousand euro grant to any parent who chooses to adopt their child from Malta, as opposed to from abroad.

Eurostat defines adoption as a *"welfare and protection measure that enables an orphaned or definitively abandoned child to benefit from a permanent family".* Domestic adoption concerns adoptive parents and a child of the same nationality and the same country of residence. Intercountry Adoption (ICA) entails a change in the child's habitual country of residence, whatever the nationality of the adopting parents. International adoption involves parents of a nationality ither than that of the child, whether or not they reside – and continue to reside – in the child's habitual country of residence.

In a European Parliament Briefing Document (2016) it affirms that adoption is a human rights issue:

The bulk of the law on adoption is in the Civil Code (Cap. 16 of the Laws of Malta) and, although the concept is ancient, adoption was only legally recognised in 1962. Before then, the adoption process was done through a deed drafted by a notary. Article 113(2)(*b*) states that ‘*"adoption" means an adoption effected under this Code and in accordance with the provisions of the Adoption Administration Act and, subject to such conditions and other provisions, and with effect from such date, if any, as may be contained in an order made by the Minister responsible for justice under this sub-article, includes an intercountry adoption; and grammatical variations thereof or cognate expressions shall be construed accordingly'.*

Article 113 defines ‘adoption’ as *"an adoption effected under this Code and in accordance with the provisions of the Adoption Administration Act and, subject to such conditions and other provisions, and with effect from such date, if any, as may be contained in an order made by the Minister responsible for justice under this sub-article, includes an intercountry adoption; and grammatical variations thereof or cognate expressions shall be construed accordingly".*

The Adoption Process

I. An applicant/s file/s an application for adoption and his/their name/s will be put on a register for this purpose by the accredited agency/agencies (so far, this role is being performed by Appoġġ). As of Art. 2, an accredited agency is an organisation which is accredited by the central authority, in accordance with the Hague Convention, to carry out local and, or intercountry adoption.

II. The accredited agency will carry out a screening process during which their social workers will assess the applicants to determine whether they are fit to adopt a child, whether their motivations are genuine, whether they have sufficient financial means to adopt a child and so on and so forth. The agency will also provide training to prospective adoptive parents. The accredited agency's role is succinctly drawn out in Articles 18-24 of the Adoption Administration Act.

III. As of Art. 22(2), the agency will then draw up a Home Study Report on the situation of the prospective adoptive parents, including any recommendations on whether such persons shall be allowed to adopt and for what reasons. For the purposes of this Report, the social workers may carry out home visits, which may be unannounced, and the prospective adoptive parents may not refuse entry to such social workers, and are to co-operate with them and provide correct information to the best of their information.

IV. The Home Study Report shall be submitted to the Adoption Board (established by the Adoption Administration Act – Articles 3-6) for it to issue the final recommendation to the Court.

V. The Adoption Board will make the final recommendation to the Court. If a person is dissatisfied with the recommendation, s/he may file an appeal before the Board of Appeal specifically established for this purpose (Article 16-17). A prospective adoptive parent may appeal from a decision delivered by the Adoption Board, by filing an application in front of the Board of Appeal by not later than twenty days from the date of service of the decision by registered mail (Article 6). The Board of Appeal will either uphold the recommendation or overturn it.

VI. If the final recommendation is positive, then the prospective adoptive parent will be placed in a register of persons who are fit to adopt until a child is available for adoption. The accredited agency shall be responsible to ensure that the matching between the child and the adoptive parents is in the best interests of the children (Article 24). The prospective adopters' preferences are also taken into consideration. For example, some prospective adopters prefer to adopt a child who has not attained a certain age, others make it clear that they do not want to adopt children with disabilities or coloured children etc.

VII. Once the matching takes place, then the prospective adoptive parents are granted the care and possession of persons to be adopted before adoption in terms of Article 116 (1) of the Civil Code which says that except where the applicant or one of the applicants is a parent of the person to be adopted, an adoption decree shall not be made unless the person to be adopted has been continuously in the care and possession of the applicant for AT LEAST three consecutive months immediately preceding the date of the adoption decree. If the child was placed with the adopters at birth, the child must have been in their possession for 3 months and 6 weeks.

Provided that, prior to the making of the adoption decree, the applicant or applicants may request the court to grant temporary care and custody of the child to be adopted:

Provided further that in the case of intercountry adoptions as defined in article 2 of the Adoption Administration Act, an adoption made in accordance with the adoption procedures under this Code and any regulations made thereunder and the Adoption Administration Act, and certified by the competent authority of the country of adoption as having been made lawfully in that country may be recognised in Malta by means of

an adoption decree notwithstanding that the person to be adopted has not been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the adoption decree.

VIII. This waiting period can be longer than three months. The three months time-frame is the minimum. Sometimes, during this period, the adoption breaks up. There can be many reasons for this, for instance if the adopter and the child do not get along together/the adopter gets pregnant and changes her mind about adopting a child/the child is diagnosed with an illness/the child turns 11 and decides against being adopted etc.

IX. Also, in terms of Article 116 (2), if placement of the child is not deemed to be in the best interests of the child, then the child may be removed from the placement (with the authorization of the court on the suggestion of the accredited agency).

X. If no problems arise during this period, the adoption decree is issued and the adoption is finalised.

XI. Finally, within the first 2 years from the date of the issuance of the decree, a Post-Adoption Report must be drawn by the social worker (Article 23).

XII. After this report is drawn up, there is no more on-going monitoring and home visits, so as to protect the family's privacy. Naturally, if the adoptive parents would like to adopt another child, then the social workers would have to see how the first adoption is working out, to determine whether to allow a second adoption.

Rights and Duties of the Adopter

- Full parental authority
- Property Rights
- Succession Rights
- Choice of name up to the age of three

In *Teresa Monreal pro et noe. vs. Piju Grech et.* (First Hall, Civil Court) (16/11/2004), the Court recognized the validity of a foreign adoption even though there had been no Ministerial decree regarding this adoption. The Court exercised the power granted to it under Article 130(3)(e) to recognize the validity of this adoption for all purposes of the law.

"Il-liġi għalhekk tagħmel distinzjoni bejn "adozzjoni" u "adozzjoni barranija", u "adozzjoni barranija" titqies "adozzjoni" fil-każ illi jkun hemm ordni dwar hekk magħmul mill-ministru; f'dak il-kaz "adozzjoni barranija" tkun tiswa daqs adozzjoni magħmula f'Malta dwar tfal residenti f'Malta u favur persuni residenti f'Malta. Kif sewwa qalu l-periti ġudizzjarji, fiż-żmien relevanti għal din il-kawża, ma kien hemm ebda ordni magħmul mill-ministru.

Madankollu, in-nuqqas ta' ordni li bis-saħħa tiegħu "adozzjoni barranija" titqies "adozzjoni" taħt l-art. 113 ma jfissirx illi "adozzjoni barranija" ma għandha jkollha ebda seħħ f'Malta għax, ukoll dwar "adozzjoni barranija", il-qorti ghandha, taħt l-art. 130(3)(e), "b'mod ġenerali dawk is-setgħat kollha li għandha dwar adozzjoni", fosthom is-setgħa li tagħraf l-adozzjoni barranija għall-għanijiet tal-liġi f'Malta.

Il-qorti għalhekk taqbel mal-periti ġudizzjarji illi n-nuqqas ta' dikriet ta' adozzjoni mogħti f'Malta ma jżommhiex milli tagħraf l-effetti ta' adozzjoni barranija, u taqbel ukoll illi l-

adozzjoni magħmula f'Bucharest tħares il-kondizzjonijiet kollha li trid il-liġi ta' Malta biex dik l-adozzjoni tkun magħrufa hawnhekk ukoll.

Għal din ir-raġuni, għal dak kollu li tgħid u trid il-liġi f'Malta, Sorin-Valentin għandu jitqies li huwa iben l-atturi u illi, għalhekk, l-atturi bħala werrieta tiegħu għandhom leġittimazzjoni attiva biex imexxu b'din il-kawza biex jitolbu l-ħlas tad-danni minħabba fil-mewt tiegħu."

Adoption Only to Take Place if Granted by a Decree
Article 114 states that:

> **114.** (1) *Adoption may only take place with the authority of the competent court (hereinafter in this Title referred to as "the court") granted by decree (hereinafter referred to as "an adoption decree") following a recommendation made by the Adoption Board, made on the application of a person of either sex.*
>
> (2) *An adoption decree may be made on the application of two spouses, civil union partners or cohabitants in a de facto or registered cohabitation, who are living together, authorizing them jointly to adopt a person and may not be made on the application of only one of such spouse, civil union partner or cohabitant in a de facto or registered cohabitation:*
>
> *Provided that where the person to be adopted is the natural offspring of either of the spouses, civil union partners or cohabitants in a de facto or registered cohabitation then, subject to the provisions of article 115(3)(c), the adoption decree may be made notwithstanding that the application is made only by the natural parent of the person to be adopted and the court shall not be bound to request or review the recommendation of the Adoption Board.*
>
> (3) *Save in the case of two spouses living together, civil union partners or cohabitants in a de facto or registered cohabitation, an adoption decree shall not be made authorizing more than one applicant to adopt a person.*
>
> (4) *An adoption decree may be made in respect of a person who has already been the subject of an adoption decree under this Title; and in relation to an application for an adoption decree in respect of such a person, the adopter or adopters under the previous or last previous adoption decree shall be deemed to be the parent or parents of that person for all the purposes of this Title.*
> (5) *In the case of a person who has attained the age of eighteen years and who is to be adopted in accordance with article 115(2)(a), no recommendation shall be required from the Adoption Board and no social worker and, or children's advocate shall be appointed.*

Note, that it is possible for a child to be adopted on more than one occasion. Note the ECHR judgement *EB v. France* (22/01/2008) (European Court of Human Rights) which goes as follows:

French legislation has a provision (similar to our law) which allows a single person to apply for authorization to adopt a child. In this case, the applicant (EB) was a 45-year-old female who was in a stable relationship with another female (R). In her application, EB noted her sexual orientation and her relationship with R. The adoption board recommended that the application be refused on the ground that the child‟s best interests would not be served due to (i) the lack of a paternal role model and (ii) R‟s ambivalence or lack of commitment to the adopted child.

EB filed a human rights action against France claiming that in exercising her right under French law for a single person to adopt, she suffered discriminatory treatment due to her sexual orientation. This, she alleged amounted to interference with her right to respect for her private life (Article 8 of the European Convention).

The French government denied that the refusal to grant authorization had been based on EB‟s sexual orientation and therefore there had been no discrimination. Instead, the refusal had been solely based on the child's best interest. It cited the lack of paternal role model as crucial, and furthermore that R‟s ambivalence was seen as a potential source of insecurity for the child.

The European Court felt that EB‟s complaint on the first ground (lack of paternal role model) was justified as the Court was satisfied that EB had been discriminated against as a result of her sexual orientation. The citing of the lack of paternal role model as a reason for the refusal of the application was deemed to have the potential to render ineffective the French legislation permitting adoption by single persons, and therefore could not be accepted as a valid reason in itself. Had EB‟s sexual orientation been different, this issue would not have been raised, and this therefore amounted to discrimination.

In response to the second ground (R‟s lack of commitment), the Court agreed with the French government that R‟s attitude was relevant to ensure necessary safeguards for the child are in place. There was no evidence that this ground was in any way linked to EB‟s sexual orientation and therefore the reliance on this ground was not discriminatory.

In conclusion, the Court found that EB had been discriminated against, as a distinction had been drawn on consideration of her sexual orientation. The Court ordered the French government to pay EB a sum of EUR 10,000 for non-pecuniary (moral) damage plus an additional sum to cover the costs.

Restrictions on Making Adoption Decrees
Article 115 defines the criteria needed for adopters and it states that:

> **115.** (1) *An adoption decree shall not be made unless the applicant or, in the case of a joint application, one of the applicants -*
>
> (a) *has attained the age of twenty-eight years and is at least twenty one years older but not more than forty- eight years than the person to be adopted: Provided that if the applicant or applicants request the court for authorisation to adopt siblings, the restriction mentioned in this paragraph shall be deemed to be satisfied if there is the required age difference at least with regards to*

one of the children, and if the adoption will be in the best interests of all the siblings involved; or

(b) *is the natural parent of the person to be adopted and has attained majority.*

(2) *An adoption decree shall not be made -*

(a) *in respect of a person who has attained the age of eighteen years except:*

i. in favour of a sole applicant who is the natural parent of the person to be adopted; or

ii. in favour of the parent and the spouse, if the person to be adopted has lived with such parent and civil union partner or cohabitant for at least five consecutive years and consents to the adoption; or

iii. in favour of a foster carer who has fostered the person to be adopted for at least the previous five consecutive years, if the person to be adopted consents to the adoption;

(i) *in favour of a person who is in holy orders or bound by solemn religious vows; or*

(j) *in favour of a tutor in respect of the person who is or was under his tutorship, except after having rendered an account of his administration or given adequate guarantee of the rendering of such account.*

(3) *Subject to the provisions of article 117, an adoption decree shall also not be made -*

(a) *in any case, other than the case of a person conceived and born out of wedlock, except with the consent of every person who is a parent of the person to be adopted and is alive, even if the parent has not yet attained eighteen years of age;*

(b) *in the case of a person conceived and born out of wedlock, except with the consent of the person who gave birth to the child if such person is alive, even if she has not attained eighteen years of age;*

(c) *on the application of one of two spouses under the provisions of sub-article (2) of article 114, except with the consent of the other spouse;*

(d) *when the person to be adopted has attained the age of eleven years, except with his consent and after having been assisted by a children's advocate.*

(4) *Subject to the provisions of article 117, before an adoption decree is made the court shall –*

(a) *hear any person who has been entrusted with the care and custody of the child to be adopted;*

(b) *in the case of a person conceived and born out of wedlock, hear the parent who has not given birth to the child if such person has acknowledged the person to be adopted as his child and if the court is satisfied that he has contributed towards his maintenance and has shown a genuine and continuing interest in him;*

(c) *where the person to be adopted is under tutorship or is living with a person who is not his parent but who has his care and custody in fact, hear the tutor or the person who has such care and custody in fact, as the case may be;*

(d) *hear the child's advocate and, or social worker appointed by the court to protect the best interests of the child and to secure his representation.*

Article 116 states that:

> **116. (**1) *Except where the applicant or one of the applicants is a parent of the person to be adopted, an adoption decree shall not be made unless the person to be adopted has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the adoption decree, not counting any time before the date which appears to the court to be the date on which the person to be adopted attained the age of six weeks:*
>
> *Provided that, prior to the making of the adoption decree, the applicant or applicants may request the court to grant temporary care and custody of the child to be adopted:*
>
> *Provided further that in the case of intercountry adoptions as defined in article 2 of the Adoption Administration Act, an adoption made in accordance with the adoption procedures under this Code and any regulations made thereunder and the Adoption Administration Act, and certified by the competent authority of the country of adoption as having been made lawfully in that country may be recognised in Malta by means of an adoption decree notwithstanding that the person to be adopted has not been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the adoption decree.*
>
> (2) *During the three month period specified in sub-article (1), the accredited agency responsible for the adoption placement shall take any measures it deems expedient to ensure that the placement with the applicant or applicants is in the best interests of the child and if the placement is not deemed to be in the best interests of the child, the accredited agency shall ask the Adoption Board to seek authorisation from the court for the removal of the child from the placement.*
>
> (3) *Where an application for adoption is pending in any court, any parent of the person to be adopted who has signified his consent to the making of an adoption decree in pursuance of the application and any tutor shall not be entitled, except with the leave of the court, to remove the person to be adopted from the care and possession of the applicant; and in considering whether to grant or refuse such leave the court shall have regard to the welfare of the person to be adopted.*

Article 117 details how the court dispenses with consent:

> **117.** (1) *The court may dispense with any consent or with any hearing required by article 115 if it is satisfied -*

(a) *in the case of a dispensation with any such consent, that:*
  (i) *the person who is required to give his consent is incapable of giving such consent; or*
  (ii) *the parent cannot be found or has abandoned, neglected or persistently ill-treated, or has persistently either neglected or refused to contribute to the maintenance of the person to be adopted or had demanded or attempted to obtain any payment or other reward for or in consideration of the grant of the consent required in connection with the adoption; or*
  (iii) *either of the parents are unreasonably withholding their consent; or*
  (iv) *either of the parents may be deprived of parental authority over the child to be adopted in accordance with article 154(1); or*
  (v) *the child to be adopted is not in the care and custody of either of the parents and the Adoption Board declares that there is no reasonable hope that the child may be reunited with his mother and, or father; or*
  (vi) *the parent or parents have unjustifiably, not had contact with the child to be adopted for at least eighteen months; or*
  (vii) *it is in the best interests of the child to be adopted for such consent to be dispensed with; or*
(b) *in the case of a dispensation with any such hearing, that the person who is required to be heard cannot be found or is incapable of expressing his views; or*
(c) *that in view of special and exceptional reasons and taking into account the interests of all persons concerned, it is proper for it to dispense with any such hearing and consent.*

(2) *The court may dispense with the consent of the spouse of an applicant for an adoption decree if satisfied that the person whose consent is to be dispensed with cannot be found or is incapable of giving the consent, or that the spouses have separated and are living apart and that the separation is likely to be permanent.*

(3) *The consent of any person in accordance with the provisions of paragraph* (a) *of sub-article* (3) *of article 115 to the making of an adoption decree in pursuance of an application may be given (subject to conditions with respect to the religious persuasion in which the person to be adopted is to be brought up) without knowing the identity of the applicant for the decree.*

(4) *The Court may dispense with any consent or hearing required for adoption following a request by a children's advocate on behalf of a child who has attained eleven years of age and who would like to be adopted*.

Function of Court as to Adoption Decrees

Article 119(1) states that:

(1) The court before making an adoption decree shall be satisfied -

(a) that every person whose consent is necessary for the making of the adoption decree and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption decree for which application is made; and in particular in the case of any parent that he understands that the effect of the adoption decree will be permanently to deprive him or her of his or her rights in respect of the person to be adopted;
(b) that the decree if made will be for the welfare of the person to be adopted;
(c) that the applicant has not received or agreed to receive, and that no person has made or given or agreed to make or give to the applicant, any payment or other reward in consideration of the adoption except such as the court may sanction;
(d) that due consideration has been given to the recommendations of the Adoption Board.

Article 119(2) and (3) states that:

> (2) *In determining whether an adoption decree if made will be for the welfare of the person to be adopted, the court shall have regard (among other things) to the health of the applicant, as evidenced, in such cases as may be prescribed, by the certificate of a registered medical practitioner, and shall give due consideration to the wishes of the person to be adopted, having regard to his age and understanding and to the religious persuasion of such person and of his parents.*
>
> (3) *The court in an adoption decree may impose such terms and conditions as the court may think fit, and in particular may require the adopter to make for the person to be adopted such provision (if any) as in the opinion of the court is just and expedient.*

Open Adoption

Article 119(4) discusses the concept of an open adoption:

> (4) *In the case of a child who has attained eleven years of age and if it is in his best interest, the court may, in making the adoption decree, authorise an agreement of open adoption which has been approved by the Adoption Board, whereby the parents and, or the natural family shall maintain contact with the child;*
>
> *Provided that the court shall ensure that an agreement of open adoption was entered into after the child and the parties had given their consent thereto:*
>
> *Provided further that any amendments to the agreement of open adoption shall not have any effect before they are authorised by the Court.*

Dr James Grech comments the following on open adoptions:

This concept of „open adoption" was introduced in the 2008 amendments, and seeks to strike a middle-way position. On the one hand, the child is given the chance to be adopted and to have adoptive parents, whilst on the other hand, not all contact with the child"s natural family is lost (which is usually the case in normal adoptions).

Prior to 2008, this was strictly not possible as it was deemed to be the in the best interests of the child not to have contact with the natural family so as to avoid undue emotional / psychological confusion. However, the legislator felt that rather than really being in the best interest of the child, it served more the interests of the adoptive parents and therefore, the concept of open adoption was introduced. The law makes it clear that an open adoption will not be automatic but only if authorised by the Court.

The Appointment of a Curator

Article 120 reads as follows: "(1) *Upon an application for an adoption decree of a person to be adopted, the court shall appoint such person as may be prescribed to act as special curator of the person to be adopted with the duty of safeguarding the interests of the person to be adopted before the court.* (2) *Upon an application for an adoption decree of a person to be adopted, the court may on its own motion or on the application of an interested person, including the child to be adopted, appoint a child's advocate and, or a social worker to ensure that the child is adequately represented and his best interests safeguarded".*

Rights and Duties of the Whole Family when the Adoption Takes Place

Adoption affects the entire family and to reflect that article 121 states that:

121. *Upon an adoption decree being made –*

(a) *the person in respect of whom the adoption decree is made shall be considered with regard to the rights and obligations of relatives in relation to each other, as the child of the adopter or adopters born to him, her or them in lawful wedlock and as the child of no other person or persons, relationship being traced through the adopter or adopters;*

(b) *the relatives of the person in respect of whom the adoption decree is made shall lose all rights and be freed from all obligations with respect to such person;*

(c) *the tutor, if the person in respect of whom the adoption decree is made is placed under tutorship, shall terminate his administration and, within three months from the date of the adoption decree, render an account thereof to the adopter;*

(d) *the parents shall, in the case of an open adoption, retain the right to maintain contact with the person in respect of whom the adoption decree is made;*

(e) *the court shall inform the competent authorities that the adoption decree has terminated the care order if an adoption decree has been made in favour of a child who is under a care order issued by virtue of the Children and Young Persons (Care Orders) Act.*

Property Rights
Article 123(1) states that *"where, at any time after the making of an adoption decree, the adopter or the adopted person or any other person dies intestate in respect of any property, that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person".*

Surname and Name of the Adopted Person
Article 124 reads as follows: *"upon an adoption decree being made, the person in respect of whom the adoption decree is made shall assume the surname of the adopter: Provided that where the adoption decree is made in favour of two spouses, the person in respect of whom the adoption decree is made shall assume the surname of the adoptive father, to which may be added the surname of the adoptive mother: Provided further that when the adoption decree is made in favour of two spouses who contracted marriage after the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017*, then the person in respect of whom the adoption decree is made shall assume the Family Name of the spouses: Provided further that where the person to be adopted is a child below the age of three years, the adopter may, with the approval of the court, give such child a new name".*

Right to Information
Introduced in 2008, article 127A states that: "(1) *An adopter or an adopted person who has attained eighteen years of age may apply to the court for a copy of the relevant adoption decree and, or details of the adopted person's natural family and, or adoption placement*. (2) *An adopted person who has attained eighteen years of age shall have the right to apply to the court for authorisation to obtain a copy of his original birth certificate from the Public Registry.* (3) *Prior to giving an order related to sub-articles* (1) *and* (2), *the court shall hear the applicant and any other person it deems fit in the circumstances".*

Prior to this point it was not possible for an adopted person to demand information about their birth-parents.

Meetings
Article 6 of the Minor Protection (Alternative Care) Act (Cap. 602 of the Laws of Malta) states that:

> **6.** (1) *The Director (Child Protection) shall hold regular meetings at suitable intervals with representatives of the Education Department, the Department of Health, the Police, and with any such other person or entity which the Director (Child Protection) deems as having responsibility for the protection of minors, or of a minor in particular, for the purpose of discussing any matter which falls within such responsibility and to set policies and protocols which are to be adopted, as well as serving as a committee for joint investigations amongst all entities having responsibility for the protection of minors or of a minor in particular.*

(2) *Minutes of the meetings mentioned in sub-article* (1) *shall be kept and the progress made between one meeting and another shall be monitored by the Director (Child Protection).*

(3) *Where a meeting is held to discuss the case of a particular minor the Director (Child Protection) may require any person or entity attending the meeting to report on the progress of the minor and a copy of such report shall be attached to the records held by the Director (Child Protection)in relation to that minor.*

(4) *Every person or entity attending a meeting shall be bound by confidentiality and may not disclose to third parties any information or provide documents or extracts thereof which may have come to their knowledge or in their possession during such meeting or as a result thereof:*

Provided that such disclosure or provision may be made following an authorisation, request or order by a court.

(5) *The heads of department or entities mentioned or identified by the Director (Child Protection) according to sub-article* (1) *shall ensure that they appoint a representative to attend each and every meeting of the committee for joint investigations.*

(6) *The committee for joint investigations shall regulate its own proceedings.*

(7) *From time to time the Minister responsible for the well-being of minors shall launch a national strategy on the protection and rights of children together with the Director (Child Protection) and those entities or departments having responsibility for the protection, safeguarding and care of minors.*

The Freeing Up of a Minor for Adoption

Article 24 states that:

24. (1) *In accordance with the provisions of this article and upon an application by the Director Alternative Care (Children and Youths) or any other person having an interest, the Court may issue a decree ordering that a minor subject to a protection order may be freed up for adoption and it may do so even without the consent of his parents:*

Provided that notwithstanding any other provision of any other law, an adoption following an order in accordance with this article may be open and without age restrictions.

(2) *Together with the relevant particulars identifying the minor and, if applicable, the parents of the minor, the application mentioned in the foregoing sub-article shall also include the reasons for the request and, if the*

Director Alternative Care (Children and Youths) has identified them, the particulars identifying the prospective adoptive parents:

Provided that if the alternative carers are amongst the persons identified as prospective adoptive parents, the Directorate of Alternative Care (Children and Youths) shall, if this is in accordance with the best interest of the minor, give preference to such carers.

(3) *Together with the application, the Director Alternative Care (Children and Youths) shall file an updated care plan providing recommendations for the continued care of the minor either with the prospective adoptive parents or with alternative carers until other carers are identified according to the care plan and the transition into their care when these have been identified, in terms of the provisions of this Act or of any other law regulating adoption.*

(4) *The application mentioned in this article shall be notified to the parent or parents of the minor depending on the circumstances of the case who shall have twenty days from such notification to file their reply.*

(4) *Following the filing of the reply mentioned in sub-article (3) or the failure to file such reply within the term therein given, the parties shall be notified with the date of the hearing of the application.*

(5) *Before issuing a decree ordering that the minor under alternative care be freed up for adoption, the Court shall:*

(a) *hear and ascertain the views and wishes of the minor if he is deemed to have sufficient understanding;*

(b) *hear every person entrusted with any form of care or custody of the minor to be freed up for adoption and professionals following and supporting such minor;*

(c) *hear the parent or parents of the minor depending on the circumstances of the case;*

(d) *hear the Children's Advocate, the key social worker and any other person it deems relevant:*
Provided that, unless there are good reasons that do not allow for such, the same Children's Advocate that had been appointed to represent the minor during the proceedings for the authorisation of the protection order, should represent the minor before the Court during the hearing appointed by the Court in terms of sub-article (4);

(e) *consider whether the freeing up for adoption is in the best interests of the minor;*

(f) *consider whether there are reasonable prospects for the parents to become capable of taking care of the minor in the foreseeable future; and*

(g) *consider the thoughts of the parent or parents depending on the circumstances of the case on whether the minor should be freed up for adoption:*

> *Provided that the fact that the consent of the parents is lacking shall not, by itself, constitute an obstacle for the minor to be given up for adoption.*
>
> (6) *When the Court issues a decree ordering that a minor shall be given up for adoption it shall give its reasons for such a decision.*
>
> (7) I*n every case in which the Director Alternative Care (Children and Youths) identifies the prospective adoptive parents in its application the Court shall refer the decree, together with the application, to that court having the power to issue decrees for adoption and for such purposes the provisions on adoption in the Civil Code shall apply mutatis mutandis and without prejudice to the provisions of this Act.*

Foster Care followed by full Adoption
Article 54 states that:

> **54.** (1) *When a minor has been under the care and custody of a foster carer for more than five years, the foster carer may request the adoption of that minor by filing an application to the Court of Voluntary Jurisdiction:*
>
> *Provided that in extraordinary circumstances and only after three (3) positive Review Reports on the fostering of the minor, the Court of Voluntary Jurisdiction may accede to a request for adoption of the minor even if the minor had not been in the care and custody of the foster carer for more than five (5) years.*
>
> (2) *Notwithstanding any other provision of the law, no restrictions based on age may apply for adoption in accordance with this article.*
>
> (3) *Adoption in accordance with this article shall be granted on condition that the rights of access to the minor by the biological parents and siblings by consanguinity shall be as wide as possible, as long as this is in the best interest of the minor.*

Article 90 states that *"the freeing up for adoption of minors signed by the Minister prior to the coming into effect of this Act shall be considered as being final and effective for all intents and purposes of this Act".*

Article 91 states that *"minors who have been in the care of foster carers for five (5) or more years prior to the coming into effect of this Act shall be exempted from the requirement of three positive reports as required under article 54. Such foster carers may proceed with the adoption of the minor under their care in terms of article 54 after informing the Director Alternative Care (Children and Youths) in writing of their intention and a detailed report is drawn up by the Director Alternative Care (Children and Youths)".*

Overseas Adoption

Article 130A states that *"notwithstanding the foregoing provisions of this Title, where an intercountry adoption is regulated by the provisions of an international treaty to which Malta is a party, the Minister responsible for justice may make regulations as he may deem appropriate for the implementation of the provisions of such a treaty, and the powers of the Court in respect of such an intercountry adoption shall be exercised in accordance with and within the limits allowed by the terms of the treaty and to ensure that the provisions of such treaty are complied with".*

According to the Overseas Adoption (Definition) Order (Subsidiary Legislation 16.05) for the purposes of article 113(2)(d) of the Civil Code, an "overseas adoption" shall include an adoption, whether made in Malta or in a State listed in the Second Schedule, carried out in accordance with the "Convention on Protection of Children and Cooperation in respect of Intercountry Adoption" concluded at The Hague on the 29th May, 1993 (hereinafter referred to as 'the Convention') and included in the First Schedule, whereby a child habitually resident in one contracting State to the said Convention(hereinafter referred to as "the State of origin") has been, is being or is to be moved to another contracting State (hereinafter referred to as "the receiving State") either after his or her adoption in his or her State of origin by spouses or by a person habitually resident in the receiving State or for the purposes of such an adoption in the receiving State or in the State of origin, provided that all the conditions of this order have been complied with. According to article 3 of that same piece of Subsidiary Legislation *"an adoption referred to in article 2 shall only qualify as an overseas adoption under this Order if it:*(a) *creates a permanent parent-child relationship; and* (b) *takes place in accordance with the Convention".* With regard to an ICA there is the obligation of publication in the Government Gazette.

In *Teresa Monreal pro et noe. vs. Piju Grech et.* (First Hall, Civil Court) (16/11/2004) the Court recognised the validity of a foreign adoption even though there had been no Ministerial decree regarding this adoption. The Court exercised the power granted to it under Article 130 (3) (e) to recognise the validity of this adoption for all purposes of the law. It is quoted as saying:

> *"Il-ligi ghalhekk taghmel distinzjoni bejn "adozzjoni" u "adozzjoni barranija", u "adozzjoni barranija" titqies "adozzjoni" fil-kaz illi jkun hemm ordni dwar hekk maghmul mill-ministru; f'dak il-kaz "adozzjoni barranija" tkun tiswa daqs adozzjoni maghmula f'Malta dwar tfal residenti f'Malta u favur persuni residenti f'Malta. Kif sewwa qalu l-periti gudizzjarji, fiz-zmien relevanti ghal din il-kawza, ma kien hemm ebda ordni maghmul mill-ministru.*
> *Madankollu, in-nuqqas ta' ordni li bis-sahha tieghu "adozzjoni barranija" titqies "adozzjoni" taht l-art. 113 ma jfissirx illi "adozzjoni barranija" ma ghandha jkollha ebda sehh f'Malta ghax, ukoll dwar "adozzjoni barranija", il-qorti ghandha, taht l-art. 130(3(e)), "b'mod generali dawk is-setghat kollha li ghandha dwar adozzjoni", fosthom is-setgha li taghraf l-adozzjoni barranija ghall-ghanijiet tal-ligi f'Malta.*
>
> *Il-qorti ghalhekk taqbel mal-periti gudizzjarji illi n-nuqqas ta' dikriet ta' adozzjoni moghti f'Malta ma jzommhiex milli taghraf l-effetti ta'*

> *adozzjoni barranija, u taqbel ukoll illi l-adozzjoni maghmula f'Bucharest thares il-kondizzjonijiet kollha li trid il-ligi ta' Malta biex dik l-adozzjoni tkun maghrufa hawnhekk ukoll.*
>
> *Għal din ir-raguni, ghal dak kollu li tghid u trid il-ligi f'Malta, Sorin-Valentin ghandu jitqies li huwa iben l-atturi u illi, ghalhekk, l-atturi bhala werrieta tieghu ghandhom legittimazzjoni attiva biex imexxu b'din il-kawza biex jitolbu l-hlas tad-danni minhabba fil-mewt tieghu."*

Finally, a brief reference should be made to Article 130A which provides that where an inter-country adoption is regulated by the provisions of an international treaty to which Malta is a party, the Minister responsible for justice may make regulations for the implementation of the provisions of such a treaty, and the powers of the Court in respect of such an inter-country adoption shall be exercised in accordance with the terms of the treaty.

The International Legal Framework

UN Convention on the Rights of the Child (specifically Article 21), which has been ratified by all EU Member States. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption has been ratified by 24 of the EU Member States, with the remaining four (Croatia, Estonia, Lithuania, Malta) in the course of accession. However, it has not been ratified by several of the countries that currently send the most children into the EU for adoption, including Russia, Ethiopia, and Ukraine. In these cases, intercountry adoption is regulated through bilateral agreements. European Convention on the Adoption of Children introduced by the Council of Europe in 1967and revised in 2008. The revised Convention, which sets standards for domestic adoption, has been ratified by 8 EU Member States (Belgium, Denmark, Finland, Germany, Malta, the Netherlands, Romania and Spain).

The Adoption Administrations Act (Cap. 495 of the Laws of Malta)

Article 3 of the AAA establishes and Adoption Board and reads as follows:

> **3.** (1) There shall be a Board, known as the Adoption Board, which shall be composed of a Chairperson and a minimum of another four members. This Board shall be composed of the following:
>
> (a) professionals representing different disciplines; and
>
> (b) a person who, in the opinion of the Minister, has adequate knowledge and is proficient in the area of adoption.
>
> (2) The Minister shall endeavour to have a person over the age of eighteen years who is adopted and a person who is or was an adoptive parent as part of the Adoption Board, and such persons may be appointed at any time during the term of office of the Adoption Board.
>
> (3) A person shall not be qualified to be appointed or continue to hold office as a member of the Adoption Board if that person is a Judge, a Magistrate, a

member of the House or of a Local Council, or a candidate for election to the House or a Local Council.

(4) The members of the Adoption Board shall be appointed by the Minister for a minimum period of two years.

(5) Any member of the Adoption Board may be removed from office by the Minister on grounds of inability to perform the functions of their office or of misbehaviour.

(6) In the event that any member of the Adoption Board vacates his office before completing his term, the member appointed in his stead shall be so appointed for the unexpired period of the original appointment.

(7) The Minister shall designate a person to act as Secretary to the Adoption Board and such person shall, as part of his duties, be responsible for the keeping of the relevant records and shall carry out such other work related to the functions of the Adoption Board as may be instructed by the Chairperson.

(8) Subject to the provisions of this Act and to any regulations made thereunder, the Adoption Board shall regulate its own procedure:
Provided that any decision of the Adoption Board shall be taken by a majority of votes; however in the case of an equality of votes, the Chairperson shall have and exercise a determining vote. The Secretary to the Board shall not vote.

(9) The Adoption Board shall meet as and when necessary, provided it meets at least once every month. In the case of a written request by the Minister or by an accredited agency, which request shall be transmitted through the Secretary of the Board, such Board shall meet by not later than forty eight hours following the request.
(10) The Adoption Board shall have the power to consult professionals or other persons having relevant knowledge and experience in the field of adoption.

(11) The members of the Adoption Board, the Secretary to such Board and any person involved in the proceedings before the Adoption Board shall be bound by confidentiality and shall not disclose to any third party any information which may come to their knowledge during the proceedings. These persons shall also not distribute to any third party any document pertaining to the Adoption Board or any copies thereof, unless requested or duly authorised to do so by any court of law.

(12) The Adoption Board shall submit to the Minister an annual report of all its activities during the preceding calendar year by not later than the fifteenth April of each year.

The functions of said Board are detailed in article 4(1) which reads as follows:

4. (1) The functions of the Adoption Board shall include:

(a) examining Home Study Reports drawn up by a social worker of an accredited agency;
(b) determining eligibility and suitability or otherwise of a prospective adoptive parent;
(c) ensuring that the placement will be in the best interest of the child to be adopted;
(d) making recommendations to the court and, or to the central authority regarding a prospective adoptive parent;
(e) making recommendations to accredited agencies and, or the Minister on training programmes and counselling sessions for prospective adoptive parents;
(f) making recommendations to the Minister on the parameters to be established for the organisation of counselling sessions;
(g) making recommendations to the Minister for the more effective implementation of Title III of Book First of the Civil Code, the provisions of this Act and any regulations made thereunder.

Furthermore, article 16 establishes a Board of Appeal whose functions, as listed in article 17, are to:

(a) review decisions of the Adoption Board upon an appeal filed in accordance with article 6;
(b) review decisions of the central authority upon an appeal filed in accordance with articles 13 and 14;
(c) hear and decide an appeal filed in accordance with the provisions of this Act and any regulations made thereunder;
(d) undertake any other function as the Minister may designate by regulations made by virtue of this Act.

Post Adoption Records

Article 23 states that "(1) *All adoptions shall be subject to Post Adoption Reports and the adoptive parents shall co-operate with the social worker in order for the report to be drawn up.* (2) *In the case of a local adoption the Post Adoption Reports shall be drawn up for a period as specified by the accredited agency which in any case shall not exceed two years from the date of adoption*. (3) *In the case of an intercountry adoption, the Post Adoption Reports shall be drawn up for a specified period in accordance with the requirements of the country of origin and forwarded to the relevant authority in the country of origin, according to its requirements".*

Offences under the Adoption Administration Act

Article 26 bans the adoption of minors by unauthorised persons or organisations and states that "(1) *Any person or organisation that makes arrangements for the adoption of a child without the authorisation of the central authority shall be guilty of an offence and shall on conviction be liable to imprisonment for a term of not less than six months and not exceeding one year or to a fine* (multa) *of not less than one thousand and one hundred and sixty-four euro and sixty nine cents* (1,164.69) *but not more than two thousand and three hundred and*

twenty-nine euro and thirty seven cents (2,329.37) *or to both*. (2) *Any conviction under sub-article* (1) *shall be notified by the Registrar of Courts to the court that made the adoption decree, and such court shall take any measures it considers expedient in the best interests of the child, including the revocation of the adoption decree if circumstances so warrant".*

Case-Law

See:

- ***Ronald Apap v. Ruby Ritchie Pro et Noe*** **(Court of Appeal 27/10/1995):** *"It-tifel illegittimu jista` jigi maghruf mill-missier fl-att tat-twelid jew f'att iehor pubbliku qabel jew wara t-twelid. Wara l-emedni ta` 1973 u 1993 il-posizzjoni tal-missier naturali li jirrikonoxxi lit-tifel illegittimu giet radikament mibdula u prattikament ekwiparata ghal dik li hi patria potesta mal-posizzjoni tal-missier legittimu. Wara l-emendi ta` l-1993, meta jkun hemm nuqqas ta` qbil bejn il-genituri dwar hwejjeg ta` importanza partikoalri, kull wiehed mil-genituri jista` jirrikorrri ghall-Qorti ta` Gurisdizzjoni volontarju fejn juri dawk id-direzzjonijiet li fil-fehma tieghu teighu jidhirlu xieq fic-cirkustanzi. Hi fl-ahhar allura l-Qorti li tiddecedi x'inhu l-interess tal-minuri. Certament li kwistjoni daqstant gravi, bhal l-affidament tal-minuri f'idejn terzi estranejibi hsieb ta` adozzjoni, hi haga ta` importanza fil-hajja tieghu. Zgur allura li l-omm, anke taht dan l-aspett, kienet obbligat, in vista tal-posizzjoni tal-missier li kien irrikonoxxa lill-minuri, li tirrikorri ghad-direttivi tal-Qorti fuq x'kellha taghmel fl-interess ta` binha qabel tafdah f'idejn terzi barranin".*
    - The Removal of Relative Incapacities of Children in the Amendments of Act XVIII of 2004, Ruth Farrugia (Id-Dritt, Vol. XIX, 2006):
        - Ronald Apap v Ruby Ritchie proprio et nomine - This was a case about a child born outside marriage whose mother gave him up in adoption to third parties. Subsequently the father of the child contested the placement and the Court decided to give the child to his illegitimate father making the following remarks:
        - *"L-emendi li sarufl-1973 kellhom 1-ghan ewlieni li jinewtralizzaw kemm jista'jkun id-distinzjoni u d-differenzi bejn ii-wild illegittimu u dak legittimu. Dan b'mod partikolari f'dawk li huma relazzjonijiet personali bejn it-tfal u 1-genituri li jirrikonoxxuhom bhala uliedhom*
        - *Dan ghaliex il-ligi riedet tekwipara kemm jista'jkun il-vantagg li jkun anke hu sottomess ghas-setgha u d-direzzjoni ta'missieru. Sa mill-emendi ta' I -1973 wiehed allura jista' jghid li 1-ligi bdiet tirrikonoxxi n-nukleju familjari illegittimu li fih ir-relazzjoni bejn il-genituri u 1-ulied, avolja barra 1-vinkolu taz-zwieg beda, fl- interess tal-minuri, jigu regolati kwazi bl-istess mod ghal dawk gia 'familjarifiz-zwieg ... "*
- ***A et vs C et*** **(Court of Appeal on the 29th May, 2015):** The facts of the case are the following, A were the parents of B (who passed away tragically). Before his death, B had a relationship with C; from this relationship the minor D was born. Mother (C) registered her child as having an 'unknown father'. The parents of B filed legal proceedings before the Civil Court (Family Section) to declare their deceased son (B) as the natural Father however, during these proceedings, it transpired that C got married and her husband adopted the minor D. The parents of B filed legal proceedings to challenge the adoption decree. The Court of Appeal held, *"il-Qorti ma jidhriliex li jkun fl-interess tal-minuri li d-digriet tal-addozzjoni jithalla jigi attakkat.*

F'kazijiet ta' din in-natura, huwa l-interess tal-minuri li hu suprem u jipprevali zgur fuq kwalunkwe interess li jistghu jivvantaw l-atturi. Il-minuri ghandu madwar tmien snin, u ghamel dan iz-zmien kollu jghix ma' ommu; l-ahhar erba' snin ghamilhom ma' zewg ommu li trattah bhala ibnu. Ma jkunx fl-interess tal-minuri li jinqala' minn dak l-ambjent jew tpoggi f'konflitt is-sitwazzjoni prezenti mar-realta`. It-tifel qed jitrabba f'familja b'omm u missier, u fis-sitwazzjoni tieghu u fl-eta` li jinsab fiha, ma jkunx flinteress tieghu li jiccahhad minn din l-istabbilita`. L-atturi jista' jkollhom interess jistabbilixxu l-vera paternita`tal-minuri, pero`mhux l-istess jista' jinghad biex tithassar l-addozzjoni tal-istess minuri." The Court of Appeal rejected their appeal.

- **Fl-Atti tar-Rikorsi ta' Martin Vella ppreżentati fil-25 ta' Lulju 1988 u fis-6 ta' Ottubru 1988 fis-Sekond Awla tal-Qorti Ċivili- Qorti Kostituzzjonali 22 ta' April 1991**- Martin Vella had a relationship with a young girl which led to a pregnancy. Upon this realization Vella wanted nothing to do with the girl anymore. She decided that she would give the child up in adoption. The child was hence placed in adoption and during the waiting period, Vella had a change of heart; stating that his brother should care for the baby. This led to Vella acknowledging the child without the consent of the mother; for unilateral acknowledgment was permissible at the time. The First Hall decided that it was in the best interest of the child to remain with the adopters. The Constitutional Court stated that the best interest of the person to be adopted should prevail; quoting Lord Denning "the first and paramount consideration is the welfare of the child, to which other considerations must be subordinate." Vella hence lost the case, and the child went to live with his adopters. Vella took his case to the ECtHR stating that he, at least, had to right to be heard.
- ***Ronald Apap v. Ruby Ritchie pro et noe- 27th October 1995, Court of Appeal- READ***- Ritchie had a very troubled background and lots of relationships with many different men; leading to 4 children from different men. Ritchie was in a relationship with Apap, giving birth to a son who she decided to put up for adoption. A couple took the child in, looking after him for about 10 months. However, within the waiting period, Apap went to the crèche to see his son; to which the sisters stated that he was with his prospective adopters. This led to Apap acknowledging the child as his own; stopping the adoption process successfully. This case is quite tough to accept, for the child ultimately went to live with Apap's sister.
- ***A B v. C D and Director of Public Registry- 14/12/2004- (Dealt with previously under a different name)***: This case dealt with a woman who gave birth to a baby unbeknownst to the father; putting the baby up for adoption. Upon realization, the biological father wanted to acknowledge the baby; yet the latter was already in another legal relationship. While stating that it would not really make a difference, the Court stated that he could acknowledge his child and have his name appearing on the child's original birth certificate. Upon the age of 18, the daughter could look up her original birth certificate in order to find out who her father is.
- **ECHR - Francis Jacobs & Robin White (ECtHR 2006):** In this case it was stated that respect for family life requires identification of what constitutes a family. The protection of the family, as the fundamental unit in society, figures at more than one place in the Convention. Article 12 guarantees the right to marry and to find a family, while Article 8 prohibits in principle, and subject to the provisions of par. (2), interference, with an existing family unit... The right to respect for family life, as guaranteed by Article 8 of the Convention, has as its principal element the protection

of the integrity of the family. What then, constitutes a family? Generally, the Commission and the Court have considered the family to include husband and wife and children who are dependent on them, including illegitimate and adopted children.

- **ECHR - *Keegan v. Ireland (18.ECHR 342.1994)***: Keegan had not enjoyed the aforementioned right to be heard. He was in a stable relationship; yet his fiancée decided against marriage. Since under Irish law, illegitimate fathers do not have the right to be heard; he had no rights under Irish law to challenge the decision. The ECtHR found that he should have been heard, but since it took so long and the child was comfortable living with his adopters; all he was given was financial remuneration and the right to visit his child. However, Keegan refused by stating that he did not want to interfere with his child's happy life. This case led to the changing of Irish law.
- **ECHR - *Odievre v. France (2003)*-** The ECtHR has so far rejected the claim that the absolute birth secrecy granted in some European countries like France violates Art. 8 of the ECHR.
- **ECHR - *Pla and Puncernau v. Andorra (13/07/2004)*** - This dealt with a violation of Articles 8 and 14. A woman left some money behind on condition that her money was not to be enjoyed by illicit children. However, the Court decided that adoption presents a legal fiction whereby the child is presumed to have been born into the marriage of the couple concerned.
- **ECHR - *Pini and Others v. Romania (22nd June 2004)- READ*-** This case deals with the adoption of two girls by Italian parents whom they had never met. The children, however, did not want to leave their crèche. The Court considered that the child's interests were to prevail over those of the adoptive parents.
- **ECHR - *Frette v. France (26/02/2002)***- A case revolving around gay adoption and ultimately not allowing it. However, in 2008 through ***E.B v. France***, the latter's tone changed, claiming that on the basis of Art. 14, not being allowed to adopt on the basis on one's sexuality is discriminatory.
- **ECHR - *Strand Lobben and Others v. Norway* (Application no. 37283/13) 10 September 2019:** *"Generally, the best interests of the child dictate, on the one hand, that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family […]"* (§ 207). *"As regards replacing a foster home arrangement with a more far-reaching measure such as deprivation of parental responsibilities and authorisation of adoption, with the consequence that the applicants' legal ties with the child are definitively severed, it is to be reiterated that "such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests' […]."* (§ 209).

VII. Alternative Care II - Foster Care

It may be the case that children, for whatever reason, can no longer be cared for by their birth parents and so they opt to relinquish their parental authority over the child and place it into alternative care. One such form of alternative care is fostering. Foster care has grown in popularity alongside the belief that children need a family environment to grow up in and so

should not be placed in residential care if at all possible. By placing the child in a family said family is better able to care for that child's individual needs.

Foster care is regulated under the Minor Protection (Alternative Care) Act (Cap. 602 of the Laws of Malta) whose aim, stated in **Article 1(2)** is *"to safeguard, protect and give priority to the best interest of minors and to ensure, in the least possible time, the permanence of the care given to minors".* This Act defines foster care as *"the placement of a minor under the care of a person, not being a parent of the minor, and which is chosen, qualified, approved and supervised to provide care for a period and in accordance with a care plan".* Other notable terms defined in this Act include 'foster carer', defined as *"one or more persons approved by the Fostering Board to foster a minor"*, 'foster care agreement', defined as *"the agreement reached in accordance with article 51"*, and 'fostering board', defined as *"the board established by article 38"*.

The Fostering Board

The Fostering Board is regulated under Title III of this same Act. Under **article 38(1)** the Board shall be composed of seven persons appointed by the Minister:

(a) one person shall be a Chairperson and shall have at least five years professional experience of practice in foster care;
(b) two persons who have at least four years professional experience in social work;
(c) one person who is, or was, a foster carer for a period of at least three years;
(d) one person who is a social worker with three years experience in foster care;
(e) one person being a warranted psychologist; and
(f) one adult person who had lived in foster care for at least three years.

These members are appointed for a renewable term of four years and shall meet once a month. However, they may be requested to meet within 48 hours if the Minister or Agency submits a written request to it.

Article 39 describes the functions of the Board as follows:

> 39. (1) The functions of the Fostering Board shall include:
> (a) determining whether prospective foster carers are adequate or not to be foster carers in accordance with the recommendations indicated in the report prepared by the social worker for such a purpose and in accordance with article 49(1)(c), hereinafter referred to as the Home Study Report;
> (b) determining whether a foster carer is adequate to act as such;
> (c) specifying which type of foster care each foster carer may provide;
> (d) keeping an updated register of foster carers;
> (e) providing foster carers with official documentation which identifies them as such and an authentic letter identifying the minors in their care;
> (f) reviewing reports compiled by the Director Alternative Care (Children and Youths), following a complaint against a foster carer, and taking any action as deemed fit in the circumstances; and

(g) the making of recommendations to the Minister on a more effective implementation of the provisions of this Act and any regulation made thereunder.

Decisions of the Board are regulated under article 40 which states that"

> (1) *in exercising its functions under article* 39(1)(a)*,* (b), (c) *and* (f)*, the Fostering Board shall consider the Home Study Reports and the Review Reports made according to article* 52 *and referred to it by a social worker of the Director Alternative Care (Children and Youths) as well as all other documentation which the board may deem appropriate.*
>
> (2) *The Fostering Board shall also hear the prospective foster carer, or the foster carer, as applicable, the minor if considered to have sufficient understanding, and any other person which the board deems appropriate given the circumstances of the case.*
>
> (3) *For any decision or action taken in accordance with sub- articles (1) and (2), reasons shall be given in writing and notified to the prospective foster carer or the foster carer, as applicable, and to the Director Alternative Care (Children and Youths).*
>
> (4) *The notification mentioned in the foregoing sub-article shall be made by registered mail within five working days from the date of the decision.*
>
> (5) *The Fostering Board shall determine any requests made to it according to this Act not later than six weeks from the date the request was made, unless the board is of the opinion that a longer period is required for a valid reason which should be declared and recorded in the acts of the case.*
>
> (6) *The foster carer or the prospective foster carer, as applicable, may appeal any decision given by the Fostering Board by filing an application with the Board of Appeal not later than five working days from the date of notification by registered mail.*

The Central Authority

Besides the Fostering Board, Article 41 stipulates that *"there shall be a Central Authority on fostering which shall be that entity which upon the entry into force of this Act was responsible for fulfilling the functions provided in article 42 and, or by regulation made under this Act: Provided that, from time to time, the Minister may, by regulations, confirm that entity or identify another entity as the Central Authority, and by the same regulations he may assign other functions and responsibilities to it in addition to those already provided in this Act for the Central Authority".*

The functions of this Authority are in turn regulated under Article 42 which states that its functions shall include:

(a) *"receiving and acknowledging applications for accreditation;*

(b) *granting, refusing, suspending and revoking the accreditation of agencies in accordance with established criteria;*
(c) *receiving, acknowledging, investigating and taking of any necessary action on any complaint against accredited agencies or agencies purporting to act as such;*
(d) *receiving requests from foreign persons who are approved as foster carers in another country or from accredited agencies, which requests shall be referred to the Director Alternative Care (Children and Youths) and it is only the Director Alternative Care (Children and Youths) which shall make the necessary checks once such references are made to it; and*
(e) *receiving applications from agencies which want to provide cross-border foster care and deciding on whether to allow such agencies to place minors under foster care".*

Alternative care agencies must be accredited by the Central Authority in a process regulated under article 44 which reads as follows:

> **44.** (1) *The Central Authority may accredit an agency if it is satisfied that the agency:*
> (a) *has professionals with sufficient experience and expertise in dealing with matters related to minors and families;*
> (b) *has an adequate number of staff trained to carry out foster care services; and*
> (c) *has the administrative and legal competency to carry out the functions appertaining to foster care services.*

However, article 47 gives the Authority the ability to revoke this accreditation:

> **47.** (1) *The Central Authority shall have the right to revoke accreditation of an agency at any time, if the agency:*
> (a) *files a request in writing for revocation;*
> (b) *ceases to comply with the criteria of eligibility for*
> (c) *accreditation;*
> (d) *is no longer deemed suitable to provide foster care services;*
> (e) *is in breach of the conditions for accreditation in accordance with the provisions of this Act or of any regulations made thereunder.*

However, article 47(3) gives them the right of appeal, stating *"if the accreditation is revoked on any of the grounds mentioned in sub-article* (1)(b), (c) *or* (d)*, the agency may request the revocation of the decision of the Central Authority by filing an application to the Board of Appeal within ten days from notification in accordance with sub-article* (2)*".*

Foster Care *per se*

The foster care itself is regulated by Title V Sub-Title 1 of the Act which reads as follows:

> **49.** *Upon receiving an application by a prospective foster carer, the Director Alternative Care (Children and Youths) shall:*
> (a) *train the prospective foster carer;*
> (b) *evaluate the suitability of the prospective foster carer;*

(c) *draw up a report on the situation of the prospective foster carer which shall include any appropriate recommendation, which report shall be known as Home Study Report; and*
(d) *forward the Home Study Report to the Fostering Board.*

(2) *For the purposes of drawing up the Home Study Report, the social worker authorised by the Director Alternative Care (Children and Youths) shall visit the ordinary residence of the prospective foster carer as necessary.*

(3) *The visits mentioned in the foregoing sub-article may be made without notice and the prospective foster carer shall co-operate with the social worker and he shall provide information which as far as he knows is correct. Denying entry of the social worker in his ordinary residence may constitute sufficient ground for the rejection of his application.*

(4) *Without prejudice to any other provision of this Act or of any other law, the Home Study Report shall include the following:*
(a) *a conduct certificate issued by the Commissioner of Police;*
(b) *a report made by a registered doctor on the state of health of the prospective foster carer;*
(c) *a register of the meetings that the social worker had with the family;*
(d) *a recommendation by the social worker on whether the prospective foster carer is suitable or otherwise, and the reasons therefor; and*
(e) *any other information as the Fostering Board may reasonably require.*

(5) *When a social worker, in the early stages of his evaluation for the purpose of drawing up the Home Study Report, has enough reasons to think that a prospective foster carer is not suitable, he shall present a preliminary report to the Fostering Board and request direction on whether he should proceed with the Home Study Report or not.*

(6) *When the Fostering Board decides that a social worker should proceed with his Home Study Report it shall inform the social worker and the latter shall proceed with his evaluation: Provided that when the Fostering Board agrees with the preliminary report it shall give its decision in accordance with this Act and it shall accordingly notify those mentioned in article* 40(3).

The Home Study Report shall include:
(a) a conduct certificate issued by the Commissioner of Police;
(b) a report by a licensed doctor on the state of health of the prospective foster carer;
(c) a register of meetings carried out with the family;
(d) the frequency of home visits carried out by the social worker;
(e) a recommendation by the social worker regarding the suitability or otherwise of the prospective foster carer and the reasons thereof; and
(f) such other information as the Board may reasonably require."

Article 50 concerns the actual pairing of the foster career with the minor and reads as follows: *"for the purpose of matching a foster carer with a minor, the Director Alternative Care (Children and Youths) shall:*

(a) *consider the individual needs of the minor;*
(b) *consider the capabilities and experience of the foster carer to cater for the particular needs of the minor;*
(c) *without prejudice to paragraph (a), make any reasonable attempt to keep siblings at the same residence;*
(d) *without prejudice to paragraph (a), make any reasonable attempt to keep a parent under the age of eighteen years and his or her offspring at the same residence;*
(e) *consider the report made by the social worker; and*
(f) *consider whether relatives of the minor are capable of taking care of said minor".*

The Foster Care Agreement

Article 51 concerns the foster care agreement and reads as follows:

> **51.** (1) Foster care shall take place following a written agreement between the Director Alternative Care (Children and Youths) and the foster carer, which may be modified by written agreement between the Director Alternative Care (Children and Youths) and the foster carer.
>
> (2) The care order, the care plan and the voluntary placement order in accordance with article 68, as well as any revision to them, shall be annexed to the agreement and shall be read and interpreted as part of the same agreement.
>
> (3) The agreement shall be signed by the social worker and the foster carers, and a copy thereof together with the relevant parts of this Act which provide for the rights and responsibilities of foster carers and the rights of minors under foster care, shall be given to the foster carers.
>
> (4) A copy of the agreement mentioned in this article may be given to the parents of the minor only if the Director Alternative Care (Children and Youths) decides that it would be in the best interests of the minor.
>
> (5) The foster care agreement shall be deemed to include the right of the foster carer to travel with the minor after having notified the Director Alternative Care (Children and Youths), and the Director Alternative Care (Children and Youths) shall have three working days to object to said travelling so that the Review Board may give a direction according to sub-article (6):
>
> Provided the notification by the foster carer shall be made within a reasonable time and the foster carer shall not have the right to any compensation or damages if he made any arrangements for that traveling before the lapse of the said three working days without any objection by the Director Alternative Care (Children and Youths), or before the Review Board has given its direction according to sub-article (6).

(6) In case of any disagreement as to the foster care agreement, any party may request a direction from the Review Board which direction is to be given by not later than ten working days.

(7) The contents of the agreement between the foster carer and the Director Alternative Care (Children and Youths) shall not be deemed as a permanent one unless it contains a clause which provides clearly to the contrary.

(8) The agreement may be terminated by the Director Alternative Care (Children and Youths) or the foster carer, as applicable, for any one of the following reasons:

(a) the foster carer does not comply with the foster care agreement;
(b) the Fostering Board decided that a foster carer is no longer capable of providing foster care;
(c) the placement of a minor under foster care is no longer in the best interests of the minor;
(d) the circumstances make it difficult for the foster carer to continue taking care of the minor under his care:

Provided that the agreement may only be terminated after the key social worker is informed of such an intent and an alternative care plan is drawn up and approved by the Review Board.

Child Monitoring

Article 52 stipulates the monitoring of the child once it is placed in foster care and reads as follows:

52. (1) During a placement under foster care, the Director Alternative Care (Children and Youths) shall designate a social worker to monitor a foster carer registered with it.

(2) The social worker shall prepare a Review Report at least once every year for the first three (3) years in which the minor is in foster care and every two (2) years following said three (3) years, so that it may be determined whether the foster carer is fulfilling his obligations in accordance with this Act and the foster care agreement, with the purpose of deciding if such carer should be allowed to continue taking care of the minor:

Provided that the Review Report shall be made before the expiry of a two-year period if there is a need to evaluate the foster carer before such expiry.

(3) For the drawing up of the Review Report, the social worker shall make the necessary visits to the residence.

(4) The visits mentioned in the foregoing sub-article may be made without notice and the foster carer shall co-operate with the social worker and he shall

provide information which as far as he knows is correct, and he may not deny the social worker entry to his ordinary residence.

(5) The social worker making visits in accordance with this article shall have the right to be assisted by members of the Executive Police in case it is deemed that there is a risk of hindrance to the exercise of his responsibilities according to this article.

The Rights and Responsibilities of Foster Carers

Article 53 details the rights and responsibilities of foster carers and reads as follows:

53. By virtue of this article, with the rights and responsibilities of foster carers listed in a foster care agreement, the following shall be deemed to be added and included:

(a) the facilitation of contact between the minor and his family and any other person which the Review Board may deem necessary in the best interests of the minor, as long as this does not endanger or threaten the safety of the foster carers or of the alternative carers;
(b) the receiving of any information, including medical information, about the minor being placed in their care and ensuring that any such information is kept confidential;
(c) the receiving of such financial assistance as may be required for the care and upbringing of the minor;
(d) the receiving of adequate support services;
(e) co-operation with all the entities and persons
(a) concerned and the furnishing to them of such information as they may deem required;
(f) ensuring that the minor attends to any treatment which the Review Board may determine as needed for the well- being of the minor;
(g) attendance together with the minor for reviews by the Review Board and updating that board on the progress being done by the minor and on any other significant event;
(h) the giving of a notification to the Director Alternative Care (Children and Youths) and the Review Board of any change in their ordinary residence, at least two months before such change;
(i) ensuring that the minor is brought up in an environment which leads to his psychological security as well as his physical well-being, to the satisfaction of the Social Care Standards Authority;
(j) respecting and facilitating of the right of the minor to practice a religion of his own choice;
(k) the reporting to the Director Alternative Care (Children and Youths) or the Review Board of any incident, abscondment, truancy from school, injury, sickness or death as they occur;
(l) the participation in on-going training as organized by the Director Alternative Care (Children and Youths);
(m) the right to open a bank account in the name of the minor, which they shall administer as a bonus paterfamilias;

(n) access to information on the biological parents of the minors, following an application to the Court which the Court may approve or refuse after having considered the case and the best interests of the minor; and
(o) the observance of any other obligation as may be imposed upon them under this Act or any other law.

Article 54 allows the foster carer to fully adopt the child in their care after a certain period of time and reads as follows: "(1) *When a minor has been under the care and custody of a foster carer for more than five years, the foster carer may request the adoption of that minor by filing an application to the Court of Voluntary Jurisdiction: Provided that in extraordinary circumstances and only after three* (3) *positive Review Reports on the fostering of the minor, the Court of Voluntary Jurisdiction may accede to a request for adoption of the minor even if the minor had not been in the care and custody of the foster carer for more than five* (5) *years*. (2) *Notwithstanding any other provision of the law, no restrictions based on age may apply for adoption in accordance with this article*. (3) *Adoption in accordance with this article shall be granted on condition that the rights of access to the minor by the biological parents and siblings by consanguinity shall be as wide as possible, as long as this is in the best interest of the minor"*.

Also note that under article 115(3)(iii) it is prohibited to adopt anyone over the age of 18 except *"in favour of a foster carer who has fostered the person to be adopted for at least the previous five consecutive years, if the person to be adopted consents to the adoption".*

The Rights of the Child

Perhaps most importantly, article 63 describes the rights of the minor in alternative care and reads as follows:

> **63.** (1) A minor in relation to whom the provisions of this Act apply shall be cared for, maintained, instructed and educated according to his abilities, aspirations and natural inclinations.
>
> (2) The minor shall also, at any time, have regular access to the social worker who is taking care of his placement in alternative care.
>
> (3) Without prejudice to the generality of the rights mentioned in sub-articles (1) and (2), and to any other right of the minor, said minor shall in particular have the following rights:
> (a) to be consulted on any decision affecting him in a manner appropriate to his age and understanding;
> (b) to have access to information on the situation of his family members in the absence of contact with them;
> (c) to maintain personal relations and direct contact with his parents, and with any such other person close to him, unless it is contrary to the best interests of the minor;
> (d) to receive nutrition in accordance with the relevant nutritional standards, as well as with his religious beliefs;
> (e) to receive appropriate medical care and psychological support;

(f) to have access to education;
(g) to have his specific safety, health, nutritional, developmental and other needs catered for;
(h) to freely decide which religion to pursue and to have his religious and spiritual needs satisfied accordingly;
(i) to have his privacy respected;
(j) to have a positive, safe and nurturing relationship with his alternative carers; and
(k) the rights mentioned in the United Nations Convention on the Rights of the Child.

(4) From time to time the Minister may update the rights mentioned in this article by regulations.

The Right of Appeal

Article 64 creates a Board of Appeal and reads as follows:

64. (1) There shall be a Board of Appeal which shall consist of three members as follows:
(a) a Chairperson who shall have a warrant to practise the profession of advocate in Malta for at least five years; and
(b) two persons who shall have at least five years of professional experience in the welfare of minors.

(2) The members of the Board of Appeal shall be appointed by the Minister for a period of three years and may be removed from office by the Minister on grounds of inability to perform the functions of their office or for misbehaviour.

(3) A member of the Board of Appeal may be challenged or may abstain for any of the reasons for which a judge may be challenged or may abstain in accordance with article 734 of the Code of Organization and Civil Procedure.

(4) When a member of the Board of Appeal recuses himself or abstains in accordance with the foregoing sub-article, the Minister shall appoint another person to sit as a member on the Board of Appeal in substitution of the said member and for the appeal for which such member recused himself or abstained.

(5) A person shall not be qualified to be appointed or continue to hold office as a member of the Board of Appeal if that person is a Judge, a Magistrate, a member of the House of Representatives or of a Local Council, or a candidate for election to the House of Representatives or a Local Council.

Article 65 describes said Board's competence and powers and reads as follows:

65. (1) The Board of Appeal shall be competent to, following a request by application:

(a) review a decision of the Fostering Board;

(b) review a decision of the Social Care Standards Authority to refuse, revoke or suspend a registration; and

(a) review decisions of the Central Authority with regards to accreditation, accreditation renewals, suspension or revocation of an accreditation.

(2) The Board of Appeal shall fulfil any other function which the Minister may prescribe by regulations made by virtue of this Act.

(3) To fulfil its functions, the Board of Appeal shall have access to all documentation related to a foster care procedure and no one may hinder it in the exercise of its functions.

(4) The Board of Appeal shall have such powers as are vested in the First Hall of the Civil Court by the Code of Organization and Civil Procedure.

(5) Without prejudice to the provisions of the foregoing sub- article, in the exercise of its functions the Board of Appeal may call upon any person to testify and to produce any necessary documents and for such purpose the Chairperson shall have the power to administer an oath.

(6) The Board of Appeal shall decide an appeal within six weeks from the filing of the application, unless it is the view of the Chairperson that a longer period is required due to a valid reason which shall be given and noted in the acts of the case.

(7) A decision given by the Fostering Board, by the Central Authority or by the Social Care Standards Authority, as applicable, shall have immediate effect unless the Board of Appeal decides to suspend it until a final decision is given.

(8) The decision of the Board of Appeal, and the reasons for it, shall be given in writing and shall be notified to the appellants, the Fostering Board, to the Central Authority and to the Social Care Standards Authority, as applicable, by registered mail within five working days from its pronouncement.

(9) In cases falling within the competence of the Board of Appeal in accordance with sub-article (1), there shall be a right of appeal on a point of law by application to the Court of Appeal (Inferior Jurisdiction) constituted in accordance with article 41(9) of the Code of Organization and Civil Procedure.

(10) The application mentioned in the foregoing sub-article shall be filed not later than fifteen working days from the date of the decision of the Board of Appeal.

Miscellaneous Provisions

Article 69 revolves around the passport for the minor and reads as follows: *"upon a minor being removed from the care and custody of a person and at once when a case is assigned to a key social worker, the key social worker shall immediately do all that is necessary so that a passport is issued for that minor and such passport shall be kept by the Director Alternative Care (Children and Youths): Provided that in those circumstances in which a passport may not be issued, the key social worker shall do what is necessary for the issue of valid travel document for that minor".*

Article 70 involves access to decisions and states that *"whenever a decision is taken according to this Act and upon the application, demand or request of any party, a copy of the decision, with reasons for such decision, shall be given to such party, without prejudice to the provision of such a copy to other persons as permitted by law".*

Article 71 involves education and consent, and reads as follows: *"notwithstanding any other provision of this Act or any other law, for matters related to the education of a minor subject to any provision of this Act, the consent of one person having the care and custody of the minor according to law shall be enough for all intents and purposes at law".*

Offences under the Minor Protection (Alternative Care) Act

Article 74 states that "(1) *Any unauthorised person or any unauthorised organisation that makes an arrangement for the placement of a minor in foster care shall be guilty of an offence and shall on conviction be liable to imprisonment for a term of not less than six months and not exceeding three years or to a fine (multa) of not less than two thousand euro* (€2,000) *but not more than five thousand euro* (€5,000), *or to both such fine and imprisonment*. (2) *For the purposes of sub-article* (1), *a person or organisation shall be deemed to make arrangements for the placement of a minor in foster care if it enters into any agreement or makes any arrangements to facilitate the fostering of a minor".*

Article 76 strictly prohibits payment for alternative caring and states that "(1) *Any person who makes or gives, or agrees or offers to make or give, or receives or agrees to receive, or attempts to obtain any payment or other compensation for any arrangements for a foster care placement shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term of not less than three months and not more than six months or to a fine* (multa) *of not less than one thousand and two hundred euro* (€1,200*) but not more than two thousand and five hundred euro* (€2,500), *or to both such fine and imprisonment, and this without prejudice to any order the Court deems fit to impose in the circumstances in order to protect the minor in respect of whom the offence was committed.* (2) *For the purposes of this article, the making of any arrangements for the placement of a minor in foster care shall not include any payments made for the maintenance of the minor or remuneration due to professionals for services rendered by them, being such professionals engaged within the Director Alternative Care (Children and Youths) and involved in the care of the minor or in other professions and acting according to their profession".*

Article 77 prohibits the publication of certain facts surrounding alternative care and reads as follows:

> **77.** (1) *Without prejudice to regulations made under this Act, no one may publish or cause to be published in any newspaper, periodical or other printed matter or by means of broadcasting, television, public exhibition or by any other means, any advertisement, news item or other matter which indicates:*
>
> (a) *that a minor may be placed in alternative care;*
> (b) *that a person intends to care for a minor in alternative care;*
> (c) *that a person intends to make arrangements for the placement of a minor in alternative care;*
> (d) *the name of an alternative carer if by doing so any detail on the minor is revealed;*
> (e) *the name of the minor placed or to be placed in alternative care;*
> (f) *the name of a parent, curator or tutor of a minor which was placed or will be placed in alternative care; or*
> (g) *anything which may lead to the identification of one of the persons mentioned:*
>
> *Provided that this article shall not apply to foster carers when they present themselves as such and without any minor being identified, directly or indirectly, by them.*
>
> (2) *Any person who acts in breach of this article shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term of not less than three months and not exceeding six months or to a fine (multa) of not less than one thousand and two hundred euro* (€1,200) *but not more than two thousand and five hundred euro* (€2,500)*, or to both such fine and imprisonment, without prejudice to any order for the payment of damages that are deemed fit in the circumstances.*

Article 78 prohibits the use of force against carers and reads as follows:

> **78.** *A person shall be guilty of an offence and shall on conviction be liable to imprisonment for a term of not less than three months and not exceeding six months or to a fine (multa) of not less than one thousand and two hundred euro (€1,200) but not more than two thousand and five hundred euro (€2,500), or to both such fine and imprisonment, if such person:*
>
> (a) *threatens or forces any authorised or approved alternative carer to give up a minor placed in their care;*
> (b) *takes the minor away from any authorised or approved alternative care provider against the will of the minor, without the approval in writing of the Fostering Board, or the Court, or the Director Alternative Care (Children and Youths) or any other relevant entity or authority, as the case may be;*
> (c) *threatens or forces any authorised or approved alternative carer to give up any order issued by any court or issued by virtue of this Act;*
> (d) *threatens or forces any authorised or approved alternative carer to act in breach of the provisions of this Act;*

(e) *threatens or causes any type of damage to any authorised or approved alternative carer; or*
(f) *forces entry into the premises of any authorised or approved alternative carer by violence or against the will of the alternative carer.*

Article 81 prohibits the child in care from leaving the care home and reads as follows:

> **81.** (1) *If any minor in relation to whom any minor protection order is made absconds from the premises at which he is required to live or is absent from such premises at a time when he is not permitted to be so absent, he may be apprehended without warrant by any member of the Police and taken back to such premises.*
>
> (2) *Any person who knowingly compels, incites or assists or in any way aids or abets any minor to abscond or to become or continue to be absent as mentioned in sub-article* (1) *shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term of not less than six months and not exceeding one year or to a fine* (multa) *of not less than six* (6) *months and not exceeding three* (3) *years or to a fine* (multa) *of not less than two thousand euro* (€2,000) *but not more than five thousand euro* (€5,000), *or to both such fine and imprisonment:*
>
> *Provided that if following the abscondment, any person takes the minor out of Malta or assists or in any way aids or abets the minor to leave Malta, shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term from two* (2) *to four* (4) *years or to a fine* (multa) *of not less than five thousand euro* (€5,000) *but not more than ten thousand euro* (€10,000), *or to both such fine and imprisonment.*

ECoHR Case-Law

See the following cases:

- *Kutzner v. Germany* (26/2/2002): Withdrawal of parental authority from parents and placement in foster care on grounds of lack of intellectual capacity, Court found violation of art 8 , such a serious interference of family life not justified.
- *Zhou v. Italy* (21/1/2014): Complaint: placement in foster care with view to adoption. What about mother' s consent and her ability to look after him? 1st placement: agreed upon, with a foster family. 2nd placement not agreed upon by the mother. Mother needed childcare actually, she was not an unfit mother. Disproportionate measures so Court found violation of article 8.

VIII. Acts of Civil Status

In the case of *Damien Schembri v. Director of the Public Registry* the Court of Appeal stated the following: *"Hija haga maghrufa illi l-ligijiet ta' l-istat civili, bir-registrazzjoni ta' l-attijiet tat-twelid u taz-zwieg, kif ukoll tal-mewt, hija haga wisq importanti ghall-hajja civili tas-socjeta`, peress illi minn dawk l-annotazzjonijiet jiddependu hafna drittijiet tac-cittadini."*

Luca J. Camilleri

According to UNICEF statistics the number of children whose births are officially registered has increased significantly worldwide, yet 166 million children under-five, or 1 in 4, remain unregistered. A name and nationality are every child's right, enshrined in the Convention on the Rights of the Child and other international treaties. This lack of formal recognition by the State usually means that a child is unable to obtain a birth certificate. As a result, he or she may be denied health care or education. Later in life, the lack of official identification documents can mean that a child may enter into marriage or the labour market, or be conscripted into the armed forces, before the legal age. In adulthood, birth certificates may be required to obtain social assistance or a job in the formal sector, to buy or prove the right to inherit property, to vote and to obtain a passport. An estimated 115 million boys and men around the world were married as children, (June 2019). Of these, 1 in 5 children, or 23 million, were married before the age of 15. Child marriage among boys is prevalent across a range of countries around the world, spanning sub-Saharan Africa, Latin America and the Caribbean, South Asia, and East Asia and the Pacific. The new estimates bring the total number of child brides and child grooms to 765 million. Girls remain disproportionately affected, with 1 in 5 young women aged 20 to 24 years old married before their 18thbirthday, compared to 1 in 30 young men.

Globally, two-thirds (38 million) of 56 million annual deaths were still not registered. Almost half of the world's children go unregistered. Many barriers prevent people from registering births and deaths. Countries need to know how many people are born and die each year – and the main causes of their deaths – in order to have well-functioning health systems. The only way to count everyone and to track all births and deaths is through civil registration. Civil registration provides the basis for individual legal identity but also allows countries to identify their most pressing health issues.

Birth, Marriage, and Death (Articles 234-306 of the Civil Code)

Article 234 deals with those acts to be drawn up on the birth, marriage or death of any person and reads as follows: "(1) *Upon the birth, marriage or death of any person, an act in the respective form annexed hereto, containing such particulars as are required under this Title, shall be drawn up in clear and legible characters, and without any abbreviation.* (2) *Where any of the said particulars cannot be known, a statement to that effect shall be entered in the proper place in the act".*

Article 238 deals with registers and reads as follows: "(1) *In the Public Registry Office in Malta and in Gozo, there shall be kept four register books: one for the registration of acts of birth, one for the registration of acts of marriage, another for the registration of civil unions and the fourth for the registration of acts of death.* (2) *Each volume of such registers shall be numbered from the first to the last page. The last page of each volume shall contain a statement as to the total number of its pages; such statement shall be signed by the Director of the Public Registry".*

Article 239 deals with registrations in the office of Malta or Gozo and reads as follows: "(1) *In the Public Registry Office in Malta, there shall be registered all acts of birth, marriage and death which shall have taken place in the island of Malta, as well as the acts mentioned in articles 244 and 285; and in the Public Registry Office in Gozo, there shall be registered all acts of birth, marriage and death which shall have taken place in the islands of Gozo and Comino.*

(2) *A copy of an act, registered as provided in sub-article* (1) *and transmitted to the Director by any electronic means, or any true copy thereof, shall be deemed a true and authentic copy for all purposes of law provided this copy is signed by the Director receiving it*. (3) *For the purposes of this article the Director's signature may also be an electronic signature according to the meaning as is assigned to it as defined in Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market".*

Article 244 deals with births, marriages, unions of equivalent status, and deaths in foreign countries and reads as follows: "(1) *Any act of birth, marriage, union of equivalent status as defined in the Civil Unions Act or death of a citizen of Malta drawn up or registered in a foreign country by a competent authority in that country, other than an act drawn up or registered under sub-article* (l) *or sub-article* (2) *of article 270, may, at the request of any person interested and upon the Director of the Public Registry being satisfied on the authenticity of such act, be registered in these Islands in the same manner as if it were an act drawn up by any of the persons mentioned in this Title.* (2) *The person making the request shall, for the purposes of registration, deliver to the Director the act in respect of which such request is made".*

Article 245 details how registrations are made and reads as follows: "(1) *The acts shall be recorded in the respective register books, consecutively in the order in which they are received, and without any blanks.* (2) *The registrations shall, as far as practicable, be made in accordance with the forms annexed to this Code relating to the drawing up of the acts, even where the documents which in the cases provided for in this Title may be delivered in lieu of such acts are drawn up in a different manner.* (3) *The registration shall also include the date of the receipt of the act and the transcription of the signature of the Director".*

Corrections

In the case of *X v. Attorney General and the Director of the Public Registry* the First Hall of the Civil Court (in its Constitutional Jurisdiction) stated that *"… Certifikat tat-Twelid jikkostitwixxi dokument pubbliku li jixhed fatt storiku dwar il-persuna li ghaliha jirreferi, u l-bidla tieghu tkun ghamil li jissarraf f'dikjarazzjoni ta' xi haga mhix korretta".*

Article 248 deals with the correction of errors and states that *"where before signing the declaration referred to in article 246, or any note, it shall be necessary to correct any error, the Director shall make the correction in the manner and form following - in the case of a registration, by means of a postil at the foot thereof to be signed by him, and, in the case of a note, by means of a postil at the foot thereof before it is signed; and necessary cancellation shall be made so that the words cancelled remain clearly legible; it shall not be lawful to make any erasure".*

Article 253 deals with the correction or cancellation of registrations and reads as follows:

> **253.** (1) It shall be lawful for any person to bring an action for the correction or cancellation of any registration, or for the registration of any act which the Director, with the approval of the retired Judge or retired Magistrate or retired

> advocate of the Court of Revision of Notarial Acts, shall have refused to receive.
>
> (2) It shall be lawful for any person to bring an action for the registration of the name or names, which name or names the person shall have used or shall have been used for him by his family, and which shall be declared by the court as being the name or names by which the person has been consistently called, or an entry in the Adoption Persons Register as the name or names given to the child and the name or names by which the child is to be called:
>
> Provided that the judicial demand mentioned in this sub-article shall not be allowed when the name or names that the person shall have used or shall have been used for him by his family, are only a shortened version or an abbreviation of the name or names appearing on the relative act of birth.
>
> (2A) Where, in the circumstances mentioned in the provisions of sub-article (2), the name or names that the person shall have used or shall have been used for him by his family are not necessarily a different name or names but a translated version in another European language of the same name or names that are registered in the act of birth, and the use of that translated name or names result from another act of civil status of such person or from a Maltese legally valid identification document or passport that has been issued to him before the 31 December 2011, the Director of Public Registry, upon a written request which has to be sustained by a sworn declaration made by the person concerned, may after he is satisfied with the correctness and veracity of such request and sworn declaration, proceed by inserting an annotation that reflects such change of name or names in the acts of civil status that concerns such person.
>
> (3) The action mentioned in sub-article (2) shall include a request that the change effected in the act of birth through the registration mentioned in this sub-article be reflected in every act of civil status relative to the same person and, where any, to the children and further descendants of such person; which acts shall be indicated in the request by the relative number and year thereof.
>
> (4) Any action shall be brought by way of sworn application before the competent court against the Director.
>
> (5) In any such action, the declaration referred to in sub- articles (4) and (5) of article 158 of the Code of Organization and Civil Procedure may also be confirmed on oath by any officer referred to in sub-article (1) or in sub-article (4) of article 306.

Article 256 deals with corrections ordered by the Courts and reads as follows: "(1) *Any correction, cancellation or registration ordered by the court shall be made by the Director within the time of ten days from the day on which the judgement shall have become res judicata and shall be made on the strength of a true copy of the judgement to be supplied to*

him by the Registrar. (2) *A reference of such judgment shall be made by means of a note in the margin of the register".*

Article 257 deals with corrections ordered by Court of Revision and reads as follows:

> **257.** Notwithstanding the provisions of articles 253 to 256, both included:
>
> (a) the correction of a registration consisting in the rectification of the erroneous indication of any one or more of the particulars specified, in respect of each act, in Part III of the First Schedule to this Code, may also be effected upon an order made in writing by the retired Judge or retired Magistrate or retired advocate of the Court of Revision of Notarial Acts; and
>
> (b) where the registration of a person as a citizen of Malta is made or is to be made on the basis of the name and, or surname shown on the act of birth of that person and such registration may give rise to the creation of a double identity or to lack of clarity regarding the identity of the said person due to the fact that the said person would not still be registered by the said name and, or surname in the official documents of another country, the retired Judge, the retired Magistrate or the retired advocate of the Court of Revision of Notarial Acts shall have the power upon the application of the person who shall have become or who envisages that he shall become a citizen of Malta or of the Director of the Public Registry, to order that the necessary annotations be made on the act of birth of the said person when the said act of birth is registered in the Public Registry for the purpose of making the said changes in the name and, or surname known and for the avoidance of creating the possibility of double identity or of lack of clarity regarding the identity as aforesaid.
>
> (2) The demand for any such correction shall be made by an application filed in the Court of Revision of Notarial Acts, accompanied by a full copy of the registration in respect of which the correction is required.
>
> (3) A copy of any such application shall be served on the Director of the Public Registry within two days of its being filed.
>
> (4) The applicant shall be required to produce such evidence as the said retired Judge or retired Magistrate or retired advocate may deem necessary and, before making any order, he shall give to the Director of the Public Registry an opportunity of being heard.
>
> (5) As soon as may be after the date of any order made as aforesaid by the said retired Judge or retired Magistrate or retired advocate and, in any case, not later than ten days from such date, the registrar of the said court shall, at the expense of the applicant, serve a copy thereof on the Director of the Public Registry and shall cause a notice of the effect thereof to be published in the Government Gazette.

> (6) Any person interested, including the Director of the Public Registry, may, within six days of the publication of the said notice in the Government Gazette, enter an appeal from such order by means of an application to the Court of Appeal.
>
> (7) Notice of any appeal so entered by any person other than the Director of the Public Registry shall be given to the latter by the Registrar of Courts not later than two days from the date of filing of the application of appeal.
>
> (8) Any correction or annotation ordered as aforesaid by such retired Judge or retired Magistrate or retired advocate shall be made by the Director within ten days of the publication of the order in the Gazette or, where an appeal against such order has been entered, within six days of the day on which the matter is finally disposed of by the Court of Appeal.
>
> (9) A reference to the order made by such retired Judge or retired Magistrate or retired advocate or, as the case may be, to the judgment of the Court of Appeal shall be entered in the margin of the register against the entry affected.

Article 258 concerns correction of errors after declaration referred to in article 246 and states that *"where it is found after the Director shall have signed the declaration referred to in article 246, that an error has been made, and such error had been incurred in transcribing an act in the register, the correction of such error shall be made by the Director by means of a note at the foot of the entry. Such correction shall be dated and signed by the Director".*

In the case of *Damian Schembri v. Director of the Public Registry* the Court of Appeal stated *"ghalhekk teorikament ma jistax ikun permess lil persuna, l-ghaliex il-kunjom taghha ma joghgobhiex, taghzel kunjom iehor li jidhrilha li hu isbah, u forsi izjed skond l-idejiet moderni prevalenti, u taddotta "marte proprio" dak il-kunjom gdid. Kieku jkun hekk, il-konsegwenza tkun id-dizordni u l-konfuzjoni fis-socjeta`, jekk kwantita` kbira ta' cittadini juzaw minn dak, jekk huwa dritt".*

Acts of Birth

Article 272 concerns persons bound to give notice of birth of child and states that *"in the case of every child born, it shall be the duty of parents, and in default of both, of the physician, surgeon, midwife, or any other person in attendance at the birth, or in whose house the birth has taken place, to give, within fifteen days of such birth, notice thereof to the officer charged with the duty of drawing up the act of birth".*

Article 273 details how notice is given and states that: "(1) *Notice of the birth may be given by transmitting to the said officer a certificate of baptism, signed by the parish priest or other clergyman who shall have baptised the child.* (2) *Any such certificate shall, if it contains the particulars required for the drawing up of the act of birth, be accepted in lieu of the declaration mentioned in the following articles, and, the said officer, if satisfied as to the correctness of the particulars therein contained, may, on such certificate, draw up the act of birth.* (3) *In any*

case, however, the certificate of baptism shall be delivered to the Director together with the act of birth".

Article 274 concerns verbal or written notice and states that *"notice of the birth of a child may also be given by means of a letter signed by the person giving the notice by electronic means, or verbally; in the latter case, the person giving the notice shall attend personally before the officer charged with the duty of drawing up the act of birth".*

Article 275 details where notice is given personally by any one of the parents and states that *"where, under the provisions of the last preceding article, the notice of the birth is given personally by any one of the parents of the child, the said officer shall, upon the declaration made by the father or the mother respecting the particulars required for drawing up the act of birth, draw up such act without any delay".*

Article 276 details where notice is given personally by any other person and states that *"Where notice of the birth is given by any person other than by any one of the parents of the child, or where such notice is given by the parents or any other person by means of a letter, the said officer shall, within the three next following days, require any one of the parents of the child, or both, to attend at his office to make the declaration respecting the said particulars: Provided that in the case where such notice is given by electronic means by the parents of the child, the officer shall not require the parents to attend his office to make the declaration respecting the said particulars: Provided further that, notwithstanding anything found in this article, the officer may, in any case as he deems fit, require the parents to attend his office".*

Article 278 lists those particulars of an act of birth and reads as follows:

> **278.** Every act of birth shall be drawn up in accordance with Form C in Part II of the First Schedule to this Code and, saving any other provisions, it shall contain the following particulars:
>
> (a) the date of the act itself;
>
> (b) the hour, day, month, year, and place of birth;
>
> (c) the sex of the child:
> Provided that the identification of the sex of the minor may not be included until the gender identity of the minor is determined.
>
> (d) the name given to the child, and, where more names are given, a special indication of the name or names by which the child is to be called and the surname of the child;
>
> (e) the name, surname, a legally valid identification document, age, place of birth and residence of the parents of the child, the mother or mothers, and the person making the declaration:
> Provided that:
>
> (i) where the child is born in wedlock, an indication of the marriage contracted between the spouses shall be stated in the act of birth next to the name and surname of the person who gave birth by using the words "spouse of the said";

(ii) when a child is born more than three hundred days from the legal separation, divorce or annulment of the marriage of the person who gave birth no reference shall be made to such legal separation, divorce or annulment of marriage of the person who gave birth;

(iii) when a child is born less than three hundred days from the legal separation, divorce or annulment of the marriage of the person who gave birth a reference shall be made to such fact in the act of birth instead of the words indicated in paragraph (i) of this proviso;

(iv) where the provisions of article 280(2)(*a*) apply a reference to such fact shall be made in the act of birth;

(f) the name and surname of the parents of each of the parents of the child, and of the parents of the person making the declaration, stating whether the are alive or dead.

Article 278A concerns the registration of names and reads as follows:

278A. (1) The Director of Public Registry may refrain from registering the name or names given to the child in the relative act of birth, if the name or names, given to the child:

(a) is shorter than three letters;
(b) includes numbers or symbols;
(c) is a common surname in Malta;
(d) is derived from an obscene or offensive word or it consists of a word or words associated with sexual activity; or
(e) exposes the child to ridicule or contempt.

(2) It shall be lawful for any person to request the Director of the Public Registry, by means of a signed declaration submitted in Form V contained in Part II of the First Schedule to this Code, to make an annotation in his act of birth or in the Adopted Persons Register in order to:

(a) correct any minor spelling variations to his name;
(b) use a "to be called name" resulting from any act of civil status of such person or from a Maltese identification document or passport:

Provided that such act of civil status or Maltese identification document or passport of such person was issued prior to 1st December 2012.

(3) The declaration made in Form V contained in Part II of the First Schedule to this Code shall be irrevocable and shall be accepted by the Director of the Public Registry upon the payment of a fee as prescribed by the Minister responsible for the Public Registry.

(4) If the Director of the Public Registry allows the request, the annotation referred to above, shall be effective as from the day when he shall enter such

> modification in the act of birth and the "extract" mentioned in article 251 shall indicate the particulars resulting from such annotations.
>
> (5) A person, in respect of whom changes in particulars relating to his change in names have been annotated in accordance with the preceding provisions, shall report the fact to the authorised officer under the Identity Card and other Identity Documents Act who shall issue a new identity card that indicates the particulars in accordance with the annotation written in the relative act. The expenses for the issue of the new identity card shall be borne by the person who changed his particulars.

Article 280 details when the person who gave birth to the child is married and reads as follows:

> **280.** (1) Where the person who gave birth to the child is married, the name of the other spouse shall be entered in the act as that of the parent, notwithstanding any declaration to the contrary, saving any correction which may subsequently be made upon a judgment in regard to the filiation of the child.
>
> (2) The provisions of this article shall not apply -
>
> (a) if the other spouse was, during the whole period of the three hundred days next preceding the day of the birth of the child, absent from Malta, and such absence is attested in writing and on oath before the retired Judge or retired Magistrate or retired advocate of the Court of Revision of Notarial Acts by at least two trustworthy persons;
>
> (b) if one of the spouses had, during the whole of the said period, lived legally separated from the other spouse; or
>
> (c) if before the notice of the birth is given the spouses together declare in writing and on oath before the retired Judge or retired Magistrate or retired advocate of the Court of Revision of Notarial Acts that during the whole period of the three hundred days next preceding the day of the birth of the child they did not have a sexual relationship together.

Article 283 concerns still-born children and states that: "(1) *In the case of a still-born child, the fact of stillbirth shall be stated in the act.* (2) *Where the child, having been born alive, dies at any time before the drawing up of the act, the act of death shall be drawn up immediately after the act of birth.* (3) *In case of abortion, an act of birth shall only be drawn up where the foetus shall have completely assumed the human form".*

Article 285A concerns children born at sea on board a vessel that is not registered in any place and reads as follows: "(1) *The Director of the Public Registry may, for humanitarian reasons only, register the birth of children that were born at sea on board a vessel that is not registered in any place and provided that it results that the Maltese islands were the first harbour where such vessel disembarked immediately after the birth of such child.* (2) *The Director shall proceed with such registration if he is satisfied, by means of scientific verifications, assurances of geographical co-ordinations and any other verifications or assurances that the Director*

deems appropriate, that the child was born at sea on board a vessel that is not registered under any jurisdiction. In such cases, the place of birth of the child shall be listed as born at sea. (3) *The registration made under this article shall in no way affect or prejudice the provisions of the Maltese Citizenship Act".*

Article 289 details where, after registration, paternity of a child conceived or born outside wedlock is established and states that: "(1) *Where, after an act of birth of a child conceived and born outside wedlock has been registered without indication of the name of the father, the paternity of such child is determined by a judgment of the court, the name of the father may, at the request of any person interested, be entered by means of a note in the margin of the register.* (2) *The same shall apply where, after the registration of a repertus it becomes known who the parents of the foundling are, either by means of a declaration made by themselves or by a judgment of the court".*

Article 292A concerns the child's surname and states that *"the person giving notice of the birth shall also deliver a declaration by the parents of the child indicating the surname to be used by the child in terms of article 4(3) or of article 92, and such surname shall be registered in the column under the heading "Name or names by which the child is to be called and Surname" in the act of birth immediately after such name or names. Where no such declaration is made in the case of a child conceived and born in wedlock the father's surname shall be presumed to have been so declared and in the case of a child conceived and born out of wedlock the maiden surname of the mother shall be presumed to be the surname so declared".*

Article 251(2A) focuses on acts and registers to be open to inspection and reads as follows:

(a) Extracts of acts of birth and of entries in the Adopted Persons Register shall be issued in the Forms I or J shown in Part II of the First Schedule to this Code.

(b) For the purpose of the extracts issued in terms of paragraph (a) hereof entries in the Adopted Persons Register shall be given consecutive numbers which follow the last number of the acts of birth registered in the year of birth of the adopted person, or one of such numbers reserved for the purpose by the Director and relative to the year of birth of the adopted person, which numbers shall not be allotted to acts of birth. The said year shall also be indicated.

(c) The fact that certain numbers have, according to paragraph (b) of this sub-article, been reserved for registration of adopted persons, shall be kept secret and confidential. A list of such numbers shall only be given to the department of Government dealing with nationality, the Passport Office, the Electoral Commission and the Marriage Registrar who shall be bound by the same secrecy and confidentiality.

Provided that the words "illegitimate father" wherever they occur in an act of civil status registered before the 1st March, 2005 shall not be reproduced in any copy or extract of such act issued by the Directors mentioned in sub-article (1), except as may be otherwise explicitly ordered or authorised by a Court:

"Provided further that in an extract of any act of birth -

(a) *the term ''single'', as relating to the status of the mother, shall not be stated;*

(b) *when a child is born more than three hundred days from the legal separation, divorce or annulment of the marriage of the mother no reference shall be made to such legal separation, divorce or annulment of marriage;*
(c) *where the child is born in wedlock, an indication of the marriage contracted between the spouses shall be stated in the act of birth next to the name and surname of the parents by using the words "spouse of the said";*
(d) *when a child is born less than three hundred days from the legal separation, divorce or annulment of the marriage of the mother any reference to that fact shall not be entered".*

Article 269(5) outlines the adopted persons register and states that *"the Director of the Public Registry shall, in addition to the Adopted Persons Register and the index thereof, keep such other registers and books, and make such entries therein, as may be necessary to record and make traceable the connection between an entry in the register book of acts of birth which has been marked "Adopted" pursuant to article 125 or article 290, and any corresponding entry in the Adopted Persons Register; but the registers and books kept under this sub-article, the adoption decrees and any amendment thereof communicated to the Director of the Public Registry, and any index thereof shall not be open to public inspection or search, and nor shall the Director of the Public Registry furnish any information contained in or any copy or extract from any such registers, books or decrees to any person, except under an order of a court or in exceptional cases, to any public officer duly authorised for that purpose by the Minister responsible for justice".*

Acts of Marriage
Article 293 outlines the particulars of act of marriage and reads as follows:

> **293.** Where any marriage takes place, the parties contracting such marriage shall draw up or cause to be drawn up an act, in accordance with Form E in Part II of the First Schedule to this Code, entering therein –
> (a) the date of the act;
> (b) the name, surname, date and place of birth, a legally valid
> (c) identification document and place of residence of the parties;
> (d) the name, surname, date and place of birth and place of residence of the witnesses present at the solemnization of the marriage;
> (e) he name and surname at birth and after marriage of the parents of the parties;
> (f) the day, month and year when, and the church, chapel, or other place where the marriage took place;
> (g) a declaration as to the solemnization of the marriage signed by both of the parties, or if the marriage takes place by proxy by the proxy and by the other party, in the presence of and countersigned by an officer of the Marriage Registry or other person authorized for the purpose by the Marriage Registrar.

Article 294 concerns the delivery of act of marriage and states that *"the act of marriage shall, as soon as it is completed and signed, be delivered for registration to the person by whom the declaration referred to in paragraph (f) of article 293 is countersigned, and such person shall*

at the earliest opportunity take all such steps as may be required for its registration by the Director".

Article 295 concerns the entry of decisions, declarations and prohibitions affecting marriage and reads as follows:

> **295.** (1) Any judgment or other decision given by a competent court whereby a registered marriage is annulled or the status resulting therefrom is affected shall, at the request of any person, be entered in the register by means of a note in the margin:
> Provided that where a judgement or a decree of divorce are given by the competent civil court, these shall be registered in accordance with article 66A(4).
>
> (2) The person making the request shall deliver to the Director an authentic copy of the relevant judgement or other decision.
>
> (3) The Director shall also enter, by means of a note in the margin of an act in respect of a registered marriage, any declaration made by a married woman on the Form Q delivered by her in accordance with the provisions of article 4(5), as well as any revision to the maiden surname or any prohibition of use of the husband's surname referred to:
>
> (a) in a note of personal separation between the spouses enrolled in accordance with article 62A, and a reference to the date and place of marriage shall be made in any such note of enrolment; or
> (b) in a judgment or decree of divorce registered in accordance with article 66A(4).
>
> (4) In respect of a marriage contracted after the coming into force*of the Marriage Act and other Laws (Amendment) Act, 2017 , the Director shall also enter, by means of a note in the margin of the act of marriage any revision to their surname at birth or to the surname of their previous marriage or any prohibition of use of the surname of the other spouse referred to:
>
> (a) in a note of personal separation between the spouses enrolled in accordance with article 62A, and a reference to the date and place of marriage shall be made in any such note of enrolment; or
> (b) in a judgement or decree of divorce registered in accordance with article 66A(4).

Article 295A concerns acts of civil union and states that: "(1) *The provisions of this Sub-title shall* mutatis mutandis *apply to civil unions contracted under the Civil Unions Act.* (2) *An act of civil union shall be in the form stipulated in Form EE in Part II of the First Schedule to this Code".*

Article 4 concerns the surname to be used by the spouse and children of the family and reads as follows:

4. (1) The spouses shall on marriage adopt the surname of the husband after which the wife may add her maiden surname or the surname of her predeceased spouse:
Provided that for the purposes of this article "maiden surname" shall include the surname of the spouse at the time of marriage even if that surname was not the surname of that spouse at birth and the spouse may also elect to retain the said surname.

(2) The wife may, instead, choose to retain her maiden surname or the surname of her predeceased spouse after which she may add her husband's surname:

However, in the case where a woman was married before the 4th of February, 2005, she shall be able to re-adopt the surname of her predeceased spouse provided that she submits Form S contained in Part II of the First Schedule to this Code to the Public Registry Office, which form shall contain a declaration that she chooses to re-adopt the surname of her predeceased spouse. Such declaration may not be made after the lapse of one year from date of entry into force of this disposition and when it is delivered to the Public Registry Office, the Director shall keep an index with the predeceased spouse's surname as well as the surname of her last husband. This declaration made by means of Form S shall be irrevocable and an annotation shall be made in all the acts of the civil status of such woman.

(3) The children of the marriage shall take the surname of their father, after which there may be added, in terms of article 292A, the maiden surname of the mother or the surname of her predeceased husband:

However in the case of children of the marriage born before the 7th of August 2007, they may add their mother's maiden surname or the surname of her predeceased husband after their father's surname, provided that they submit Form T contained in Part II of the First Schedule to this Code, to the Public Registry Office, which form shall contain a declaration that in their social life they wish to add and make use of their mother's maiden surname or the surname of her predeceased husband after assuming their father's surname since birth. Such declaration shall be accepted by the Director of the Public Registry from the date of the coming into force of this proviso and when this form is delivered to the Public Registry Office, the Director shall make an annotation of this declaration on every act of the civil status of the person making such declaration. This declaration made by means of Form T shall be irrevocable.

(4) Where the wife intends to retain her maiden surname after marriage she shall, before marriage, so declare her intention when applying for the publication of the banns in accordance with the Marriage Act and shall subscribe the appropriate declaration in the Act of Marriage. Such declaration shall be irrevocable.

(5) *Sub-article (1) of this article shall apply to a wife who has married prior to the 1st December, 1993, unless and until she delivers or causes to be delivered to the Public Registry Office, the Form Q contained in Part II of the First Schedule to this Code showing that she is opting to reassume her maiden surname. Such note may not be made after the lapse of six months after the 1st December 1993, and when delivered to the Public Registry Office, the Director shall register the same in a book kept for the purpose, for which he shall keep an index under the wife's maiden surname and that of her husband.

(6) Where a wife intends to retain the surname of her predeceased husband after remarriage, she shall, before remarriage, so declare her intention when applying for the publication of the banns in accordance with the Marriage Act and in lieu of the declaration in the Act of Marriage referred to in sub-article (4) she shall subscribe to a declaration, in Form R contained in Part II of the First Schedule to this Code and containing the particulars therein indicated, such form shall be delivered to the Public Registry together with the Act of Marriage and shall be signed by the spouses and countersigned by all the other signatories in the Act of Marriage.

(7) The descendants including the adopted children of persons who have submitted Form T referred to in sub-article (3) to the Public Registry Office may, by not later than one year following the closing date to submit Form T also submit to the Public Registry Office, Form U contained in Part II of the First Schedule to this Code, declaring that they wish to use the same surname as their ascendant's was duly annotated in his respective acts of the civil status by virtue of sub- article (3). Upon receipt of such form the Director of the Public Registry shall make an annotation of this declaration on every act of the civil status of the person making such declaration. This declaration made by means of Form U shall be irrevocable.

(8) Where the children are under the age of eighteen the declarations made by means of Form T and U shall be made by the parents or, if both parents are deceased, by their tutor or curator:
However, irrespective of whether the parents of the child are still married or not, or whether they are divorced or separated, one of the parents, or the child himself, if he is not a minor, shall have the right to make a declaration by means of Form T. This shall be notified to the other parent, at his last known address as indicated on his identity card, who shall have five working days from notification to oppose this request if he is of the opinion that this would not be in the best interests of the child. If the other parent does not oppose, the Director shall proceed with the registration in the relative act.

(9) The wife of a person who has submitted a declaration made by means of Form T and U, shall assume the husband's surname as duly annotated, if upon marriage she had chosen to assume her husband's surname.

(10) A person in respect of whom a change in surname has been annotated according to this article, shall report the fact to the authorised officer under the Identity Card and other Identity Documents Act, who shall issue a new identification document that indicates the surname in accordance to the annotation written in the relative act of birth. The expenses for the issue of the new legally valid identification document shall be borne by the person who changed the surname.

(11) Partners in a civil union contracted according to the Civil Unions Act may, when applying for the publication of banns relating to the civil union elect to:

(a) adopt for both of them the surname of one of the partners to the civil union or the surnames of both of the partners in the order they chose for both; or
(b) retain their own surname:

Provided that if no choice is expressed in accordance with this sub-article the partners to a civil union shall retain their own surnames.

(12) When applying for the registration of a marriage contracted abroad between partners of the same sex, the partners to the marriage may elect to:

(a) adopt for both of them the surname of one of the partners to the marriage or the surnames of both in the order they choose for both; or
(b) retain their own surname:

Provided that if no choice is expressed in accordance with this sub-article the partners to the marriage shall retain their own surnames.

(13) Spouses married after the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017*, may, when applying for the publication of the banns, elect to:

(a) adopt for both of them the surname of either one of the parties to the marriage; or
(b) adopt for both of them the surnames of both parties in the order of their choice:
Provided that the combination of the spouses' surnames shall not result in a surname which is longer than the combination of four surnames:
Provided further that when the surname of any one or both of the spouses already has a combination of two or more surnames, the order of the surname of that spouse shall be retained, and the spouses shall not change such order and, or drop any part of their own surname; or
(c) retain their own surname:

Provided that if no choice is expressed in accordance with this sub-article, the spouses shall retain their own surnames.

(14) Without prejudice to the provisions of sub-article (13), where the spouses choose to change their surnames in accordance with sub-article (13)(a) or (b),

such choice shall also become the Family Name, which shall be included in the Act of Marriage.

(15) Without prejudice to the provisions of sub-article (13), where the spouses choose to retain their surnames in accordance with sub-article (13)(c), or where no choice is expressed, the parties shall determine their Family Name in accordance with the provisions of sub-article (13)(a) or (b), which shall be included in the Act of Marriage.

(16) The Family Name chosen by the parties shall be the surname which shall be adopted by any future children of the parties.

(17) Sub-articles (13) to (16), both inclusive, shall apply only to marriages contracted after the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017*.

Acts of Death

Article 296 concerns notice of death by physician and reads as follows: "(1) *On the death of any person, the physician or surgeon in attendance during the last illness who of his own personal knowledge or from information obtained from any other person is aware of such death shall, without delay, give notice thereof in writing, manually or electronically signed as defined in Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market, according to Form F in Part II of the First Schedule to this Code, to the officer charged with the duty of drawing up the act of death, specifying the house or other place in which such person died, the cause of death, and the hour at which the death occurred.* (2) *Such physician or surgeon may deliver the notice to any adult member of the family of the deceased, to be transmitted to the officer above-mentioned or such notice may be delivered by electronic means.* (3) *The provisions of this article shall not apply, if the deceased is one of the persons, on the occasion of whose death the drawing up of an act of death is not, under the provisions of article 235, required for the purposes of this law".*

Article 297 concerns notice of death by members of the family and reads as follows: *"In the case of death of any person who has not been attended by a physician or surgeon, it shall be the duty of the members of the family and of the domestic servants of the deceased as well as of the person occupying the house or other place in which the death occurred, or having the management of such house or place, to give notice of such death: Provided that such notice may be given either by its delivery, by any person, to the officer referred to in article 296(1) or by it being delivered by electronic means".*

Absent Presumed Dead

Articles 298(2) reads as follows *"the provisional act of death shall become final after the lapse of one year from the date of registration".*

Article 299(1) states that *"if the absence of a person has continued for a period of six years since provisional possession has been granted or if the absence has been declared by judgment as provided under article 223 and such person is not one in respect of whose death the*

provisions of article 234 are not applicable in terms of article 235, then the heirs, whether testamentary or heirs-at-law of the absentee, or their heirs, or any interested person or the State Advocate, may make a demand to the court of voluntary jurisdiction in the island in which the absentee last resided to order the officer charged with the duty of drawing up the act of death, to draw up and deliver to the Director for registration within four days from that order, a certificate of death of the absent person according to Form G in Part II of the First Schedule to this Code".

Contents of Death Certificate

Article 301 reads as follows:

> **301.** The officer mentioned in article 296, howsoever he may have received information of the death of any person, shall, after ascertaining such death, draw up, within two days from the receipt of such information, an act according to Form G in Part II of the First Schedule to this Code containing the following particulars:
>
> (a) the date of the act;
> (b) the name, surname, a legally valid identification document, age, place of birth, and place of residence of the deceased;
> (c) the name and surname of each of the parents of the deceased stating whether they are alive or dead;
> (d) the name, surname of the man or woman, if the dead person was married, in a civil union, in a cohabitation registered under the Cohabitation Act or enrolled by means of a public deed under the Cohabitation Act, 2020 or a widow or widower;
> (e) the hour, day, month, and year when, and the place where the death occurred, and the place where the deceased was, or will be, buried;
> (f) the cause of death.

ACT No. Marriage Act and other Laws (Amendment) of 2017 (ACT No. XXIII of 2017)

Article 29 amends article 4 of the Civil Code and reads as follows:

> **29.** (a) In sub-article (1) of article 4 of the Code, for the words "of her predeceased spouse." there shall be substituted the words "of her predeceased spouse:" and immediately thereafter there shall be added the following proviso:
>
> "Provided that for the purposes of this article "maiden surname" shall include the surname of the spouse at the time of marriage even if that surname was not the surname of that spouse at birth and the spouse may also elect to retain the said surname.";
>
> (b) immediately after sub-article (12) of article 4 of the Code there shall be added the following new sub-articles:

"(13) Spouses married after the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017, may, when applying for the publication of the banns, elect to:

(a) adopt for both of them the surname of either one of the parties to the marriage; or

(b) adopt for both of them the surnames of both parties in the order of their choice:

Provided that the combination of the spouses' surnames shall not result in a surname which is longer than the combination of four surnames:

Provided further that when the surname of any one or both of the spouses already has a combination of two or more surnames, the order of the surname of that spouse shall be retained, and the spouses shall not change such order and, or drop any part of their own surname; or

(c) retain their own surname:

Provided that if no choice is expressed in accordance with this sub-article, the spouses shall retain their own surnames.

(14) Without prejudice to the provisions of sub- article (13), where the spouses choose to change their surnames in accordance with sub-article (13)(a) or (b), such choice shall also become the Family Name, which shall be included in the Act of Marriage.

(15) Without prejudice to the provisions of sub- article (13), where the spouses choose to retain their surnames in accordance with sub-article (13)(c), or where no choice is expressed, the parties shall determine their Family Name in accordance with the provisions of sub- article (13)(a) or (b), which shall be included in the Act of Marriage.

(16) The Family Name chosen by the parties shall be the surname which shall be adopted by any future children of the parties.

(17) Sub-articles (13) to (16), both inclusive, shall apply only to marriages contracted after the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017.".

Article 100 amends article 15 of the Marriage act and reads as follows:

100. Article 15 of the principal Act shall be amended as follows:

(a) sub-article (2) thereof shall be substituted by the following:

"(2) During the ceremony, the Registrar or other officiating officer in front of whom the marriage takes place shall ask each of the persons to be married, first to one of them and then to the other, whether that person will take the other as such person's spouse, and upon the declaration of each of such

persons that they so will, made without any condition or qualification, the Registrar or other officiating officer shall declare them to be spouses."; and

(b) immediately after sub-article (3) thereof, there shall be added the following new sub-article:

"(4) Without prejudice to the provisions of sub- article (2) the persons to be married may indicate to the Registrar or other officiating officer in front of whom the marriage takes place the form of words which will be used during the ceremony, including any readings, songs or music:

Provided that the persons to be married must make such request by not later than seven days prior to the date set for the marriage.".

Selected Cases

Balzan Imqareb Nardu v. Direttur Tar-Registru Pubbliku **(Reference 66/1989/1 30/06/2004 FH CC):**

"L-isem tal-persuna f' ghajn il-ligi huwa ta' importanza vitali u ta' esigenza pubblicistika kemm bhala mezz ta' identifikazzjoni personali kemm bhala element distintiv tas-singola persuna fis-socjeta`. In kwantu tali l-isem hu soggett tad-dritt tutelabbli mil-ligi;

Dan l-isem jikkonsisti mill-prenom u mill-kunjom. Fil-lingwagg komuni l-prenom hu maghdud bhala l-'isem proprju' tal-persuna lilha moghtija fil-mument tat-twelid mill-genituri u membri familjari ohra. Minn naha l-ohra l-akkwist tal-kunjom jindika l-appartenenza tal-persuna ma' grupp familjari specifiku li jsehh bhala konsegwenza legali tar-rapport ta' filjazzjoni.

Omissis

Iz-zewg dokumenti ewlenin li solitament jaghtu fidi kemm lill-isem u l-kunjom tal-persuna huma r-registri parrokkjali tal-fidi battezimali in kwantu anke dawn jaghmlu prova legali tal-kontenut taghhom sa prova kuntrarja, u l-Att tat-Twelid ta' l-Istat.

In linea ta' principju huwa komunement accettat illi l-isem u l-kunjom li bihom persuna hi konoxxuta skond il-precitati atti ma jistghux jigu modifikati, hlief meta xort' ohra provvdut mil-ligi nnifisha. Dawn il-modifiki, meta konsentiti espressament mil-ligi, huma previsti f' dawk ic-cirkostanzi korrelatati maggorment ma' rapport familjari.

Fil-kaz ta' l-atti tat-twelid il-ligi tipprovdi ghal sitwazzjonijiet fejn il-kunjom jista' jinbidel.

Ma jidhirx illi fl-istat tal-ligi Maltija dak li jkun jista' bis-semplici volonta` tieghu jippretendi li jista' jibdel kunjomu jew jezigi rettifika f' dan is-sens anke jekk ghalih ikun jissarraf bhala xi sinjal distintiv ta' l-identita` tieghu.

Id-dritt ghar-rettifika ma jistax jigi akkwistat b'xi forma ta' usucapio ossia bl-uzu ghal medda ta' zmien ta' kunjom differenti minn dak registrat ufficjalment".

Schembri-Damian Damian v. Direttur Tar-Registru Pubbliku **(Reference 1294/1995/1, 01/02/2001, FH CC):**

"It-terminu "isem" fl-artiklu 253 tal-Kap. 16 (registrazzjoni ta` isem fir-Registru Pubbliku) ghalkemm lingwistikament huwa minnu li jista' wkoll jikkomprendi fih il-kunjom ta' persuna - kien u hu biss ghall-fini tal-precitat artiklu 253 cirkoskritt ghal dak li bl-ingliz jissejjah "first name" jew "name to be called" - a differenza ta' dak li hu kunjom jew "surname". Fil-lingwa Franciza, bhal f'ilsna ohra, tinzamm differenza aktar netta bejn dak li jissejjah "prenom" minn dak li hu "nom de famille".

Kunjom huwa wkoll patrimonju tas-socjeta' d-distinzjoni rispettiva tal-familji. Din hija l-bazi u l-ordni ta' kull socjeta', u ghalhekk teoretikament ma jistax ikun permess lil persuna, l-ghaliex il-kunjomi taghha ma joghgobhiex li taddotta marte proprio dak il-kunjom gdid. Kieku jkun hekk, il-konsegwenza tkun id-dizordni ul-konfuzjoni tas-socjeta'."

Schembri Damian-Damian v. Direttur Tar-Registru Pubbliku **(Reference 1294/1995/, 16/12/2003, Court of Appeal (Civil, Superior)):**

"Ic-certifikat tat-twelid ta' persuna ma jaghtix il-kunjom ta' dik il-persuna izda, ghal dak li huwa kunjom, jaghti l-kunjom ta' missier u ta' omm dik il-persuna (ara l-Formula "C" annessa mal-Kodici Civili u l-Artikolu 278 tal-istess Kodici). Huwa biss l-isem (dak li dari kien jissejjah "Christian name" a differenza ta' "surname") li jigi moghti specifikatament lill-persuna li ghaliha jirreferi c-certifikat li jkun.

Anke qabel ma gie introdott l-Artikolu 4(3) kif inhu llum, it-tifel legittimu kien dejjem meqjus li jiehu kunjom missieru, u dan kien jista' jigi argumentat minn dak li kienu jipprovdu l-Artikoli 80(2)(a), 92(1), 278 u 279 tal-Kap. 16. U huwa proprju ghax ic-certifikat tat-twelid ma jattribwix "kunjom" lit-tifel - it-tifel semplicement jassumi l-kunjom ta' missieru (li mieghu, illum, jista' jzid kunjom ommu) - li r-referenza ghall-"isem" fis-subartikolu (2) tal-Artikolu 253 hija neccessarjament referenza ghall-prenom u mhux ghall-kunjom jew "family name".

Anke mid-dibattiti parlamentari hu evidenti li l-hsieb tal-legislatur kien li, minkejja li ma jkunx jista' jinghad li hemm zball - ghax fil-kaz ta' zball japplika s-subartikolu (1) tal-Artikolu 253 - persuna li tkun giet konsistentement imsejha b'isem (jigifieri "first name") differenti minn dak indikat fic-certifikat tat-twelid taghha, tkun tista' tbiddel dak l-isem. Qatt ma kien il-hsieb tal-legislatur li jawtorizza bdil fil-kunjomijiet.

Hija haga maghrufa illi l-ligijiet ta' l-istat civili, bir-registrazzjoni ta' l-attijiet tat-twelid u taz-zwieg, kif ukoll tal-mewt, hija haga wisq importanti ghall-hajja civili tas-socjeta`, peress illi minn dawk l-annotazzjonijiet jiddependu hafna drittijiet tac-cittadini. Issa l-kunjom ta' familja, kif inhu l-partimonju ta' l-individwu, li l-familja ma tistax tinnegalu, huwa wkoll il-patrimonju tal-familja li ghandha certu interess li l-membri taghha jkunu maghrufa b'dak il-kunjom; u huwa wkoll patrimonju tas-socjeta` d-distinzjoni rispettiva tal-familji. Din hija l-bazi u l-ordni ta' kull socjeta`, u ghalhekk teorikament ma jistax ikun permess lil persuna, l-ghaliex il-kunjom taghha ma joghgobhiex, taghzel kunjom iehor li jidhrilha li hu isbah, u forsi izjed skond l-idejiet moderni prevalenti, u taddotta "marte proprio" dak il-kunjomgdid. Kieku jkun hekk, il-

konsegwenza tkun id-dizordni u l-konfuzjoni fis-socjeta`, jekk kwantita` kbira ta' cittadini juzaw minn dak, jekk huwa dritt.

Annotazzjoni fil-margini tal-att ta' twelid, jekk hi permessa mill-gurisprudenza ghanda ssir biss f'kazijiet eccezzjonali li verament ikunu jimmeritaw li dak l-att b'xi mod jintmess."

Joseph, Charles u Maryanne mart Charles, aħwa Buttigieg v. Direttur tar-Registru Pubbliku għal Għawdex **(Citazzjoni Numru. 76/2007/1, Seduta tat-22 ta' Novembru, 2007, Qorti Tal-Magistrati (Ghawdex) Gurisdizzjoni Superjuri):**

"[H]emm żewg żbalji (i) billi fil-parti relattiva għal "l-Omm" fil-kolonna intestata "Isem u kunjom" l-isem "Marianna Buhagiar moglie del suddetto" huwa skorrett u jrid jigi "Marianna Tabone moglie del suddetto" u (ii) fil-parti relattiva għal "l-Omm" fil-kolonna intestata "Isem u kunjom il-missier u jekk hux ħaj jew mejjet" l-isem "Giuliano Buhagiar vivo" huwa skorrett u jrid jigi "Giuliano Tabone vivo".

Illi fic-certifikat tat-twelid ta' Maria Buttigieg nee' Mercieca maħrugā mill-Parrocca Maria Bambina tax-Xagħra, Għawdex u kif ukoll fic-certifikat tal-mewt ta' Giuliano Tabone maħrugā mir-Registru Pubbliku, d-dettalji indikati huma korretti (Dokument B u C).

Illi Maria Buttigieg mietet fit-tnax (12) ta' Frar elfejn u sebgħa (2007).

Illi minħabba l-iżbalji li hemm fic-certifikat tat-twelid fuq imsemmi, għad ma jistax jigi rilaxxjat certifikat tal-mewt ta' l-istess Maria Buttigieg".

Fasolo Marcello Basile K/A Marcello v. Direttur Tar-Registru Pubbliku Et **(Ref 1594/2001/1, 19/04/2005, Court of Appeal (Civil, Superior)):**

"Huwa biss f'kazijiet eccezzjonali li ghandha tigi akkordata talba ghal annotazzjoni fil-margini. Hawnhekk gie ritenut li dak li kien qed jippretendi l-appellant kien li jitronka kunjom missieru - minn Basile-Fasolo igibu biss Basile - u mieghu izid kunjom ommu.

Il-Qorti qieset li dan kien jippekka kontra l-Artikolu 4(3) tal-Kodici Civili sia kif kien meta nghatat is-sentenza appellata ("Ulied iz-zwieg jiehdu kunjom missierhom, li warajh jistghu jzidu kunjom xbubit ommhom.") u sia kif inhu llum, cioe` wara l-emendi introdotti bl-Att XVIII tas-sena 2004 ("Ulied iz-zwieg jiehdu kunjom missierhom, li warajh jistghu jizdiedu, skond l-artikolu 292A, kunjom xbubit ommhom jew kunjomzewgha li jkun miet qabilha.").

Il-Qorti qieset li l-appellant seta' jsejjah lilu nnifsu dak li jrid - pero` skond il-ligi huwa jibqa' kunjomu Basile-Fasolo; huwa jista' biss, jekk irid, izid il-kunjom Cherubino ma' dan Basile-Fasolo."

A -vs- B **(Citazzjoni Numru. 362/2006, Seduta tat-23 ta' Novembru, 2007, QORTI CIVILI (SEZZJONI TAL-FAMILJA):**

"Tordna lid-Direttur tar-Registru Pubbliku li jirregistra l-korrezzjonijiet necessarji (kompriż dak indikat fl-ezezzjoni ulterjuri tiegħu) fl-att tat-twelid numru 0000 tas-sena 2003 billi jigu

mniżżla l-konnotati tal-konvenut D minflok dawk tal-konvenut C u dan fi żmien għaxart ijiem minn meta l-istess Direttur jigi notifikat mill-attur bil-konnotati tiegħu u b'kopja vera ta' din is-sentenza mill-istess attur."

Noel u Marisa konjugi Bajada f'isimhom proprju u bhala legittimi rapprezentanti ta' binhom minuri Euchar Bajada v. Direttur Registru Pubbliku ghal Ghawdex **(Citazzjoni Numru. 105/2007, Seduta ta' l-20 ta' Novembru, 2007, Qorti Tal-Magistrati (Ghawdex) Gurisdizzjoni Superjuri)):**
"Tiddikjara li l-att tat-twelid bin-numru ta' iskrizzjoni … tas-sena elfejn u hames (000/2005) hu skorrett fis-sens li isem il-minuri ghandu jaqra "Euchar" u mhux "Eucar".

tordna lir-Registratur sabiex tibghat kopja legali tas-sentenza lill-konvenut fit-terminu stipulat fl- Artikolu 256 tal-Kodici Civili (Kap. 16 tal-Ligijiet ta' Malta) sabiex tkun tista' ssir il-korrezzjoni mitluba".

Hamdan Najm v. DPR **(12 May, 2015):**

In his application Najm explained that his birth certificate gave his surname as Najem instead of Najm. He further explained that he was always known as Najm and produced a number of documents indicating his surname, including his Syrian passport. The fact that his surname on his birth certificate was given as Najem caused difficulties for him and his family. He asked the court to order the necessary correction in light of Article 253 of the Civil Code.

The Public Registry defended the action by explaining that the original birth certificate is Syrian and that registered in Malta was a faithful translation that the plaintiff forwarded. Furthermore, it was the plaintiff who wrote his name in English and the error could only be attributed to him, the Public Registry was not to blame.

The First Hall of the Civil Court held that Article 253 of the Civil Code gave the right to any person to ask for a correction of the names mentioned in certificates. In this particular case the plaintiff, who was born in Syria is asking the court to allow a correction of his surname since it was written Najem, when it had to be Najm. Article 244 of the Civil Code states:

"(1) Any act of birth, marriage or death of a citizen of Malta drawn up or registered in a foreign country by a competent authority in that country, other than an act drawn up or registered under sub-article (l) or sub-article (2) of article 270, may, at the request of any person interested and upon the Director of the Public Registry being satisfied on the authenticity of such act, be registered in these Islands in the same manner as if it were an act drawn up by any of the persons mentioned in this Title.

"(2) The person making the request shall, for the purposes of registration, deliver to the Director the act in respect of which such request is made."

In those cases where the birth certificate is derived from another country, the details are taken from a translation issued from that country. Although the translation is official, it does not exclude errors. The court commented that this was happening very often, especially translations from the Arabic language to the English language issued by Libyan authorities.

The court recommended that the Maltese departments should engage translators who would verify the accuracy of these official translations. This would avoid numerous requests for corrections in official certificates.

In this particular case the defendant, the Director of Public Registry, did not make a mistake, since it registered the plaintiff from a document the plaintiff had given the department. The court had to make its own verifications that the document submitted in court was authentic and could be used as a basis of the correction requested. The court appointed its linguistic expert, Nadia Lanzon and from her report it was explained that the correct translation of the plaintiff's name is Najm.
The court then ordered all necessary corrections and ordered the plaintiff to pay the costs of the case since the defendant department was not to blame.

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"(2) The person making the request shall, for the purposes of registration, deliver to the Director the act in respect of which such request is made."

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linguistic expert, and from her report it was explained that the correct translation of the plaintiff's name is Najm.

The court then ordered all necessary corrections and ordered the plaintiff to pay the costs of the case since the defendant department was not to blame.

***Joanne Cassar v. Malta* (ECtHR FOURTH SECTION DECISION Application no. 36982/11):**

The applicant was born in 1981 and was registered on her birth certificate as male. She always felt she was in fact female and in October2004 she sought medical help. On 20 January 2005 she successfully underwent gender reassignment surgery.

The applicant instituted proceedings under Article 257A of the Civil Code. On 28 June 2006 the First Hall of the Civil Court declared that the applicant had undergone an irreversible sex change and assumed the female sex (Art. 275A(2)) and it ordered that an annotation be made in the applicant's birth certificate whereby the applicant's details regarding sex be changed from male to female. The court further ordered that an annotation be made in respect of the applicant's name, which was to be changed from Joseph to Joanne. The relevant annotations to the birth certificate were duly made.

***Cassar, Joanne v. Direttur tar-Registru Pubbliku et* (Qorti Civili, Kostituzzjonali, 30 ta' Novembru 2010, Rikors Numru 43/2008):**

"Illi mela dan ifisser li llum hija cara u konsistenti il-posizzjoni li hadet il-Qorti Ewropeja fis-sens li persuna li bidlet is-sess taghha b'mod irreversibbli bhal kaz odjern, ma tistax tigi mpeduta mill-Istat li tizzewweg persuna tassess oppost minn dak ta' dak minnha assunt jew akkwistat u rikonoxxut skont il-ligi. Dak li ma huwiex permess huwa zwieg bejn zewg persuni tal-istess sess, u persuna li bidlet is-sess taghha, kif provdut mil-Ligi, u rikonoxxuta bhala tali, ghandha d-dritt li tizzewweg persuna tas-sess oppost ghal dak minnha assunt jew akkwistat; altrimenti jekk tigi mpeduta milli taghmel dan, hija ma tkunx tista tizzewweg, ghaliex certament ma tistax tizzewweg persuna tas-sess simili ghal dak li twieldet bih…"

***Joseph sive Joanne Cassar vs Direttur tar-Registru Pubbliku* (P.A. (RCP) – 28 ta' Gunju 2006):**

"Tiddikjara illi l-intimat Direttur tar-Registru Pubbliku ma jistax jirrifjuta li johrog it-tnidijiet ghaz-zwieg tar-rikorrenti ma' persuna ohra ta' sess maskil u dan a bazi tal-fatt illi rrikorrenti twieldet bhala ragel u ssottomettiet ruhha ghalloperazzjoni fuq indikata u assumiet u akkwistat is-sess ta' mara u dan kif rifless fl-annotazzjonijiet li saru fic-certifikat tat-twelid taghha konsegwenti ghas-sentenza fl-ismijiet".

***Id-Direttur tar-Registru Pubbliku v. Joanne Cassar* (P.A. (JRM) – 21 ta' Mejju 2008):**

"… din il-qorti hija tal-fehma li l-introduzzjoni ta' dan l-artikolu [257A tal-Kodici Civili] mhux intiż biss sabiex jissalvagwarda d-drittijiet tar-rikorrent fit-termini ta' privatezza kif qed jifhimhom l-intimat, iżda l-kappa ta' protezzjoni hija bil-wisq ikbar għaliex il-bdil fic-certifikat tat-twelid tar-rikorrenti jintitola l-istess, kif jippovdu l-istess artikoli, sabiex l-awtoritajiet kompetenti joħorgu d-dokumenti kollha necessarji, inklużi dawk tal-karta tal-identità, u allura

wkoll passporti, registrazzjoni tax-xogħol, u kull certifikati oħra, sabiex l-istess persuna, fis-socjetà u fit-trattamenti tagħha mal-awtoritajiet kompetenti, tigi trattata għall-finijiet u effetti kollha tal-ligi bħala mara, cioè konformament mas-sess tagħha jew assunt minnha wara l-interventi msemmija, u in vista tad-dikjarazzjoni tal-qorti, u l-annotazzjojnijiet appositi. Din il-qorti tħoss li kemm-il darba awtoritajiet governattivi, inkluż l-intimat, ma jirrikonoxxux, anke għaż-żwieg, is-sess tagħha assunt jew akkwistat bħala s-sess applikabbli għaliha, anke għall-fini tal-Liāi taż-Żwieg, dan jammonta għal ksur tad-drittijiet tagħha bħala mara u konsegwenti ksur tal-istess artikolu 8 tal-Konvenzjoni.

Fis-sitwazzjoni kif inhi llum, l-attrici hija mcaħħda mill-possibbilità li tifforma sħubija tal-ħajja kemm ma' ragel u kemm ma' mara. Iżda huwa dan il-fatt – in-nuqqas tal-ligi li taħseb għal forma ta' sħubija tal-ħajja għal min hu fis-sitwazzjoni tal-attrici – aktar milli r-rifjut tar-Registratur li joħrog it-tnidijiet għaż-żwieg li jwassal għall-ksur tal-obbligu pożittiv tal-istat li jara li jkun hemm rispett xieraq għad-dritt tal-attrici għall-ħajja privata".

***Joanne Cassar v. Malta* (ECtHR FOURTH SECTION DECISION Application no. 36982/11):**

By a letter dated 12 April 2013 the Government informed the Court that an out-of-court settlement had been reached with the applicant on 10 April 2013 and that she wished to withdraw her application.

IX. Tutorship

Appointment of tutor by court

Article 91 states that *"in default of parental authority, the appointment of a tutor to a child conceived and born out of wedlock shall be made by such court as may be prescribed by or under any law in force from time to time".*

Where minor is subject to tutorship

Article 158 states that *"any minor, whose parents have died or have forfeited parental authority and who has not married, is subject to be placed under tutorship until he becomes of age or until he marries".*

Appointment of tutor

Article 159 states that "(1) *A tutor is appointed by the court on the demand of any person*. (2) *In appointing a tutor, the court shall take into account any disposition contained in the will of either of the parents of the child relating to the appointment of a tutor".*

Persons competent to act as tutors

Article 160 states that *"where among the relatives of the minor there are competent persons, the court shall appoint one of such persons, preference being given, subject always to the best interests of the child, to the nearest relative by consanguinity".*

Where more than one tutor is appointed

Article 161 states that "(1) *It shall be lawful for the court to appoint more than one tutor.* (2) *Where more than one tutor have been appointed the court may at any time, either of its own motion or upon the demand of any of the tutors, specify their respective duties; and, until such time as particular duties shall have been assigned to each of them, each of the tutors shall*

have all the powers and duties of a tutor, and they shall all be jointly and severally liable for the acts of each of them. (3) *Where any of the tutors dies or otherwise ceases to be tutor, the tutorship shall be exercised by the other tutor or tutors unless the court, of its own motion or upon the demand of any person shall have appointed another tutor in his stead".*

Persons not competent to hold the office of tutor
Article 163 reads as follows:

> **163.** The following persons cannot be appointed tutors:
> (a) persons who have not attained majority;
> (b) persons who are not vested with the free administration of their property or who are notoriously incompetent to administer property;
> (c) persons who are or are about to be, or whose spouse or relatives by consanguinity or affinity up to the degree of uncle and nephew, are, or are about to be involved in a lawsuit with the minor, in which the status of such minor, or a considerable part of his property is at stake;
> (d) undischarged bankrupts;
> (e) persons who have been sentenced to the punishment of imprisonment for a term exceeding one year, or to any punishment for an offence affecting the good order of families, or for fraud;
> (f) persons who are of a notoriously bad character, or manifestly untrustworthy or negligent;
> (g) persons who are trustees of property for the benefit of the minor.

Judges and magistrates not eligible as tutors
Article 164 states that "(1) *The judges and the magistrates are not eligible for the office of tutor, except in the case of their own relative by consanguinity in any degree in the direct line, or up to the degree of cousin in the collateral line.* (2) *Tutorship already assumed in regard to persons other than the aforesaid relatives shall cease on the appointment of the tutor to the office of judge or magistrate".*

Persons who may be excused from the office of tutor
Article 165 states that:

> **165.** The following persons are entitled to be exempted from accepting or continuing in the office of tutor:
> (a) members of the House of Representatives;
> (b) heads of public departments, and any other public officer having the direction of any particular branch of the public service;
> (c) persons belonging to the armed forces of Malta, if on active service;
> (d) persons who have attained the age of sixty years, or are suffering from a habitual infirmity, which incapacitates them from discharging the office of tutor without serious inconvenience;
> (e) any person who is a father or a mother of five living children;
> (f) persons who are already discharging a tutorial office;

(g) any person not being a relative of the minor, or being a distant relative, if there is in Malta a relative, or, as the case may be, a nearer relative competent to discharge the office of tutor, and not excused therefrom:
(h) Provided that where the incapacity or the ground of exemption of the relative or nearer relative ceases, the stranger or the distant relative, as the case may be, may claim to be relieved of the office.

Tutorial inventory
Article 167 states that "(1) *The court shall, before appointing a person to the office of tutor, direct such person to make an inventory of the property of the minor or, according to circumstances, a description of such property, verified on oath by such person, and to bind himself with hypothecation of his own property limited to a fixed sum, well and truly to administer the property of the minor, and to render on the termination of the office a true and faithful account of his administration.* (2) *The court may order that the tutorial inventory or description aforesaid be made by a person other than that who is to be appointed to the office of tutor".*

Power of court in regard to tutor
Article 168 states that "(1) *It shall be lawful for the court, when it deems it expedient, in the decree of appointment, to impose on the tutor the obligation of presenting in the registry of the court, yearly or at such other intervals as the court shall direct, an account of his administration.* (2) *The court may also direct the person who offers to assume the office of a tutor, to give security, and, in any such case, the obligation of the surety as well as that of the tutor must precede the appointment of the tutor".*

Suspension or removal of tutor
Article 169 states that "(1) *The court may suspend or remove any tutor or curator from his office on any of the grounds mentioned in paragraphs (b), (c), (d), (e) and (f) of article 163, or for failure to render an account in due time, or for unfaithfulness in the account rendered, or for any other just cause, saving the provisions of article 35 of the Code of Organization and Civil Procedure.* (2) *In all cases the court shall chiefly consider the interest of the minor".*

Curator *ad ventrem*
Article 170 states that "(1) *If, at the time of the death of any one of the spouses without issue, the surviving spouse declares that she is pregnant, the court may, upon the demand of any person interested, appoint a curator ad ventrem with a view to preventing any supposition of birth, or substitution of child, and administering the property up to the day of the birth, under such directions as the court may deem it proper to give.* (2) *It shall be lawful for the court to appoint a female as curatrix, and entrust another person with the administration of the property".*

Remuneration to tutor
Article 171 states that *"the court may at any time grant to the tutor, or to the curator mentioned in the last preceding article, a moderate remuneration".*

Duties of tutor

Article 172 states that *"the tutor shall have the care of the person of the minor; he shall represent him in all civil matters, and administer his property as a bonus paterfamilias".*

Power of court with respect to education of minor
Article 173 states that *"the court shall, as appropriate, prescribe the place in which the minor is to be brought up, the education which it is proper to give him, and the expense to be incurred for his maintenance and education".*

Powers of tutor in case of bad conduct of minor
Article 174 states that "(1) *Where the tutor has serious reasons for being dissatisfied with the conduct of the minor, the provision of article 134 shall apply.* (2) *The necessary expenses shall be at the charge of the minor".*

Duties of minor towards tutor
Article 175 states that "(1) The minor shall obey the tutor in all that is permitted by the law. (2) *Where the tutor abuses his authority, or neglects his duties, the minor himself or any other person on his behalf, may make a complaint to the competent court; and the court shall caution the tutor or give any other expedient direction".*

Administration and Rendering of Accounts
Articles 176-187. Note the parallels with interdiction and appointment of guardians as well as the distinctions between curators, tutors, and guardians.