CVL 2015
LAW OF PERSONS

The European Law Students' Association

MALTA

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LAW OF PERSONS

Second Year

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Table of Contents

Introduction

This strain of law was baptised by **Sir Adrian Dingli** in his **Ordinance of Persons**, which was duly consolidated in the first edition of the **Civil Code of Malta**.

The Law of Persons is an extension of the behemothian body of **family law** – revolving around legal obligations in situations pertaining to **non-intimate relationships**, **maintenance**, **adoption**, **parental authority**, and more. But ultimately, the Law of Persons deals with relationships ***inter partes***.

However, the holistic definition of 'family law' is one which has experienced the scrutiny of many a theorist.

"[Family law is] the rules by which men and women establish intimate relationships that have legal consequences."

Krause

Thus, **Krause** defines family law by splicing all relationships beheld by males and females under one characteristic – that of being intimate. But this can hardly be regarded as accurate. For instance, the relationship between two brothers or two sisters is definitely not 'intimate'. Thus, one would require a better definition of family law.

To this, **Eekelaar** suggests that **family law is a law of personal obligations** – which hints at a deeper definition connoting a **sense of affection between persons**, thus heralding **moral** (and **legal**) **obligations**.

Ultimately however, all this sheds light on the inherent need to have an efficacious chronicle of family law due to the fact that meanings and definitions are always changing alongside humanity's stride across space and time.

Malta features family law in many limbs of legislation, including the **Marriage Act**, **Domestic Violence Act**, and **Foster Care Act**.

Maintenance between married spouses is nigh extinct nowadays – due to the fact that modern spouses tend to be financially independent from one another.

Maintenance

The subject of maintenance is one pertaining to **public policy**, encapsulating the inherent essence of relationships ***inter partes***. Thus, maintenance connotes an obligation **between spouses**, **parents with their children**, and **ascendants with their descendants**.

Maintenance is usually granted in two scenarios: in **separation** and in **custody**; and usually connotes the **taking away of something** belonging to one person in order for it to be **given to another individual** to whom the former already has an established relationship with.

> "**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**."
>
> **Art. 19**, Civil Code

The elements of '**food**', '**clothing**', and '**health**' are all self-explanatory. '**Habitation**' refers to the paying of **rent** and all possible appurtenances, such as **water** and **electricity**.

Act XIV of 2011 sheds light on how important **maintenance for education** is – thus increasing the obligation of providing maintenance pertaining to schooling for children up to **23 years of age**; as long as said child reads for a full-time **master's degree**.

Therefore, although **maintenance for one's child stops being due once said child reaches 18 years of age**, the threshold by which the longevity of giving maintenance is demarcated extends until the child reaches 23 years of age – given that the child pursues full-time education.

A typical example of a situation begetting maintenance would be in a **separation of parents** – wherein one parent **compensates the other parent** by giving him/her a **sum of money** to spend on their child. In return, the latter parent satisfies his/her parental duty by **having the child live with them**.

In such a situation therefore, the child is being provided two essential elements from his two separated parents – **money** and **time**. And although the monetary contribution given has to be **adequate**, the law provides **NO direct definition** of what the term 'adequate' truly connotes.

Causes for Separation

The law speaks of instances wherein a person may, under valid reasons, petition to legally separate from his/her spouse and claim maintenance.

The first cause for separation, and possibly the most common one, is that of **Adultery** – which is an extra-marital relationship proved by text messages, witnesses, and other physical evidence.

The proof provided has to ascertain, beyond a shadow of a doubt, that the accused spouse is actually partaking in such an illicit endeavour. And the **onus of proof** naturally burdens the shoulders of the **accuser**.

"Either of the spouses may **demand separation on the ground of adultery** on the part of the other spouse."

Art. 38, Civil Code

It is important to note that if a spouse commits adultery, and is broken up with their significant other, then **the unfaithful spouse MAY NOT demand maintenance**. Naturally, if both spouses commit adultery, then they are both vetoed from the right of demanding maintenance. Most importantly however, if there is a child caught in the crossfire of a parental separation caused by adultery, the **child in question may never be left without maintenance** – regardless of whether the parent looking after him committed adultery or not.

Another valid reason for separation would be that of **Desertion** – wherein one spouse abandons the other for a time period **exceeding two years**.

"…either of the spouses may also demand separation if, **for two years or more**, he or she shall have been **deserted** by the other, **without good grounds**."

Art. 41, Civil Code

CASE LAW – '**Antonio Xuereb v. Maria Xuereb'**

This judgement asserted that the **desertion** in question has to be committed **without any good reason**. If desertion occurs due to a forceful incident, then desertion is not identified.

Paying Maintenance

Maintenance is normally paid on a **monthly basis**. However, in **cases of separation**, the law does not preclude the possibility of having it paid as a **lump sum**.

When maintaining a child, maintenance is generally **paid in two parts**:

1. A **capital amount** covering all expenses required for **food**, **clothing**, and **habitation**; AND
2. A **shared amount** of maintenance covering **health**, **education** and **extracurricular activities** of the child in question. These shared elements are **paid for equally by both parents**. It is important to note that this notion is **NOT covered by law**, **but is a common practice**, **nonetheless**.

"… on **separation** being pronounced, the court may […] order the **spouse liable to supply maintenance** to pay to the other spouse, [..] a **lump sum**..."

Art. 54 (5), Civil Code

Thus, the Judge **builds a formula** by which the amount being paid as maintenance is multiplied by a number of months or years so that a sum total of money encompassing a significant period of time may be paid as a lump sum. This generates a situation wherein a '**clean break**' between the appurtenant parties is induced.

However, clean breaks are never employed when it comes to maintaining children. Clean breaks are elements solely sighted in maintenance between spouses.

Whenever children are involved in the crossfire of a separation, **lump sum payments are discouraged** due to there being **NO ultimate control over the funds paid**. This is because **the courts and the debtor lose control of the money paid**, and if the mother receiving the maintenance decides to spend the money on something other than the child's needs, then there would thus exist no regulation on the matter.

Maintenance is normally paid by **cheque** or **bank transfer**, so that some sort of **record** is kept. Cash is thus not a very popular medium by which maintenance is satisfied.

Failing to pay maintenance amounts to a **contravention** under the Criminal Code. Thus, one may **file a police report** in such events. The punishment attached to such an offence may amount to **custodial sentence** not exceeding a term of **3 months**.

> "Every person is guilty of a **contravention against public order**, who –
>
> **(z)** when so ordered by a court or so bound by contract **fails to give to a person the sum fixed** by that court or laid down **in the contract as maintenance** for that person, **within fifteen days** from the day on which, according to such order or contract, such sum should be paid…"
>
> **Art. 338 (z)**, Criminal Code

Maintenance pendente lite

The term '***pendente lite***' translates to '**pending litigation**' – thus meaning that **maintenance *pendente lite*** gives rise to an **interim measure** until a **court case pertaining to separation** reaches its close.

> "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…"
>
> **Art. 46A**, Civil Code

This measure makes it possible for **compensation to be given before the case closes** – which might take an obscene amount of years before that happens. Therefore, any **funding needed to sustain a child** residing with one of the separated parents may be **fulfilled through this interim measure**.

The idea of waiting years for maintenance to be received would be unconventional. Hence, this measure makes certain that certain people requiring maintenance are provided for adequately – even though the respective court case would not yet be finalised.

But how is maintenance calculated in such situations?

A **principle of proportionality** comes into play – wherein the budget for maintenance is calculated **in proportion to the salary**, **assets**, and **benefits** enjoyed by the funding party.

The law also makes it possible for maintenance *pendente lite* to be given simply for '**bare subsistence**'.

> "… it shall be lawful for the court, *pendente lite*, to order the defendant to pay to the plaintiff an interim allowance in such amount **as is necessary for bare subsistence**…:
>
> **Art. 25 (1)**, Civil Code

However, this provision is **rarely invoked** due to the fact that maintaining someone to the simple extent of 'bare survival' would be **too crude a lifestyle to suffer for a long time** until patiently waiting for court proceedings to end.

Moreover, if the **claim of maintenance is disallowed**, then the **defendant** has the **right to being reimbursed** from the **plaintiff** (or from the **person actually responsible for paying the maintenance**) for any amounts the defendant may have already paid to the plaintiff – **including any interest accrued**.

CASE LAW – '**The Police v. Carmelo Farrugia'**

This judgement bore the fact that in cases wherein the lifetime of maintenance *pendente lite* expires whilst court proceedings are still abound, then the **duty to pay maintenance will persist until said court proceedings draw to an end**.

Maintenance in kind

This notion is a **dead letter of the law** – meaning that although it is written down in the law, and is technically enforceable, it is **never actually practiced in reality**.

With this form of maintenance, individuals may **take children under their custody instead of paying them monetary allowance**. Therefore, it substitutes **payment for habitation**.

> "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**."
>
> **Art. 23**, Civil Code

However, this legal tool is **rarely ever employed**, and has largely never been accepted by the courts.

If a child is living with a family member other than his parents (such as a grandparent), then **both parents must pay a stipulated amount to the person offering the child asylum**.

Other than that, **courts almost never allow for siblings to be separated and posted in different households**. Normally therefore, children either live with their mother, or with their father.

Duty to Contribute Towards the Needs of the Family

According to the law, **spouses are required to contribute towards the needs of his family** in order to sustain the lifestyle of each other and of their children (if any).

> "**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**."
>
> **Art. 3**, Civil Code

The role of **housewife** or **househusband** started being regarded as actual 'work' in **1993**. Therefore, one may contribute to his or her family by submitting themselves to the duty of overseeing the daily chores revolving around housework.

Ultimately, the idea is that the person who is living with the child is paying **day by day**, and the person not living with the child pays on a **monthly basis**.

Duty of Spouses Towards Their Children

Civil matrimony endows spouses with the legal obligation to care for their offspring by tending to their needs and aspirations. Thus, this includes the **maintenance** and **educating** of children – with a notable emphasis placed unto the **natural inclinations** of said offspring.

> "**(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.
>
> **Art. 3B**, Civil Code

Certain circumstances require spouses to continue maintaining their children even after amassing 18 years of age and becoming majors at law.

Put simply, the paying of maintenance is due until the age of **18**, but if the child decides to purse his studies further, then that obligation is stretched to the age of **23**.

Therefore, having a child denied the luxury of having a full-time job due to his already being a **full-time student** requires the **extended maintenance of the parents**, at least until the child amasses **23 years of age**. Once that **limit is surpassed** however, a **parent becomes absolved of the legal obligation of maintaining his child** – even if said child is still pursuing a full-time academic endeavour.

If the education stops at any point after attaining 18 years of age, **then the maintenance received shall be stopped as well – for as long as the educational impetus persists.**

Children who are **not capable of providing for themselves** due to factors such as **vegetative physical** or **mental health** must remain under their parents' care, regardless of whether or not they become majors at law.

(2) [This] **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**;

(b) have a disability, as defined in the Equal Opportunities (Persons with Disability) Act, whether such disability is **physical** or **mental**.

Art. 3B, Civil Code

Unlike sub article (a), **there is no specified age in sub article (b)**. This is because no permanent disability halts its existence once a person reaches the age of 23. Therefore, the law does not mention an age because of a possible element of **permanency**.

However, the mentioned **disability must impede one's capability of maintaining a job**. If a disabled person is still potent enough to maintain a job, then the courts may decide that he is not entitled to any more maintenance from his parents.

CASE LAW: *'Valenzia v. Valenzia'*

In this case, a spouse's child was suffering from ***spina bifida*** – which caused him to spend his life strolling around in a wheelchair.

His father was refusing to pay maintenance to him, and even refused to buy him a new wheelchair; all this while arguing that, according to him, his son was fully capable of having a job – regardless of his disability.

The court agreed with this perspective, and states that the child ***"irid jaqbad ir-riedni f'idejh u jipprova jahdem"***.

Thus, the disabled son was entitled to a just a single year of maintenance from his father.

The law also addresses the matter of maintenance and the obligations imposed on an individual who assumes the role of a parent ***in loco parentis*** to another person's child.

This binding relationship is established by virtue of the marriage between the person *in loco parentis* and one of the child's biological parents. The law specifies that such legal obligations come into effect when the other biological parent of the child has experienced certain conditions – namely **death**, being declared as an **absentee**, or being **unknown**.

(3) [These] **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**…

Provided that the **provisions of this sub-article shall be without prejudice to the obligations of the natural parents of the child** …"

Art. 3B, Civil Code

In essence therefore, the provision seeks to ensure that the responsibilities of individuals assuming parental roles in certain circumstances are duly recognised and enforced, all the while underlining the inherent obligations of the child's biological parents.

Calculating the Amount of Maintenance

> "**(1)** Maintenance shall be **due in proportion** to the **want of the person** claiming it and **the means of the person** liable thereto."
>
> **Art. 20 (1)**, Civil Code

The law does not give a maximum or a minimum of the amount of maintenance one is obliged to pay. However, because of this, our courts have established a **custom** that the bare minimum for maintenance is **€200/month** – together with **½ of health**, **education**, and **extracurricular activities**. It is also a custom that that **amount must go up according to the rate of inflation per annum**, as found in the First Schedule of Cap. 158 of the Law of Malta.

Naturally, the amount of **maintenance increases if there is more than one child**. Normally, it continues to multiply itself up until there are 3 children in the picture; however, this is not an established custom. Therefore, 2 children would require €400 of maintenance, but 3 children would not necessarily require €600. The amount here is left completely to the discretion of the courts.

In fact, if a person thinks that the amount of maintenance he is ordered to pay is unjust, then he may file an action of **Reconsideration** for the amount of maintenance under **Art. 2294 of the COCP**.

The maintenance of children is naturally brought about by the fuelling of monetary allowance. **Without money, maintenance cannot be given**. In sustaining a child's needs for elements such as **food**, **clothing**, and **health**, a parent requires monetary stability; and this is to ensure that, as much as humanly possible, the child is bequeathed a **life untainted by the ravages of parental separation**.

However, what is it that renders an amount of maintenance acceptable and sufficient for attaining the above goal?

Germany tackles this conundrum by setting a standard amount of maintenance relative to the salaries of the parties involves – something dubbed as the **Düsseldorfer Tabelle**.

The **Maltese system** however is **far less static** than the German method due to a substantial volume of discretion being left to the Judge and his interpretation of the situation.

But although the Maltese system lies bereft of this mathematical certainty applied in Germany, Judges in Malta tend to achieve something virtually unattainable by the Düsseldorfer Tabelle – which is **true consideration for the child and his needs**. If a Judge feels that a child requires more than just a mathematical derivative of his parents' salaries, then the child will be given exactly that.

Any disabilities or illnesses which may impede a child from maintaining themselves are also considered when calculating the quantum of maintenance. Unlike German courts therefore, **Maltese courts calculate maintenance on a case-by-case basis**.

As stated before therefore, Maltese courts still hold a **customary minimum** (NOT a statutory minimum) of **€200 and ½ of health and education** for a **single child**. This practice is **applicable for spouses bearing one child**. If a couple has three children, this customary minimum **does NOT scale** according to the number of offspring borne.

The primary advantage of the Maltese system is that children who might require some ulterior maintenance due to **particular contingencies** such as dietary or medical necessities will receive a fair and relative amount of maintenance that will cater for such needs.

Thus, the **principle of proportionality** would apply on such occasions. For instance, if the husband makes twice the amount received by his wife's salary, then that income would be taking into consideration by the courts.

Other than salaries, the court also gives heed to any beneficial by-products accumulated by **movable or immovable assets** owned by the parents, as well as any **interest accrued under a trust fund** when calculating the amount of maintenance one needs to pay.

> "**(3)** 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 […] and to the **fruits of any movable or immovable property** and any **income accruing under a trust**."
>
> **Art. 20 (3)**, Civil Code

Similarly, the court also considers these same aspects emanating from the **claimant's side** when calculating the amount of maintenance owed. In fact, if a debtor is obliged to pay maintenance, he reserves the **right of knowing what the claimant earns**.

> "**(5)** 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**."
>
> **Art. 20 (5)**, Civil Code

Claimants must also undergo certain scrutiny and assessment with regards to their **capacity for self-sufficiency**. For example, it would make a world's difference were a claimant to satisfy all the necessary requisites needed for him to able to exercise some kind of **remunerating profession**.

> "**(2)** 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."
>
> **Art. 20 (2)**, Civil Code

Moreover, a person arguing that he may only fulfil his obligation to provide maintenance by offering the claimant a **spot under his roof** is **not considered to be capable of supplying maintenance**. However, this does not hold if the **claimant is an ascendant or descendant**.

> "**(4)** 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."
>
> **Art. 20 (4)**, Civil Code

Obligations for Maintenance

The **volume of maintenance** must always be **commensurate with the needs of the child**. Naturally however, the **means of the parents** (their profession, assets, and other benefits) are considered when determining the amount of maintenance.

> "… the **maintenance due to children** in the **event of separation**, shall be determined having regard to the **means of the spouses**, […] 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**."
>
> **Art. 54 (2)(a)**, Civil Code

Other than that, other elements considered when calculating the amount of maintenance are **Social Benefits** enjoyed by spouses and **Insurance Schemes** paid by one spouse that would have benefitted the couple had it not been sliced by the ravages of separation.

The Court may also order payment for maintenance to **be taken directly from the salary or allowance** of the person obligated to pay such an allowance. This is carried out through the administering of a **Garnishee Order**, as stipulated in the **COCP**.

The amount of maintenance may also be **increased incrementally** as time passes by. Thus, this mitigates the contingency of having problems such as **inflation** impinge on the amount of maintenance.

Supervening Changes

Supervening changes are **cataclysmic events** impacting one's life, altering it significantly along the way – for better or for worse. This might include a change in employment, a loss of an asset, signing new contracts, and much more.

Supervening changes may occur on **both the claimant and defendant's end**.

In light of such circumstances, the law allows the Court to **suspend** or **alter** the amount of maintenance a spouse is obliged to pay.

> "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** […].
>
> 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 […] 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."
>
> **Art. 54 (9)**, Civil Code

Therefore, if only **partial satisfaction** has been delivered unto the claimant, then the effect of any supervening changes shall apply **only to the portion left unsatisfied**.

If a **lump sum** has been paid **prior** to a supervening change, **no refunds** are given.

If a supervening change renders a person **incapable of performing his obligations** of paying maintenance, then he may request the Court to **absolve him** of his obligations; or that, at least, his **obligations be reduced**.

CASE LAW – **'The Police v. Anthony Saliba'**
In this case, the defendant, acting on his judgement alone, **halted all payments of maintenance after losing his employment**. Instead, the Court contended that the defendant should have formally asked permission before deciding to stop entertaining his duties and obligations. Thus, the Court awarded Mr Saliba an **ammenda of Lm5** in response to his reckless actions.

However, if a **sudden supervening change blesses the life** and wellbeing of the party having a claim to maintenance, then **such claim dissipates**. In such cases therefore, any **lump sums** being paid in instalments will either **cease** or be **reduced** in accordance with the circumstances of the situation.

Although a person **destitute of means** to supply maintenance may **suddenly become capable of paying such maintenance** after a supervening change, this sudden influx of affluency **does not compensate** for the time period wherein said person was absolved from paying due to a lack of means.

Ultimately, a person suffering a **self-inflicted negative** supervening change (such as a sudden resignation from one's profession) does not become absolved from his obligations to pay maintenance. Thus, one may not spite the person/s he is bound to pay maintenance to by inducing a self-imposed supervening change.

CASE LAW – '**Rita Attard v. Raymond Attard'**
It was revealed here that the defendant **intentionally resigned from his job** in order to **withhold maintenance** from his former spouse. The Court, however, disappointed his aspirations by declaring that his obligations were not to cease.
CASE LAW – '**Francis X Aquilina Case'**
In this case, the **plaintiff was denied a reduction in the amount of maintenance owed** to the defendant due to his justification lacking a believable backbone. The Court even went as far as stating that the plaintiff only submitted such a petition to spite the defendant – his former spouse.
CASE LAW – '**Charmaine Zahra Case'**
The **First Hall of the Civil Court** asserted that: "**Id-dizokkupazzjoni m'hijiex, per se`, motiv biex tehles lir-ragel mill-obbligu tal-manteniment** lejn martu u uliedu. Dan aktar u aktar umbaghad fejn, bhal f'dan il-kaz, **id-dizokkupazzjoni tkun kolpuza**".

Cessation of Duty to Pay Maintenance

The most standard cause for this cessation of the duty to pay maintenance would be due to the **sudden inability of a dutybound person** to continue paying maintenance – which occurs mostly due to **supervening changes**.

This duty might expire when:

- A claimant departs from his/her **matrimonial home**, without good cause, and unjustifiably **refuses to return**.
- A **claimant contracts marriage**. The party liable to paying maintenance may thus oppose his obligations after such an event, as long as any oppositions are made on valid grounds. This demand has to be made via a **judicial act** presented to the parties contracting marriage –thus filed in the **Registry of the Civil Court**.
- An **ascendant** refuses to pay maintenance to a **descendant** on the same grounds upon which he/she may **disinherit** said descendant – namely **Art. 623 of the Civil Code**.

Moreover, duty to pay maintenance ceases when a **child dies**, becomes a **major at law**, is **emancipated into trade**, or **halts his academic journey**.

Revising Maintenance

The most common causes as to why maintenance may be revised is whenever the **person dutybound with paying maintenance suddenly becomes unable to do so**.

> "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."
>
> **Art. 21**, Civil Code

Another reason for the revision of maintenance would be a **claimant's departure from destitution**. **Supervening changes** make a reappearance here and may also be the root cause for a revision in maintenance.

CASE LAW – '**John Debono v. C. Debono'**
Here, the Court asserted that although court-enforced amounts of maintenance may be revised at the discretion of the judge when influenced by previous court judgements, **contractual agreements cannot be amended** (***pacta sunt servanda***).

CHECKPOINT

Art. 19, Civil Code

Food, Clothing, Health, Habitation

Act XIV of 2011, Education

↓

Causes for Separation

Adultery

Desertion

Xuereb v. Xuereb

↓

Paying Maintenance

Maintaining Children (monthly)

Maintaining Spouses (monthly / lump sum / clean break)

↓

Maintenance Pendente Lite

Proportionality / 'Bare Subsistence'

The Police v. Carmelo Farrugia

↓

Maintenance In Kind

Dead Letter of the Law

↓

Duty to Contribute Towards the Needs of the Children

↓

Duty of Spouses Towards Children

Valenzia v. Valenzia

In Loco Parentis

↓

Calculating the Amount of Maintenance

NO Max. / NO Min.

Custom of €200/month + ½ Health, Education, Extracurricular

Maintenance Scales for up to 3 Children

Reconsideration (Art. 2294, COCP)

Düsseldorfer Tabelle

Proportionality – Maltese Courts operate on Case-by-Case Basis

↓

Obligations for Maintenance

Amount of Maintenance = Needs of Child

Social Benefits

Insurance Schemes

Garnishee Orders

↓

Supervening Changes

The Police v. Anthony Saliba

Attard v. Attard

Francis X Aquilina Case

Charmaine Zahra Case

↓

Cessation of Duty to Pay Maintenance

Claimant Suddenly and Unjustifiably leaves Matrimonial Home

Claimant Contracts Marriage

Ascendant Refuses on Same Grounds of Disinheritance

Child Dies

Child becomes Major at Law

Child Emancipated into Trade

Child Stops Studying

Revising Maintenance

Sudden Inability to Pay Amount of Maintenance

Claimant Departs from Destitution

Filiation

Filiation refers to the **exercise of determining who the father of a child is**. Thus, it is the **establishing of paternity**. There are two approaches when dichotomising this concept.

The **first** one is the law's pointing out that, whenever a child is born within the ambit of a marriage, then that offspring is considered to be the by-product of such matrimony, thus parented by the spouses.

Therefore, this begets the Latin maxim of ***pater est quem iustae nuptiae demonstrant*** – meaning that the **father is he who is married to the mother**.

> "A child **conceived in wedlock** is held to be the **child of the spouses**."
>
> **Art. 67**, Civil Code

The **second** notion follows the Latin maxim of ***mater semper certa est, pater numquam*** – meaning that whereas the **identity of a mother is always certain** under a ***iure et de iure*** presumption due to her participation in the birth of her child, there is no sure-fire guarantee that the identity of the father will always be known.

> "A child born **not before one hundred and eighty days** from the **celebration of the marriag**e, **nor after three hundred days from the dissolution […] of the marriage**, shall be deemed to have been **conceived in wedlock**."
>
> **Art. 68**, Civil Code

The mere discussion of filiation has gained significant popularity over time, being slowly undressed from its being regarded as taboo.

Moreover, Maltese courts have started accepting **DNA tests** in order to detect the identity of a child's true father figure. Thus, edits to paternity statuses on birth certificates have become much more common nowadays.

Wedlock

Under **Roman** understanding, children born in wedlock were considered to be **legitimate**, whereas children born outside of it were deemed as **illegitimate**. This discernment bestowed upon the former a set of rights which was denied to the latter – such as the **right to inheritance**. And only until the **Act XVIII of 2004** did this mindset go extinct.

> ***"All children, whether born in or out of wedlock, shall enjoy the same social protection."***
>
> **Art.2**, Universal Declaration on Human Rights

This was duly supplied by the **Convention of the Legal Status of Children Born out of Wedlock**.

CASE LAW: 'Inze v. Austria'
This **ECHR judgement** scrutinised Austrian law **favouring 'legitimate' children over 'illegitimate' ones** when it came to **intestate succession**, deeming it **discriminatory** and unfaithful to the European Convention on Human Rights.
CASE LAW: 'Kroon v. Netherlands'
The **ECHR** here observed that the **Netherlands contravened the Convention** by making it possible for a **father to deny paternity** of a child born in marriage, but **did not permit the wife to deny maternity** in a like scenario.

In Malta, whenever a husband and wife bear a child, the presumption is that the **child borne belongs to the husband of the wife**. Additionally, when a wife bears offspring brought about by an **extramarital affair**, the child in question becomes **registered under the husband's name**.

However, this was battled in the following case:

CASE LAW: 'Carmen Zammit v. Wail Dadouch'
In this case, the plaintiff, who happened to be the defendant's former spouse, bore a child with another person in an extramarital relationship. Thus, the plaintiff insisted that the new-born be registered under the label of '**unknown father**' – whereas the **Director of the Public Registry** thought elsewise, and registered the child under Mr Dadouch's name. Ultimately, the Director was instructed by the Courts to change such information on the child's birth certificate, thus registering the child with an unknown father.

Natural Parentage

"**Any spouse**, **except for the spouse who gave birth to the child**, may bring an **action to repudiate a child born in wedlock**."

Art. 70, Civil Code

This comes due to several situations enshrined within the law, wherein the repudiating spouse brings forward an action based on certain facts that took place from the **300th till the 180th day before the birth of his child**. These include instances wherein the repudiating spouse:

- Was in the **physical impossibility of cohabiting** with the spouse who gave birth.
- Was **legally or *de facto* separated** from the spouse who gave birth (provided that, during the mentioned time, no **form of reunion** between spouses occurred).
- Was afflicted by **impotency**.
- Was **betrayed by his spouse** who, although gave birth to the child, either committed **adultery** or **concealed the pregnancy or birth** of her offspring.
- Provides **DNA samples** and genetic proof excluding parenthood.

CASE LAW: 'Raymond Magro v. Rita Magro'
This case drew the fact that although a couple may be *de facto* separated, such a notion does not necessarily render them physically incapable of cohabiting with each other. Therefore, the **physical impossibility asserted by the plaintiff must be one which completely nullifies the potential of two people seeing each other physically**.
CASE LAW: 'Joseph Vincenti v. Concetta Vincenti' [OUTDATED]
The Court stated that: "***Il-prova xjentifika jew genetika mhix xi prova assoluta***…". Therefore, the court opined that DNA testing should not be the only fact speculated upon.
CASE LAW: 'Anna Zammit v. Carmelo Zammit'
This judgement opposes the one above due to its **basing a child's repudiation simply upon results borne of biological testing**. However, this was due to no other evidence being supplied.

Children themselves may also bring forward an action for filiation as per the law.

If a person incessantly refuses to submit a DNA sample in order to identify a child's parentage, then the Court may opt to **translate this refusal into assuming that the refusing person is indirectly admitting to being the mentioned child's biological parent**.

If one is so adamant on not being a child's parent, then no qualms should be found when asked to supplement such claims with hard scientific evidence (**Art. 70A**). To do this, the Court **"substitutes one's consent"** to politely force a person to commit to a genetic test.

The court does not physically consign the mentioned person to a doctor, so the mechanism to safeguard the law is the threat that if one does not do a genetic test, the court may thus draw inference from that resistance and thus jump to conclusions. Unfortunately, instances of DNA testing are rendered impossible when persons being approached for testing are found to have **departed the country**.

It must also be said that although children have the inherent right to claim filiation in a court of law, that same right might be **undermined if it negatively affects other fundamental rights borne by the child**.

Ultimately, the courts try **to balance the rights of the child and the parents**; and leaning on one side for a minute too longer might give rise to a constitutional case.

Registration of Birth

CASE LAW: 'John Zammit v. Direttur tar-Registru Pubbliku'
The court here stated that: "…hija haga maghrufa illi […] 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**. Therefore, this highlights the **important implications beheld by one's registration of birth** – because it directly effects the rights of the citizen concerned.

Possession of Status Proven by Series of Facts

In cases **where direct evidence is lacking**, the legal provision outlined in **Art. 79** stipulates that the **continued possession of the status of a child conceived or born in wedlock is deemed sufficient**.

Art. 80 further elaborates on how this possession is to be established – requiring a presentation of a **series of facts that collectively demonstrate the connection of filiation and relationship between an individual and the family to which they claim to belong**.

These facts include, among others:

1. The **consistent use of the father's surname** for individuals born to spouses married before the enactment of the Marriage Act and other Laws (Amendment) Act, 2017.
2. The **use of the family name for those born to spouses married after this Act**.
3. The **parents treating the child as their own**, providing for the child's maintenance and education, societal acknowledgment, and acknowledgment by the family.

These criteria serve as **evidence when the possibility of conducting a DNA test is hindered**, particularly in cases where the alleged father is deceased, making genetic sampling difficult (though not impossible).

Ultimately, **Art. 81** affirms that **no person can claim a status contrary to that attributed to him by the act of birth**.

If a person is born in marriage and has his name written down as being the **child of the mother's husband in his birth certificate**, then that person CANNOT claim that he or she is NOT the child of the stipulated mother's husband.

CASE LAW: 'Tauss v. Director of the Public Registry'.
The Court here quoted jurist **Ricci** and said that: "[The presumption that the child registered in the birth certificate is the child of the other's husband] is reinforced by the common life of the spouses and leads to considering the husband as the father of children conceived by his wife during the marriage. The Roman legal experts understood this presumption as the embodiment of the solemn formula ***pater is est quem justae nuptiae demonstra,*** meaning that the father is he whom the lawful marriage points a finger at.

CASE LAW: 'Victor Buttigieg v. Direttur tar-Registru Pubbliku', 2022.
The plaintiff claimed to be the son of a renowned millionaire shortly after the latter died. The plaintiff thus stipulated that he was born in wedlock to another family. Buttigieg proceeded by requesting an exhumation of his alleged 'father' – which was accepted initially, but denied upon appeal. The appeal was upheld because on the plaintiff's birth certificate, it was written that he was the son of his mother's husband – who was NOT the wealthy millionaire the plaintiff alleged was his father. Due to **Art. 81** therefore, the fact that **no one can assert a status contrary to that assigned to him by birth**, the exhumation did not happen, and the plaintiff lost the case.

Children Conceived and Born Out of Wedlock

Art. 86 affirms the parents, whether **jointly** or **separately**, have the **right to acknowledge the child as their own**.

However, an important condition is specified in the proviso: **if the person acknowledging themselves as the parent, but did not give birth, is a minor, then this acknowledgment is considered null and void**.

This provision aims to ensure that acknowledgments are made by individuals who are considered legally competent and of age to make such decisions.

If a child is conceived and born out of wedlock to one of the spouses either before or during their marriage, **Art. 89** establishes a particular rule regarding the child's residence – stating that such a **child may NOT be brought into the matrimonial home (the residence shared by the married couple) without the explicit consent of the other spouse**. This emphasises the **importance of both spouses agreeing to the presence of the child in their shared household**.

However, there is an exception – **if the other spouse has previously given consent to the acknowledgment of the child, then the child can be brought into the matrimonial home without the need for additional consent**.

Art. 90 delineates the rights pertaining to **parental authority** for a child conceived and born out of wedlock. Firstly, the **parent who formally acknowledges a child born out of wedlock is granted all the rights associated with parental authority**, **EXCEPT FOR LEGAL USUFRUCT**.

These parental authority rights typically encompass **decision-making responsibilities** for the child's welfare and upbringing.

Secondly, the law introduces flexibility by stating that if the child's best interests necessitate it, **the court has the authority to decree that only one of the parents is to exercise these parental authority rights**. This could arise in situations where joint decision-making might not be in the child's best interest.

Thirdly, Art. 90 grants the court the **power to impose restrictions on the exercise of parental authority rights**. In more severe cases, the court is empowered to entirely exclude both parents from exercising these rights. This indicates that if circumstances arise that jeopardise the child's well-being, the court has the authority to intervene and make determinations to protect the child's interests.

Lastly, the law outlines specific conditions under which the court may limit parental authority. This provision underscores the legal framework's commitment to the child's welfare, providing a mechanism for the court to intervene and tailor parental authority arrangements based on the unique circumstances of each case, particularly when the criminal conduct of the parents may impact the child's best interests.

Judicial Demands

Art 86A contends that if a child is born **out of wedlock**, and the father has NOT acknowledged the child, the mother of the child (as well as the child) has the right to make a **judicial demand to establish the paternity of the child**. If the court finds in favour of paternity, it will thus order the **registration of this paternity in the relevant civil status records**.

Moreover, **heirs** or **descendants of the child** can also seek this legal remedy if the circumstances outlined in Art. 85 are present.

A judicial demand can be made through any **public document**, whether created before or after the child's birth. This suggests flexibility in the methods by which a parent can formally acknowledge their parentage of a child born out of wedlock.

Declarations made by either parent, **or even by a minor**, are considered admissible as **evidence in an affiliation suit**.

Importantly, the law specifies that the **acknowledgment does not confer any rights on the child against the other parent**. This means that even if one parent acknowledges the child, it does NOT automatically grant the child legal rights against the non-acknowledging parent.

Surnames

If someone's surname changes, does their status change too?

Art. 92 stipulates that **if the child has been formally acknowledged by the father, the child will adopt the father's surname**. In cases where both parents jointly acknowledge the child on the Act of Birth, the determination of the child's surname will be governed by the provisions of article **292A**.

Art. 292A specifies that the person providing notice of the birth must also present a declaration from the child's parents indicating the chosen surname for the child. This selected surname will then be recorded in the birth certificate, following the child's given name. If there is no explicit declaration of the surname for a child born in wedlock, **it is presumed that the father's surname has been chosen**. Conversely, for a child born out of wedlock, the default assumption is that the **maiden surname of the mother will be the chosen surname**.

CASE LAW: *'Nardu Balzan Imqareb v. Direttur tar Registru Pubbliku'*, 2004.
The court here affirmed that: *'…**akkwist tal-kunjom jindika l-appartenenza tal-persuna ma' grupp familjari specifiku** li jsehh bhala konsegwenza legali tar-rapport ta' filjazzjoni'.* Therefore, one's ultimate acquisition of a **particular surname reflects the consequence of that person's affiliation with a particular family**.

The Presumption That a Person Was Conceived or Born in Wedlock

Art. 101, as amended in **2004**, establishes a significant change in the status of children conceived and born OUT of wedlock when their parents later marry or when the court, with voluntary jurisdiction, issues a decree. According to the amended version of the article, in such circumstances, these children are now **categorically and conclusively considered to have always been conceived or born within the bounds of wedlock**, and this determination is made ***iure et de iure***.

Therefore, the law dictates that, in such situations, the legal status of these children is an absolute legal truth that **they are to be treated as if they were conceived and born within a valid marriage right from the start**.

It is also important to note that the **2004 Amendment** reflects a clear legal intent to confer unequivocal legitimacy upon children born out of wedlock in certain circumstances, **aligning their status with that of children born within the confines of a legal marriage**.

Art. 102 outlines the **conditions under which the presumption of legitimacy** arising from the subsequent marriage of parents comes into effect. This presumption is reliant upon certain actions by the parents – specifically, the children must have been formally acknowledged by both parents through a **declaration in the act of marriage**. Additionally, the **presumption holds if the paternity and maternity of the children have been judicially declared by a court judgment**.

Art. 103 details the consequences of this presumption, which is the direct effect emanating from the marriage of parents. **Children deemed by legal presumption to have been conceived or born WITHIN wedlock due to the subsequent marriage of their parents are granted the same rights as those born within a legal marriage**.

These rights are **retroactively vested** in the children from the day of the celebration of the marriage. This retroactive effect depends on certain conditions: the **children must have been acknowledged on the day of the marriage or before it**, or their **filiation must have been declared through a court judgment prior to the marriage**.

Art. 110 outlines the rules governing the determination of a **child's surname** when a legal presumption in their favour is established through a court decree. Thus, if a child is benefiting from such a presumption, **he or she shall adopt the surname of the parent whose demand led to this legal presumption**.

This provision also introduces the notion wherein the legal presumption results from the joint demand of both parents. In such cases, the child is **designated with the surname of the father**, and the mother's surname may be added to it.

The proviso specifies that for children born to spouses who entered into marriage after the enactment of the Marriage Act, the surname to be assumed by the child presumed to have been conceived or born within wedlock is determined differently. In these cases, the **Family Name** chosen takes precedence over the individual surnames of the parents.

CHECKPOINT

Determination of Father

↓

pater est quem iustae nuptiae demonstrant

mater semper certa est, pater numquam

Wedlock

↓

Roman Law Thinking

Act XVIII of 2004

Inze v. Austria

Kroon v. Netherlands

Presumption that Child Belongs to Husband of the Mother

Carmen Zammit v. Wail Dadouch

↓

Natural Parentage

Any Spouse May Repudiate (300^{th} – 180^{th} Day Prior to Birth)

Physical Non-Cohabitation

Legal or *de facto* Separation

Impotence

Adultery & Concealment of Pregnancy

DNA Evidence

Magro v. Magro

Vincenti v. Vincenti

Zammit v. Zammit

DNA Testing / Substitution of Consent

↓

Registration of Birth

Zammit v. Direttur tar-Registru Pubbliku

↓

Possession of Status Proven by Series of Facts

Continued Use of Father's Surname

Use of Family Name

Parent's Treating Child as if Their Own

Person may NOT Change Status Attributed to Him at Birth

Tauss Case

Buttigieg v. Direttur tar-Registru Pubbliku

↓

Children Conceived and Born out of Wedlock

Parent may still Claim his own Child out of Wedlock (NOT Applicable to Minor Parents)

Parent Claiming his own Child gains Parental Authority (NOT Applicable to Legal Usufruct)

↓

Judicial Demands

↓

Surnames

Art. 92 – If Child Acknowledged by Father → Father's Surname

Art. 292A – If NO Surname in Declaration of Surname → Presumed to have chosen Father's Surname

Art. 292A – If NO Surname in Declaration of Surname in Wedlock → Maiden Surname of Mother

Nardu Balzan Imqareb Case

↓

Presumption That a Person Was Conceived / Born in Wedlock

2004 Amendment – Presumption of Being Born in Wedlock to Confer Same Rights on such Children

Repudiation

Repudiation refers to the act of **rejecting**, **disowning**, or **refusing to acknowledge** one's own child. For obvious reasons, this practice in familial matters can only be performed by the **non-birthing spouse**.

When the Husband May NOT Repudiate

Art. 69

The law establishes conditions under which the spouse who has not given birth is prohibited from repudiating a child born **within 180 days after the marriage**:

1. **Prior Awareness of Pregnancy**: the non-birthing spouse cannot repudiate the child if he was aware of the pregnancy before entering into the marriage.

2. **Declaration for the Birth Certificate**: if the non-birthing spouse has made the required declaration for the drafting of the birth certificate, acknowledging themselves as the parent of the child, then they become barred from subsequently repudiating the child.

3. **Declaration of Non-Viability**: repudiation is not allowed if the child is declared not viable.

When the Husband MAY Repudiate

Art. 70

There are certain circumstances under which the non-birthing spouse may initiate a legal action to repudiate a child born **within wedlock**:

1. **Physical Impossibility of Cohabiting**: Repudiation is permitted if the non-birthing spouse proves that, from the 300th to the 180th day before the child's birth, they were physically unable to cohabit with the spouse who gave birth either due to a question of distance or else owing to some other accident, thus emphasising the necessity of physical proximity for establishing parentage.

2. ***De Facto*** **or Legal Separation**: Repudiation is allowed if the non-birthing proves that, during the mentioned time frame, they were either *de facto* or legally separated from the birthing spouse. Do note however that this right to repudiate is forfeited if there was any temporary reunion between the spouses during the mentioned time frame.

3. **Affliction by Impotency**: Repudiation is permitted if the non-birthing spouse proves that, during the stipulated time-period, they were afflicted by impotency, even if it was limited to impotency to generate.

4. **Adultery or Concealment of Pregnancy and Birth**: Repudiation is allowed if the non-birthing spouse proves that the spouse who gave birth committed adultery or concealed the pregnancy and birth of the child.

5. **Other Facts and Genetic/Scientific Tests**: Repudiation is permissible if the spouse produces evidence of any other fact, including genetic and scientific tests and data, that tends to exclude their parenthood.

CASE LAW: *'George Baldacchino v. Jane Baldacchino'*, 2001.

This case held that:

"In-necessita' tat-testijiet u provi genetici […] huma kwazi imposti fejn l-azzjoni attrici tkun ibbazata fuq is-sub-inciz (c) ta' l-Artikolu 70 (1) tal-Kodici Civili.

[…]

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."

Therefore, it was determined *inter alia* that **medical testing would be necessary to prove impotency**. Moreover, issues borne of **proximity** and ***de facto* separation** during the 300th – 180th day-period before the child's birth are also extremely relevant when determining the parenthood of the child birthed.

CASE LAW: *'Peter Zammit vs Maria Zammit'*, 1960.

"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 zewgha ma jkunx jaf bit-twelid.

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."

This judgement highlighted that the **non-birthing spouse is permitted to repudiate if his spouse committed adultery and concealed the pregnancy**. In this case however, the plaintiff's wife did not go out of her way to conceal her pregnancy, even though she did not advise him of it in the beginning.

Procedurally speaking, parties seeking repudiation must perform the necessary legal steps. For starters, persons seeking disavowal of children must direct such an action **against the child in question if the child is a major at law**. Naturally, if the child is still a minor, then he or she will be represented either by a **court-appointed curator** or the child's **tutor**. Regardless of the child's age or legal status, the spouse who is not filing the action is required to be **made party to the suit**.

CASE LAW: ***'Mizzi v. Malta'***

The case involved a husband disputing the paternity of a child born after he had separated from his wife. Although it was later confirmed that he was not the father, the law in Malta prevented him from legally challenging assumed paternity at that time. And even when the **law changed years later to allow challenges to the paternity, the husband was outside the permitted time limits**.

The **ECtHR** ruled that the husband's **right to access the court** and his **right to private and family life** had been violated. The extended time limits had **restricted his ability to challenge paternity**, and while time limits can be in the interest of children, they should never entirely block the parents' use of legal remedies.

The court considered that, at the time of the child's birth, any action by the husband to contest paternity would have had little chance of success, as he would not have satisfied all legal requirements needed for disavowal to commence - namely that the birth of the child had been concealed from him. After the **1993 Amendments**, the concealment requirement became only one of the alternative preconditions for bringing such an action. However, the applicant was then **time-barred** from raising his claim before a court. Therefore, later updates in the law, although introducing new alternatives, came too late for the husband due to the expired time limit for legal claims.

Genetic Testing

When an individual entitled to seek clarification regarding parentage submits an application to the **Civil Court (Family Section)**, it signifies a request for a **genetic testing to be carried out**.

According to law, the Civil Court (Family Section) is **granted the authority to mandate any relevant party involved in the proceedings** — be it the spouses, the child, or the alleged natural parent — to provide their consent for a genetic test of parentage.

Most importantly, if a concerned party does not willingly provide consent for genetic tests to be carried out, the law empowers the court to **substitute that reluctance** with the assumption that the unwilling party is **indirectly admitting to being the genetic relative to the child in question**.

CASE LAW: ***'AC v. Dr Beppe Fenech Adami', 2013.***

The court here asserted that:

"Skond il-konvenuta, ommha 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 f' artikolu 70 (2) appena citat fis-sens li dikjarazzjoni tal-omm li zewgha mhux missier it-tifel taghha "ghandha tinghata konsiderazzjoni" f'kawza ta' denegata paternita'.

This case therefore highlighted that when a **birthing spouse openly declares that her non-birthing spouse is NOT the father of her child**, then such evidence should be given high regard when determining the possibility of repudiation by the non-birthing spouse.

Surnames

If the Civil Court (Family Section) ascertains that a non-birthing spouse is not the natural parent of a child, it holds the prerogative of effectuating a **change in the child's surname** and that of their descendants. This change is thus directed to reflect the **surname of the birthing spouse**, exclusively. However, it is essential to note that the court retains the discretion to make exceptions to this general rule if, upon consideration of all pertinent circumstances, it deems it appropriate.

Furthermore, in cases wherein one of the spouses initiates an action to disown a child, any judgment that results in the disownment of the child **will NOT automatically change the child's surname** or the surname of any individual who adopted it from the child. However, if any party requests a different arrangement, the court has the authority to make alterations as deemed appropriate.

Time Limits

Art. 73

When spouses have the legal capacity to initiate an action to disown a child, they are required to do so within specific timeframes. For instance, if the non-birthing spouse was **present in Malta on the day of the child's birth**, the action must be brought within **6 months from that day**. In cases wherein the non-spouse was **NOT in Malta at the time of the child's birth**, the action should be initiated within **6 months of their return** to Malta. Moreover, if the birth of the child was concealed, the non-birthing spouse must bring the action **within 6 months of discovering the fraud**.

Concealment

Baudry-Lacantinerie holds that for there to be **concealment of birth**, it is necessary that it appears from the circumstances that the **wife had the intention to hide from her husband the birth of the child**. Because only then can a **silent acknowledgment of the non-paternity** of the husband be discerned in her behaviour. The concealment of pregnancy and birth can therefore result solely from the **wife's silence** towards her husband. However, not announcing the birth is not necessarily synonymous with concealing it. Ultimately, such circumstances may never be generalised. It is a matter of **circumstantial fact**.

CASE LAW: *'Grazio Mallia v. Dr Joseph Cassar Galea'*
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. This case highlighted that the non-birthing spouse had not been living with the birthing spouse and had not partaken in any sexual activities with the mentioned party within the 300-day period stipulated by law. Therefore, **the fact that the non-birthing spouse was not aware of the pregnancy of the birthing spouse was not owed to a display of concealment by the latter, but was rather, a residual consequence of the miserable relationship, both personal and proximal, beheld by the two parties**. Thus, there was NO concealment of birth.

CASE LAW: *'Epifanio Vella v. Giuseppe Vella'*
This case contended that c**oncealment of birth as contemplated by the law has to be proved by positive acts, and not only by the silence of the birthing spouse**.

CASE LAW: *'Antonio Borg vs Mary Borg'*
Once again, this judgement underlined that **one must not consider the silence of the birthing spouse in isolation to other circumstantial evidence** when ascertaining whether there was **concealment** of birth or not.

NO Time Limits

Act III of 2008

The Family Court has the authority to, **at any time**, grant permission for an applicant to initiate legal proceedings to disown a child **born within wedlock** to the other spouse.

CASE LAW: ***'Anthony Grima v. Josianne Grima'***

This case quoted the **Mizzi v. Malta** case and asserted that there is an evident recognition of the **father's right to repudiate his children**, even after the expiry of certain legal provisions, albeit depending on the circumstantial nature of the case itself. This comes in view of the rebuttable presumption beheld by **Art. 67** of the Civil Code, which presupposes that *'L-iben imnissel matul iż-żwieġ jitqies li hu bin żewġ ommu'.*

Unfortunately for the applicant, although there was irrefutable proof that the children in question were not the natural descendants of the applicant, the plaintiff failed to provide sufficient convincing material which could reverse that which was stipulated in the children's birth certificate.

In this case, there also was a clear explanation of the presumption made in Art. 67. The rationale behind it is that it would **not be in the minor's best interests if a person who is declared to be the father in a minor's birth certificate suddenly decides to attempt deserting that child based on the argument of not being genetically related**.

Heirs

Art. 74

The law specifies that if one of the spouses dies before initiating an action to disown a child within the time frames specified in the preceding provisions, the **heirs have the authority to bring forth such an action**. The timeframe for this action is set at **6 months** – commencing either from the day the deceased's property is transferred to the child OR from the day the child disturbs the heirs in the possession of said property.

Impeachment

The **parentage** of a child born **300 days after the termination** or **annulment of a marriage** can be contested by any interested party. Additionally, the parentage of a child born within wedlock can also be challenged by any interested person provided that it is proven that:

- From Day 300 to Day 180 before the child's birth, the **husband was physically unable to cohabit with his wife**; OR
- From Day 300 to Day 180 before the child's birth, the **wife engaged in adultery**, thus substantiated by any relevant genetic or scientific tests provided by the person contesting such parentage.

Moreover, the Civil Court (Family Section) has the **authority to permit individuals who claim to be the natural parent of a child born within wedlock or the spouse who gave birth to initiate legal proceedings for the declaration of parenthood**.

The court will thus consider the rights of the person claiming parenthood and the rights of the child in making this decision. However, the court will not change the parental figures of the child in question on a whim.

CASE LAW: *'A[BA]C v. Direttur tar-Registru Publikku'*
"Il-hsieb tal-Legislatur kien li l-istat ta' tifel imwieled fiz-zwieg ma jigiex facilment skussat u rovexxjat".

The Natural Father

Art. 77A

Any interested individual asserting to be the biological parent of a child born within wedlock may initiate legal proceedings **against the pertaining spouses and the child**, or their respective heirs if any of them are deceased. However, this claimant can only be declared as the biological parent of the child if they present evidence that, from the 300th day to the 180th day before the child's birth, the **spouse who gave birth engaged in adultery with the claimant**. The claimant must also provide evidence of any other facts that could be pertinent, along with **genetic** and **scientific tests** and data that tend to disprove one of the spouses as the biological parent of the child.

The Mother

Art. 77B

The mother may initiate a legal action for a **declaration of parenthood against the other spouse** (the alleged natural parent). The parent seeking the declaration must substantiate the claim by presenting evidence that, from the 300th day to the 180th day before the child's birth, she **engaged in adultery with the person they are demanding to be declared as the natural parent**. Also, the claimant must provide evidence of any other facts that could be pertinent, along with **genetic** and **scientific tests** and data that tend to disprove one of the spouses as the biological parent of the child.

in instances covered by **Art. 77**, **77A**, and **77B**, the individual asserting to be the natural parent of the child born within wedlock, or the respective spouse who gave birth, is **entitled to pursue the legal action for a declaration of parenthood within a period of 6 months from the birth of the child**.

Maintenance

If a successful legal action for ***denegata paternita*** is pursued, and the non-biological father is found to have already advanced maintenance payments, the **mother is obligated to reimburse these payments**. However, this obligation arises if and only if the non-biological father subsequently brings a relevant action before the Family and Civil Courts.

CASE LAW: *'Stephen Vella v. Adriana Vella'*

The court here asserted that –

"L-attur kien hallas il-manteniment ghaliex hekk kien obbligat jaghmel wara ordni tal-qorti. L-attur ma setax jehles minn din l-obbligazzjoni hlief wara pronunzjament tal-Qorti li tiddikjara li l-wild 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".

Therefore, there exists the **notion of being repaid back that which has been unfairly paid**. However, the mother's obligation to repay undue maintenance is established only if the non-biological father of the child becomes absolved from taking care of the child after having filed a successful action in court.

The cessation of maintenance is also **calculated to have ceased from the day of the birth of the child**, and not from when the action is deemed justiciable by the courts. And this mirrors the fact that **the person who brought the action has not been the biological father of the child since the moment of birth, and NOT since the moment of the successful action at court**. Therefore, repayment has to be made accordingly.

CHECKPOINT

When the Husband May NOT Repudiate

180 Days after Marriage

Prior Awareness of Pregnancy

Declaration for Birth Certificate

Declaration of Non-Viability

↓

When the Husband MAY Repudiate

Within Wedlock

Non-Cohabitation

Legal / *de facto* Separation

Impotence

Adultery

Concealment of Pregnancy / Birth

Genetic Testing

Baldacchino v. Baldacchino

Zammit v. Zammit

Mizzi v. Malta

↓

Genetic Testing

Court Mandate / Substitution of Reluctance

AC v. Dr Beppe Fenech Adami

↓

Surnames

Possible Surname Change Mandated by Court if NOT Spouse's Child

↓

Time Limits

6 Months from Day of Birth IF Non-Birthing Spouse present in Malta

6 Months from Day of Return to Malta IF Spouse Abroad during Day of Birth

6 Months from Day of Realisation that Birthing Spouse Concealed Birth of Child

↓

Concealment

Baudry-Lacantinerie: Concealment ONLY present if Wife shows Intention to Conceal (Silent Acknowledgement)

Grazio Mallia v. Dr Joseph Cassar Galea

Epifanio Vella v. Giuseppe Vella

Borg v. Borg

↓

NO Time Limits

Court may Permit an Applicant to Disown Child within Wedlock ANYTIME

Grima v. Grima

↓

Heirs

↓

Impeachment

300 Days after Annulment of Marriage

A [BA] C v. Direttur tar-Registru Pubbliku

↓

The Natural Father

Must bring Evidence of Adultery which occurred 300 – 180 Days Prior to Birth of Child

Must bring DNA Evidence to Disprove Parentage of Other Party

↓

The Mother

Must bring Evidence of Adultery which occurred 300 – 180 Days Prior to Birth of Child

Must bring DNA Evidence to Disprove Parentage of Other Party

Must do this Within 6 Months from Birth of Child

↓

Maintenance

IF *denegata paternita* → Mother Must Reimburse Person Paying Maintenance

Vella v. Vella

Parental Authority

Parental authority refers to the **rights and responsibilities that parents enjoy over their offspring** – of who's said rights and responsibilities meets their end once the child reaches legal majority at the **age of 18**.

Therefore, just because maintenance can be given to children until they attain the age of 23, **parental authority strictly expires once the child exceeds 18 years of age and becomes a major at law**.

Parental Authority vs Care & Custody

There looms a massive difference between parental authority and the notion of care and custody.

Comparatively speaking, the notion of **custody in the United States is a physical phenomenon** – thus referring to where the child in question is physically residing. In Malta however, the topic of residence is a separate matter altogether from that of custody.

In Malta, custody is NOT a physical phenomenon, but rather, it is the right to make decisions on behalf of one's own children. And these sorts of decisions generally pertain to the children's **education**, **health**, and **religion**.

Residence

In Malta, the notion of a **primary residence** and **primary carer** is that which is recognised. While a child may have two parents therefore, one parent is typically designated as the primary carer either as a matter of fact or by legal designation.

With this in mind, it is important to understand that the **home of the primary carer is informally referred to as the primary residence**. Thus, this becomes the official and primary residence of the child – thus becoming the domicile wherein they receive letters and correspondence.

It is also important to note that **custody and residence are distinct issues**. Residence is usually singular, while custody is generally shared.

In Malta (and unlike the US) **custody is typically shared**, meaning both parents have the right to make decisions on behalf of their children.

Changing custody is a challenging process in Malta, and the law stipulates that custody can only be revoked for serious reasons – with **domestic violence** being the sole reason explicitly stated. However, other grave reasons, such as substance abuse, parents lacking mental soundness, or the residence being uninhabitable and unsanitary, may also be considered.

The Child as a Subject to Parental Authority

Art. 131

The inherent notion of parental authority stems from the Roman Law belief of ***patria potestas*** – which refers to the power a parent has over his descendants. This doctrine underscores the inherent authority parents possess over their children; a principle deeply rooted in historical legal traditions.

Art. 131 delineates the exercise of **parental authority**, indicating that, barring specific cases defined by law, this authority is jointly **executed through the mutual agreement of both parents**. Following the demise of one parent, the surviving parent assumes the mantle of sole authority, ensuring a seamless transition in the exercise of parental responsibilities.

In scenarios marked by **parental discord** on matters of substantial significance, the law empowers either parent to seek resolution through legal avenues.

The provision thus allows a parent to apply to a designated court to seek directions deemed appropriate for the circumstances at hand.

Procedurally speaking, the court, after affording an opportunity for both parents and the child (if aged 14+) to present their perspectives, issues suggestions deemed in the best interest of the child and family unity. Should the impasse persist, the court is authorised to grant decision-making authority to the parent it deems more suitable to safeguard the child's interests in that specific case.

Although the law mentions the **age of 14**, children may still speak to the court either directly or indirectly through a child advocate or a child psychologist in practice – even before the age of 14. By virtue of this mechanism, the court might get away with particular legal arguments, advocating that **what the child wants**, **the child gets**. However, this is not always an optimal mentality to adopt.

CASE LAW: ***'Kevin Pace v. Mariella Hammett'***

In this case, after having spoken with the child, the respective **child advocate** recommended that all communication being transmitted between the child and her father, including that which was electronic, ceases instantly – thus basically **removing the dad from the child's life**.

However, it is important to note that a child advocate is simply a lawyer and typically cannot make any decisions against any parent. But in this particular case, the child advocate but was deputised by the court to make a decision.

It is very difficult to revoke one's custody. In this case, the father managed to attain information regarding the education and health of his child by having his lawyer subpoena a representative from school and hospital to under provide an account of his child's academic performance and general welfare respectively, under oath. And this lucidly shows why it is so difficult to remove a parent's custody.

In situations involving an **immediate threat of significant harm** to the child, either parent is empowered to take urgent and necessary measures without delay. This provision acknowledges the critical importance of swift action when a child's well-being is at stake, granting both parents the authority to intervene to prevent serious harm. It effectively deputises parents to act decisively in the face of imminent danger to ensure the immediate safety and welfare of the child, emphasising the paramount importance of the child's protection.

Moreover, the law also mentions **third parties and their involvement in matters related to parental authority** over the child. In instances wherein third parties act in good faith, each spouse is considered to be acting with the consent of the other when undertaking actions concerning parental authority over the child. This provision offers legal recognition and protection for actions taken by one spouse in the genuine belief that it serves the best interests of the child, even in the absence of explicit prior consent from the other spouse.

Parental Authority over Minors

Art. 132 of articulates the **obligations and restrictions placed on a child** in relation to parental authority. Most importantly, there exists a fundamental principle that a **child is obliged to obey their parents in all matters permitted by law**.

There also exists a specific constraint – stipulating that, except where otherwise provided by law, a **child CANNOT lawfully leave the parental house or any designated residence without the consent of the parents**. This provision aims to ensure that a child's movements are subject to parental approval.

In situations wherein a child departs without the requisite consent, the law grants parents the **right to recall the child**. Moreover, and if deemed necessary, parents are authorised to seek the assistance of the police in ensuring the child's return.

However, **Art. 133** introduces circumstances under which a competent **court may lawfully grant permission for a child to leave the parental house** – normally due to reasons borne of a just cause, albeit always maintaining the confidentiality of the reasons behind the decision. This legal mechanism is vital for children dwelling in a harmful domicile and need to leave their home as soon as possible.

Procedurally speaking, one might muse that might be scenarios in which delays could prove to be detrimental for the child in question. In such cases, **any magistrate is empowered to issue the necessary order promptly**.

This order must be reported to the designated court not later than the subsequent working day. The court then holds the authority to confirm, revoke, or modify the order issued by the magistrate.

Finally, a child who has attained the age of 16 and has been successfully emancipated into trade shall be deemed to be a major at law in all relative commercial appurtenances, thus meaning that in particular scenarios **such an emancipated child would not be held under parental authority**.

Alternative Care – IMP

Art. 134

This article has been present in the Maltese legal system since the **1784 Code de Rohan**. However, there has been no jurisprudence abutting the notion of alternative care for children until quite recently.

In instances wherein **parental authority proves insufficient** to manage the child's actions, the law allows parents to lawfully remove the child from the family environment. Therefore, **Art. 134** comes into play when the **parents are unable to control the child**, and thus desire to have their **custody removed**.

Said removal of child, however, comes with the concomitant **obligation for the parents to allocate maintenance to the child**, ensuring the fulfilment of the child's basic needs during this period of relocation – wherever he or she may be.

As a **complementary mechanism**, the law offers an avenue for parents to seek court authorisation when removal alone is inadequate. **With the approval of a court, parents may place the child in an alternative form of care for a duration outlined in the court decree**. The court is vested with the authority to determine the most suitable form of care, considering the circumstances at hand. Importantly, parents bear the financial responsibility for the expenses associated with this alternative care, with the overarching objective of facilitating the child's discipline and education during this temporary placement.

Generally speaking, **verbal requests** for such authority are deemed acceptable, and the court is mandated to issue the necessary order promptly. This swift approach underscores the practical nature of the provision, facilitating quick intervention when parents seek assistance in managing their child's behaviour.

Legal Representation of the Child

Art. 135

This legal limb makes it very clear that **parents jointly represent their children, whether born or to be born, in all civil matters**.

Power of Administration

Art. 136

Essentially, parents exercise **joint administration over the property belonging to their children**, whether **already born** or **anticipated**. This joint administration, however, may be subject to particular exceptions where specific conditions – such as **routine administrative actions**, which may be undertaken independently by either parent without necessitating the involvement of the other.

Extraordinary administrative actions require the joint participation of both parents. These include, among others, the **disposal and partition of movable assets** for the purpose of profitable investment, the **collection of due capitals**, the gran**ting of personal rights of enjoyment over immovable property**, the **acceptance of inheritances**, **legacies**, and **donations** on behalf of the child.

This list is indicative, NOT exhaustive.

Acts necessitating court authorisation are also deemed to be extraordinary administration, suggesting actions such as the **alienation of both immovables and movable assets owned by the child**, contracting **loans or debts** on the child's behalf, **pledging or hypothecating** the child's property, and entering into **suretyship**. However, these actions can **only be undertaken in cases of necessity or manifest utility**, and o**nly with the explicit authority of the court**.

In instances where such actions are deemed essential, the court may, upon request from the parents, authorise a **single parent to represent the child** in the relevant legal document.

As stipulated in **Art. 141**, parents are also endowed with the **usufruct**, and are thus allowed to enjoy the property acquired by the child through succession, donation, or any other form of gratuitous title. This right to enjoy usufruct ends once the child becomes a major at law, or if the child meets his or her premature demise.

The right to enjoy usufruct perishes if parental authority of a parent also ceases.

Inheritance

Art. 136

Any **inheritance** passing to the children is required to be accepted by the parents, and this acceptance is to be accompanied by the benefit of an **inventory** (unless stipulated otherwise by the court).

If a person is unable to accept an inheritance jointly with the other parent in the name for their child, then a singular parent may make the decision of accepting the inheritance upon **authorisation of the court**.

Conflicting Interests

Art. 139

When conflicting interests arise among the children or between the children and either parent, the competent court is empowered to appoint one or more special **curators** as deemed necessary in the given circumstances.

It is noteworthy, however, that either parent has the **legal right to abstain from representing any of the children** in conflicts against another child or against the other parent. This legal provision thus ensures a fair and impartial resolution of disputes among family members, recognising the potential for conflicts of interest and providing mechanisms to address them in the best interests of the children involved.

Cessation of Parental Authority

Art. 150

Parental authority is initiated as a result of parentage. The moment one becomes a parent, one also becomes endowed with the right to parental authority. However, this authority it not of an immortal nature, and may cease in two ways:

1. ***Ipso Iure*** (by **Operation of the Law**)
2. By **Forfeiture**

Essentially, the main difference between cessation and forfeiture is that if something ceases, it comes to a **natural end**, but if something is forfeited, then it connotes that a person has **lost access to a particular** right after having acted in an unjustifiable way. Therefore, forfeiture is generally considered to be punitive.

Art. 150 delineates the circumstances under which automatic cessation of parental authority either *ipso iure* or by operation of law may take effect:

1. **Death of Both Parents**
2. **Death of the Child**
3. Child Attains the **Age of 18**
4. **Marriage of the Child**
5. Child Establishes a **Separate Domestic Establishment**

These circumstances lead to cessation *ipso iure*.

6. **Failure to Make Required Registrations** – *however, note that parental authority remains intact for the parent who has complied.*
7. **Remarriage** of the Surviving or Adoptive Parent

These circumstances lead to cessation by forfeiture.

In cessation by forfeiture, the court is empowered to reinstate the parent, either wholly or partially, in parental authority if it considers it advantageous for the well-being of the mentioned child. This **reinstatement is dependent upon the parent rectifying the omission that led to the forfeiture of their authority**.

Art. 154 outlines other circumstances in which a parent may, either wholly or partially, be deprived of parental authority, such as **ill-treatment** or **neglect** of the child beyond the bounds of **reasonable chastisement**, maintaining a conduct which **threatens the academic welfare** of the child, being **interdicted** or **disabled** as per the COCP, and **mismanaging the child's property**.

In the best interest of the child, the court may also order that **only one parent** exercise parental authority.

CASE LAW: ***'AB as an 'ad litem' curator for his son CB v. DB'***

"…jezistu c-cirkostanzi gravi kontemplati fil-ligi supra citata li jiggustifikaw fl-interess tal-minuri li l-Qorti tnehhi s-setgha ta' genitur minn fuq iz-zewg genituri.

[...]

Jirrizulta wkoll illi huwa l-isess iben li qed jitlob li ma jkollu l-ebda kuntatt la ma' ommu u lanqas ma' missieru. Huma cirkostanzi dawn verament pietuzi u sfortunati ghal dan it-tifel illi filwaqt li gie moghni b'intelligenza 'il fuq mill-medja sab ruhu f'cirkosanzi familjari mill-aktar difficli fejn il-konsum tad-droga u l-promiskwita' ta' ommu kienet ir-regola ta' kuljum filwaqt li missieru jinsab karcerat ghal ghomru l-habs."

Therefore, it was stated that **if it is in the best interest of the child, parental authority will be forfeited by the parents**. In this case, the mother of the child was consumed by **drug addiction** and **promiscuity**, whereas the father of the child was **incapacitated for life in prison**. Thus, it was in the best interest of the child be placed under an authority other than that of his natural parents.

CASE LAW: ***'AB in the names of him/herself and his/her child CD v. ED'***

"Fil-fehma tal-Qorti kuntrasti bejn il-genituri ma humiex per se ragunijiet bizzejjed sabiex Qorti iccahhad genitur mis-setgha ta' genitur. Dan ghaliex f'kawzi ta' din ix-xorta tista' tghid illi dejjem hemm kuntrasti bejn il-partijiet dwar dak li jikkoncerna l-minuri."

This case underlined the fact that **parents bearing differences between one another** when it comes to the raising of their child is not sufficient grounds upon which such parents may have their parental authority forfeited.

CHECKPOINT

Parental Authority vs Care & Custody

US Custody vs Maltese Custody

↓

Residence

Primary Residence and Primary Carer

↓

The Child as a Subject to Parental Authority

patria potestas

Parental Authority exercised Mutually by Parents

Pace v. Hammett

Parent's Singular Action to Immediate Threat of Harm to Child

↓

Parental Authority over Minors

Child is Obliged to Obey Parents

Child Cannot Leave Residence without Consent of Parents or of Court

Child Emancipated to Trade is NOT Subject to Parental Authority

↓

Alternative Care

1784 Code de Rohan

Custody Removed when Parents Unable to Control Child

Obligation of Parents to Maintain Child in Alternative Care

Complementary Mechanism

↓

Legal Representation of the Child

Parents Jointly Represent Child (Born / Unborn) in Civil Matters

↓

Power of Administration

Parents Jointly Administer Property of Child (Born / Unborn)

Routine Administrative Actions

Extraordinary Administrative Actions

Right to Usufruct Ceases Upon Cessation of Parental Authority

↓

Inheritance

Inventory

↓

Conflicting Interests

Curator

↓

Cessation of Parental Authority

Forfeiture or ipso iure

Death of Both Parents

Death of Child

Child 18 Years Old

Marriage of Child

Child Established Separate Domestic Establishment

Failure to Make Registrations

Remarriage of Surviving / Adopting Parent

In Forfeiture, Court may Reinstate Parental Authority

Ill Treatment / Excess Chastisement / Interdiction / Disability

AB as an 'ad litem' curator for his son CB v. DB'

AB in the names of him/herself and his/her child CD v. ED

Guardianship & Interdiction

Act XXIV of 2012 introduced legislation regarding **guardianship**, thus seeking to preserve and protect those persons who suffer from an ailment either physical or mental which impedes them from managing their own affairs. In fact, **Chief Justice Emeritus Vincent DeGaetano** juxtaposes this legislation with the **Mental Health Act** and delineates certain commonalities, such as the reference made to obligations borne by a **curator** (who mainly manages fiscal affairs of the ailed) and **guardians** (who are bound by responsibilities revolving around the general welfare of the infirmed).

The insistence on needing to promulgate legislation regarding curators and guardians was also always advocated for by the **National Commission of Persons with Disability (KNPD)** – who always recognised that parents of those persons suffering from some severe form of mental or physical impediment need assistance from a third party.

Ultimately, Act **XXIV of 2012 caters for majors at law** who cannot take care of their own affairs due to a physical or mental disability. Additionally, persons already under **tutelage** can be assigned a guardian from the age of 17.

Guardianship Orders involve respecting and considering the wishes of the person under guardianship, promoting their well-being, aligning the order with intended goals, and restricting the person's freedom only when necessary and in proportion to the pursued objective.

Persons Subject to Guardianship

Art. 188A

As stated above, if a major at law has a mental disorder that makes it difficult for them to take care of their own affairs, they can be placed under guardianship, even if there are rules about interdiction and incapacitation. The same applies to legal minors. And if anyone so desires, they can **apply for guardianship voluntarily**.

If during any legal proceedings, the court believes that one of the parties might require guardianship, the court will pass the issue on to the **Guardianship Board** – who will ultimately decide whether guardianship is necessary in that situation.

It is important to note that, for the purposes of this particular legal remit, '**disability of mind**' or '**arrested or incomplete development of mind**' should NOT be considered as referring to a mental disorder. Rather, a '**mental disorder**' here refers to a noticeable dysfunction in mental or behavioural patterns, shown by signs and symptoms that suggest a disturbance in mental functioning – thus disrupting cognitive areas like thought, mood, volition, perception, orientation, or memory.

Guardians

Art. 188B

A guardian is **responsible for looking out for the well-being**, both personal and financial, of the person they are appointed to take care of.

The guardian acts on behalf of this person in matters related to **personal or financial affairs** when the person is considered incapable of handling certain aspects of daily life, as specified in the Guardianship Order.

The guardian may also carry out other tasks for or on behalf of the person they are responsible for, always at the behest of the **Guardianship Board** or the **Court of Voluntary Jurisdiction**.

Ultimately, the legislation itself is tailored to respect the desires of the person under guardianship as much as possible, whilst also ensuring the well-being of such a person.

In fulfilling his responsibilities, the guardian must himself act in the **best interests of the person he is guarding**, encourage the person he is responsible for to be involved in the community, support the infirmed person both emotionally and in financial matters, and act as a shield against neglect and abuse.

Within the boundaries set by the Guardianship Order, a guardian has the **authority to sign and carry out all necessary actions** to fulfil the functions and obligations assigned to them on behalf of the person under guardianship.

The 2005 UK Mental Capacity Act

When studying this realm of law, one might look at legislation hailing from other states in order to gain sharper interpretative insight.

According to the 2005 Mental Capacity Act of the UK, when deciding what is in a person's best interests, the **decision-maker should NOT base his judgement solely on the person's age, appearance, or any conditions of that person** – because this might lead to particularly unjust assumptions.

Thus, the decision-maker needs to consider all relevant circumstances, such as whether the person is likely to have the capacity to make decisions about the matter in the future. Moreover, the person’s past should be considered as well, paired with advice given by other consultants, such as other caregivers or lawyers.

Interdiction

Art. 189

An adult with a physical or cognitive disorder rendering them incapable of managing their own affairs may be restricted from certain actions through **interdiction** or **incapacitation**. This process is outlined in **Art. 520-527 of the COCP**.

If someone believes that there is a person suffering an infirmity restricting his capability of managing personal affairs, they can request interdiction through an application to the **Court of Voluntary Jurisdiction**. Such report must be thus supplemented by valid witness substantiation and pertinent reports of a nature relevant to the case at hand.

People who can request interdiction or incapacitation include the following:

- A **husband against his wife**, or vice versa.
- Any person against another person related by **consanguinity**.
- Any person **related by marriage** and who may thus have **responsibilities** for the person in question.
- The **Attorney General** may also make the request unless someone else has already made it.

Ultimately, persons who are **insane**, **prodigal**, or are **suffering from any condition which is impeding them from carrying out personal affairs** are subject to being **interdicted**.

When interdiction or incapacitation is ordered, it becomes **effective from the day of the official decree**. Therefore, any actions taken by the person who has been interdicted or incapacitated after this decree are considered null and void.

The **invalidity** of actions carried out by the incapacitated person can only be raised by the **curator** appointed to oversee their affairs OR by the **person incapacitated himself**, his **heirs**, or **others claiming rights under him**.

Before actually interdicting persons, the court has the **authority to summon** the person for whom interdiction or incapacitation is being requested to thus question them and have them examined by experts.

Once the court interdicts a person, it must issue a notice in the **Government Gazette** describing the inhibitions imposed on the pertaining person. Moreover, every **notary** must keep note of this interdicted person.

Consequences of Interdiction

An interdicted person is generally banned from:

- **Suing** or **being sued**;
- **Borrowing money**;
- **Receiving capital**;
- Giving a **discharge**;
- **Transferring** or **hypothecating** his property; or
- Performing any act of mere **administration** without the aid of a curator.

Prodigals

CASE LAW: ***'Alfredo Zammit v. Emilia Poggi'***
This case underlined the fact that interdicting someone worth interdicting comes at the **benefit of the pertinent family and society as a whole**. Therefore, the limitations imposed on an interdicted persons are there to preserve society in general – because **whosoever maltreats his patrimony is thus deemed a burden on the society that cares for him, as well as being a potential threat to himself**.

Apart from being impeded from carrying out daily and personal affairs, a person suffering from a mental disorder is deemed to be suffering from the same definition provided by the **Mental Health Act** – insofar that it **hinders one's full and effective participation in society on an equal basis with others**.

The Curator

The court will appoint a **curator** to manage the property of an interdicted person. The appointment of a curator is initially for a period of up to **3 years**, which can be extended if necessary.

The court may grant the curator a **payment**, all the while considering the nature of the services and the property of the person who has been interdicted.

Throughout his term, the curator is required to submit an **annual sworn report** to the court outlining the circumstances of the curatorship and the overall condition of the interdicted or incapacitated person.

CASE LAW: ***'Assunta Vella vs Philip Vella'***
This case outlined that the **interests of the interdicted person must always be considered when it comes to appointing a curator for such a person**. However, this does not mean that the interests of the family members of the interdicted person are to be overridden by the interests of the incapacitated. In fact, the court must give **immense heed to the spouse**, if any, of the interdicted person.

Interdicted Minors

Towards the **end of the last year of a minor's period of being under tutorship**, the minor can either be placed under guardianship is elsewise interdicted. In either situation, the **Guardianship Board** or the **Court** can appoint either the existing tutor or someone else as the guardian or curator. Therefore, the appointed guardian or curator is only allowed to start managing the minor's property **from the day when the tutorship officially ends**.

Rights of the Interdicted

In order to comply with the **United Nations Convention on the Rights of Persons with Disabilities**, states are required to implement appropriate measures to grant individuals with disabilities access to the support they need to exercise their legal capacity.

Therefore, states must ensure that all measures related to the exercise of legal capacity incorporate effective safeguards to **prevent abuse** in accordance with international human rights law. These safeguards must thus guarantee that the rights, will, and preferences of the interdicted person are still respected.

Moreover, decisions taken for the sake of these persons must be free from conflicts of interest, tailored to the individual's circumstances, have the shortest duration possible, and are subject to regular review by a competent, independent, and impartial authority or judicial body.

Conversion & Revocation

The law makes it possible for one to request the **Court of Voluntary Jurisdiction** to **convert an existing interdiction or incapacitation into a Guardianship Order**. The Court, in considering such requests, is allowed to seek input from the **Guardianship Board**.

Interdiction or incapacitation will be lifted when the reason for imposing these measures no longer exists.

CHECKPOINT

Act XXIV of 2012

National Commission of Persons with Disability

Guardianship Orders

↓

Persons Subject to Guardianship

Legal Majors who Cannot Take Care of own Affairs

Guardianship Board

Definition of 'Mental Disorder'

↓

Guardians

Guardian to Take Care of Well-Being of Person

Guardian to Take Care of Personal and Economic Affairs

Guardian to Act in Best Interest of Person he is Guarding

↓

The 2005 UK Mental Capacity Act

Decision-Maker to Heed ALL Relevant Factors

↓

Interdiction

Spouses Against Each Other

Persons Related by Consanguinity

Persons Related by Marriage and thus have Responsibilities for the Persons being Interdicted

The Attorney General can make requests for Interdiction

The Insane and the Prodigals are Subject to Interdiction

Interdiction Effective from the Day the Order is Issued by Court

Interdicted Person or his Curator/s may Challenge the Interdiction

Interdiction to be Published on Government Gazette

Consequences of Interdiction

Interdicted Person BANNED from:

Suing / Being Sued

Borrowing Money

Receiving Capital

Giving a Discharge

Transferring / Hypothecating Property

Performing Acts of Administration without Aid of Curator

↓

Prodigals

Alfredo Zammit v. Emilia Poggi

Prodigals are Hindered from Participating Normally in Society

↓

The Curator

Appointment of Curator for 3 Years, Subject to Extension

Court May Pay Curator

Annual Sworn Report

Assunta Vella v. Philip Vella

↓

Interdicted Minors

↓

Rights of the Interdicted

United Nations Convention on the Rights of Persons with Disabilities

↓

Conversion & Revocation

Possibility to Convert Interdiction / Incapacitation to Guardianship Order

Interdiction / Incapacitation Revoked once Reasons for its Consummation Perish

Tutorship, Guardianship, & Curatorship

Tutorship

Art. 158

In cases wherein a minor suffers a loss of parents either due to death or forfeiture of parental authority, then such a child is placed under **tutorship** until he becomes a **major at law** or is **wed in civil matrimony**.

In cases of tutorship, the **tutor assumes parental authority** as the ***bonus paterfamilias*** of that minor. Therefore, a legal relationship between the tutor (or tutors) and the child becomes consummated – wherein the child **must obey the tutor as if he was his natural parent**, and may make **formal complaints** to court if he is dissatisfied by the behaviour of his tutor.

A child may be assigned a tutor in all the situations wherein parents may lose parental authority either *ipso iure* or by forfeiture – as stipulated in **Art. 150**.

Ultimately, **a tutor may be appointed by the court upon the request of ANY person**.

When there is no parental authority in place, the **responsibility of appointing a tutor** for a child born out of wedlock falls within the purview of a designated court. Moreover, the court shall heed any provisions specified in the **will** of either parent of the child pertaining to the designation of the tutor. However, preference for tutorship is given to any competent persons related by **consanguinity** to the minor in question, as long as this is in the **best interest of the child**.

In the absence or parental authority, the court shall also appoint a tutor for children conceived and born **out of wedlock** – thus highlighting the importance of always having someone represent the child.

When there are multiple tutors assigned at the same time, the court may opt to delineate the **particular responsibilities** borne by such tutors. Also important to note is that each tutor shares **joint and several liability** for each other's actions. And if one of the tutors passes away, then the other tutors shall take over the responsibilities of the ***decujus*** until the court appoints a substitute tutor.

The court maintains the authority to determine the appropriate place for the minor's **upbringing**, specify the **education** deemed suitable, and establish the **expenses to be borne** for the minor's maintenance and education, always considering the minor's best interests.

A list of people who CANNOT be assigned as tutors includes the following:

- **Minors**
- Persons **incompetent to administer their own property**
- **Bankrupt persons**
- Persons **convicted to prison for more than a year**
- Persons convicted of **fraud**
- Persons who are notoriously **negligent**

Judges and **magistrates** are also ineligible for being assigned as tutors – unless they themselves happen to be in the line of consanguinity of a minor related to them who requires a tutor. Moreover, the following people are exempt from accepting or continuing their office of tutor:

- **Members of the House of Representatives**
- **Heads of public departments** in the public service
- Persons on active duty with the **AFM**
- Persons aged **60+**
- **Habitually infirmed** persons
- Parents of **5+ living children**

Prior to appointing an individual to the position of tutor, the court is mandated to instruct that person to prepare an **inventory** of the minor's property, which must be confirmed under oath by the designated person. Furthermore, the court requires the person to bind themselves by hypothecating their own property. The appointed individual is also obliged to provide a thorough and accurate account of their administration upon the conclusion of their tenure.

Finally, the court may at any time opt to grant the tutor/s any form of adequate **remuneration**.

Guardianship

Art. 188A

A major at law who is suffering from a mental disorder or another condition that hinders their ability to manage their own affairs may become subject to **guardianship**.

To this, parents of an adult person with a disability, mental disorder, or any other condition that renders them incapable of self-care should, to the extent possible, endeavour to place the individual under guardianship. And only if this proves unfeasible should the parents then consider pursuing the **interdiction** or **incapacitation** of the said person.

The same principle is applicable to minors, specifically those under 18 years of age who have been **emancipated to engage in trade**. This implies that, for emancipated minors facing similar challenges in managing their affairs due to a disability, mental disorder, or another incapacitating condition, guardianship should be explored as the primary recourse, with interdiction or incapacitation being considered only if placing the minor under guardianship is not a viable option.

A guardian may be appointed even to adults, not just minors, such as those described in **188A** – a major who has a mental disorder or condition which renders him incapable of taking care of his own affairs.

When a guardian is appointed, a **guardianship order** is issued, and the court of voluntary jurisdiction is notified of this order – which might hold an **appeal** for this order or revoke this order altogether. **Financial institutions** such as banks tend to be invested in such an order when there are any transactions made on behalf of an adult.

Therefore, **a tutor is given to a minor and a guardian is normally given to a major**.

Curatorship

Art. 233

A **curator** is normally appointed by the court when the children of an **absent parent** are minors and are not under parental authority.

This person takes on **responsibilities similar to those of a guardian**, overseeing the welfare and interests of the minors involved. Most importantly however, the curator is normally tasked with the **legal representation** of minors – such as in cases wherein children require a curator for wills.

When both parents of a minor are deceased, the **provisions pertaining to Tutorship** shall be applicable *mutatis mutandis* to the Curatorship of the mentioned minor.

In the event of the death of one of the spouses without any children, if the surviving spouse asserts pregnancy, the court has the authority, upon the request of any concerned party, to designate a **curator *ad ventrem***. This curator *ad ventrem* is thus tasked with overseeing the property until the birth occurs. Moreover, the court might want to assign a **female curatrix** to be responsible for things other than the administration of property.

Finally, the court may at any time opt to grant the curator any form of adequate **remuneration**.

Cessation of Tutorship and Curatorship

Art. 169

The court possesses the authority to suspend or dismiss a tutor or curator from their position as per the stipulations of **Art. 163**. Additionally, the court may take such action if a tutor or curator **fails to submit an account** within the stipulated timeframe, exhibits **unfaithfulness in the rendered account**, or for **any other justifiable reason**.

In all instances, the **paramount consideration for the court is the best interest of the minor**. This implies that decisions regarding the suspension or removal of a tutor or curator are fundamentally guided by a primary focus on the welfare and well-being of the minor involved.

CHECKPOINT

Tutorship

Tutor appointed as *bonus paterfamilias* of Child whenever Natural Parents Lose Parental Authority

Child must Obey Tutor as if Natural Parent

Tutor may be appointed at the Request of ANY Person

Possibility of Multiple Tutors with Designated Roles

Tutors Maintain Joint and Several Liability of Each Other

Tutor must draw up Inventory

Tutor may be granted Recompense by Court

↓

Persons who CANNOT Be Tutors

Minors

Persons Who Cannot Administer Own Property

Bankrupt Persons

Persons Sentenced 1+ Years in Prison

Persons Convicted of Fraud

Persons who are Notoriously Negligent

Judges / Magistrates (unless related by Consanguinity to Child)

↓

Persons Exempt from Accepting Tutorship

Members of the House of Representatives

Heads of Public Departments

Active Members of the AFM

Persons Aged 60+

Habitually Infirmed Persons

Persons who have 5+ Living Children

↓

Guardianship

Guardianship is normally granted to Majors at Law incapable of taking care of themselves

Guardianship Order

↓

Curatorship

Curator is normally assigned to Child with Absent Parents

Curator *ad ventrem*

Curatrix

Curator may be granted Recompense by Court

↓

Cessation of Tutorship and Curatorship

Child Protection

Our Civil Code describes a **child** (or minor) as a person who has yet not attained the **age of 18**; whereas the **United Nations Convention on the Rights of the Child** (**UNCRC**) describes a child as human being below the age of 18 unless, under the law applicable to the child, majority is attained earlier.

As established above, a minor must be maintained and cared for by the persons bearing parental authority over such child. Therefore, if a child's education, welfare, health, and general development become hindered by some kind of **marital breakdown** or **abuse** from the parents' behalf, the child in question has to be put in a **state of protection**.

The concept of protecting the child is construed from two conflicting theories: that of the State being the ***parens patriae*** (the nation is the legal protector of the individual), and the **Libertarian** approach (wherein there is NO intervention by the State in familial affairs).

The UNCRC

The abovementioned **UNCRC** stipulates that whichever decisions are taken in this regard, primary consideration must be given to the **best interests of the child**.

States signatory to the UNCRC are committed to providing children with the necessary protection and care for their overall welfare. However, this commitment takes does not shun the rights and responsibilities of the child's parents, legal guardians, or other individuals legally responsible for them.

Ultimately, the UNCRC asserts that **a child is only to be removed from his family setting ONLY when it is necessary for the best interests of the child**.

States Parties are thus **mandated to enact legislative measures** safeguarding children from various forms of **harm**, **physical or mental violence**, **injury**, **abuse**, **neglect**, **maltreatment**, and **exploitation** from their parental figures or guardians. And to ensure efficacy, the UNCRC also makes it imperative for States Parties to enact protocols which make it possible for **preventive measures** such as **identification**, **reporting**, **referral**, **investigation**, **treatment**, and **follow-up** of instances of child maltreatment to occur – because prevention is better than cure.

A child who is either temporarily or permanently evacuated from his family environment for their best interests is entitled to receive special protection and assistance from the State.

Thus, States Parties are required to ensure, in accordance with their national laws, **alternative care for such a child** – such as foster placement, adoption, or, when deemed necessary, placement in suitable institutions designed for the care of children. Additionally, the child's ethnic, religious, cultural, and linguistic background should be taken into account to ensure a holistic and culturally sensitive approach to their care.

Therefore, this sums up the UNCRC's **3 P's**:

1. **Protection**
2. **Prevention**
3. **Participation**

The ECHR

The **European Convention for Human Rights** (**ECHR**) makes it possible for **care orders** to be issued – which ultimately interfere with the child's liberty and the parent's respect for a private family life. Therefore, an unjustifiable care order will be stomped upon by any court administering judicial review.

For a care order to be issued justifiably, the court must first identify whether or not the child's human rights have been infringed by one of his legal guardians. Then, the court will determine if issuing such a care order would be in **accordance with the law**, is **legitimate**, and is **necessary** for the welfare of both the child and society in general. And only if all these boxes are ticked will a care order be issued by the courts.

A minor may also be placed under **temporary residential care** under **Art. 5 of the ECHR** – which is thus an exception to the human right to liberty. Therefore, this liberty may only be legally infringed upon if it is intended for the **educational supervision** of the child, or if the child is being prepared to be brought before a **competent legal authority**.

It is imperative to understand that a protection order is temporary in nature.

CASE LAW: *'R. v. Finland'*, 2006.

This **ECtHR case** explained the aim and purpose of **residential care**, asserting that the guiding principle whereby a care order should be regarded as a **temporary measure**, should be consistent with the **ultimate aim of reuniting the natural parent and the child**.

Moreover, this case solidified that the state's **duty to facilitate family reunification** commences and increases temporally once a temporary care order is issued. However, the court must always consider the **best interest of the child**, and if placing the child in his former family environment after having established a benevolent relationship with his new family home will disrupt him, then the courts will opt NOT to reinstate him in his previous family environment.

CASE LAW: *'K.A. v. Finland'*

This case goes hand in hand with the above notion, and asserts that:

"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 family situation changed again may override the interests of the parents to have their family reunited."

Here therefore, the **best interest of the child overrides the interests of the parents**.

Filing a Report

Our domestic **Minor Protection (Alternative Care) Act** ascertains that any individual who has a reasonable belief that a minor is currently undergoing (or is in danger of experiencing) significant harm has the authority to report the pertinent circumstances to either the **Director of Child Protection** or to the **Police**.

Irrespective of any obligations beheld by his profession, any professional who becomes aware of an act that has caused or may cause significant harm to a minor, or who at least has knowledge that a minor is in need of care and protection, is **obliged** to report such information to the above authorities. Most importantly however, making a ***bona fide*** report CANNOT be considered a criminal offence and DOES NOT give rise to any legal action under any law.

If a report is submitted to an entity other than the authorities mentioned prior, that particular entity is required to **record the report in writing** and, within a maximum period of **24 hours** from the receipt of the report, communicate the report with the pertinent authorities.

In cases wherein the report pertains to a **pregnant minor** in need of care and protection, every effort should be made to ensure the mother and child remain together after birth. And this reunification should only be avoided if it is unequivocally contrary to the safety and well-being of the new-born.

Any professional who fails to submit a report is thus deemed to have committed a criminal offence heralding a punishment of imprisonment or a fine.

Moreover, any and all reports made in this regard are treated as if they were enshrined by the **protection of professional secrecy**. Furthermore, these reports are NOT to be made accessible to the public.

Harm

Defining 'harm' towards children may prove to be quite challenging due to the diverse range of abuses that can occur. Children may experience abuse within the confines of a family, institution, community, and also through the channels of social media or the internet, and the perpetrators could be adults or other children.

Furthermore, certain cultural practices, such as female genital mutilation or forced or early marriage, can inflict significant harm upon children. Thus, the complexity of the issue lies in its multifaceted nature.

In the context of **Cap. 602**, 'significant harm' encompasses a range of actions – namely **abuse**, **neglect**, **harassment**, **maltreatment**, **exploitation**, **abandonment**, **exposure**, **trafficking**, **intimidation**, and **female genital mutilation**.

Ultimately the main strains of harm are the following:

Physical: actual or potential physical harm perpetrated by another person, adult, or child (ex. ***hitting***, ***shaking***, ***burning***). Physical harm may also be caused when a parent or carer deliberately induces illness in a child.

Sexual: forcing a child to partake in sexual activities that he or she does not fully understand and has little choice in consenting to. This may include acts of ***rape***, ***oral sex***, ***penetration***, or ***non-penetrative*** acts such as ***masturbation***, ***kissing***, ***rubbing***, and ***touching***. This also does not exclude the act of having children in looking at, or producing, sexual images or activities, and encouraging children to behave in sexually inappropriate ways.

Sexual Exploitation: when children are involved in sexual activities in exchange for various incentives such as ***money***, ***gifts***, ***food***, ***accommodation***, or anything else that fulfils their or their family's needs. Typically, this exploitation entails manipulation or coercion, often through tactics like befriending, gaining trust, and using drugs or alcohol. This exploitation may involve an older perpetrator exercising control over a young person financially, emotionally, or physically.

Neglect: a continuous failure to fulfil a child's fundamental physical and psychological requirements, thereby posing a substantial risk of severe impairment to the child's healthy ***physical***, ***spiritual***, ***moral***, and ***mental development***. This form of maltreatment encompasses the persistent inability to adequately supervise and shield children from harm, along with the failure to provide essential elements such as nutrition, shelter, and safe living or working conditions.

Emotional: constitutes ongoing maltreatment that significantly affects a child's ***emotional development***. This form of abuse encompasses various emotionally harmful acts, such as ***restricting movement***, ***degrading***, ***humiliating***, ***bullying***, and employing ***threats***, ***intimidation***, ***discrimination***, ***ridicule***, or other non-physical forms of ***hostile or rejecting treatment***.

Commercial Exploitation: exploiting a child in work or other activities for the benefit of others, thereby detrimentally affecting the child's physical or mental health, education, moral values, or socio-emotional development.

The Minor Protection (Alternative Care) Act

Cap. 602

First introduced in July 2020, **Cap. 602** provides for protection orders for minors to be issued, and for alternative care applicable to minors bereft of parental care to be administered.

The main function of this Act is to preserve the **best interests of the child** and to ensure that the care afforded to minors is as **permanent** as possible. This notion of permanence is contemplated as being pertinent to relational, physical, and legal dimensions which ensure that the minor experiences feelings of **love**, **protection**, **safety**, and **support** from the individuals with whom they share affection.

In fact, all these elements (and their relative absence) are all considered when a Judge or Magistrate is debating on whether it is adequate to issue a **care order** or not. Thus, this also connotes that a Judge or Magistrate will follow such a train of thought when contemplating on whether *revoking* such an order would be justifiable.

Protection Orders

Art. 19

There are **6 types** of protection orders capable of being issued by court.

Welfare Care Order

This order is issued when a minor is deemed to have suffered, or is in the imminent of suffering, **significant harm**.

Correctional Care Order

This order is released when the **behaviour of the child** is being sought to be regulated.

Supervision Order

This connotes a situation wherein a minor is being **supervised by a person other than the parent**. This differs from **Supervised Access Visits**, wherein children's access to their parents is supervised by an entity identified by the Director for Child Protection.

Treatment Order

This order can be issued either in favour of the minor or against the parents of the minor, especially in a case of **domestic violence** or when parents are in use of any **illicit substances**. This order directs the parents/guardians of the minor to undergo specific interventions; including **treatment for substance abuse or alcohol misuse**; participating in **programs** addressing domestic violence; enrolling in **parenting skills training**; undergoing **inter-relational therapy**; receiving **psychiatric or psychological care**; or undergoing any other treatment or assistance deemed suitable by the court.

Removal Order

A removal order is issued against the author of significant harm (generally the parent) who, under this order, is **removed from the premises**.

Emergency Order

When a minor is undergoing significant harm, or when no legal guardian is present to care for a minor, the Director for Child Protection is empowered to promptly initiate the removal of the minor from the location where such harm is occurring. This action can be taken **without the requirement of any authorisation**.

Ultimately, each and every one of these orders is always carried out in the **best interests of the child**. Moreover, unless it is not in the child's best interest, the minor does not lose access to his or her parents.

When issuing or revoking a protection order, the court determines the **age of the child**, the **desires of the minor**, the **relationship** the child has with his natural parents compared to that he maintains with his alternative carers, and the **potentiality of psychological harm** ensuing if the child is plucked out of his present home and placed in the one prior.

Alternative Care

Every minor under **Cap. 602** is entitled to care, maintenance, instruction, and education that align with their abilities, aspirations, and natural inclinations. Thus, the minor in question will be put in alternative care that ensures access to these fundamentals if his primary home does not do so in a very blatant way.

Moreover, the minor always has access to the **social worker** overseeing his or her placement in alternative care, furnished by other rights; such as – the right to be **consulted**, **access to information** concerning his family members, maintaining **personal relations** with his parents, receiving adequate **nutrition**, **medical care**, and **education**, and to freely practice a chosen **faith**.

The child also maintains the **right to be heard**. In attempting to draw out a scenario best befitting the interests of the child, it logically connotes that the court must also heed what the child desires.

CHECKPOINT

Libertarian & *parens patriae* Theories

↓

The UNCRC

Children to be Removed from Household ONLY if in their Best Interests

State Parties Mandated to Enact Legislative Measures

3 P's: Protection, Prevention, Participation

↓

The ECHR

Care Orders

Temporary Residential Care

R. v. Finland

K. A. v. Finland

↓

Filing a Report

Director of Child Protection / Police

Obligation to File Report

Pregnant Minors

Professional Secrecy

↓

Harm

‘Significant Harm’ Connotations

Physical Harm

Sexual Harm

Sexual Exploitation

Neglect

Emotional Harm

Commercial Exploitation

↓

The Minor Protection (Alternative Care) Act

Ensures Best Interest of Child

Ensures Permanency of Protection enjoyed by Child

↓

Protection Orders

Welfare Care Order

Correctional Care Order

Supervision Order

Treatment Order

Removal Order

Emergency Order

Best Interest of the Child

↓

Alternative Care

Minors are Entitled to Care, Maintenance, Instruction, and Education

Social Workers

Right to be Heard

Foster Care

The **Minor Protection (Alternative Care) Act of Malta (Cap. 602)** defines foster care as:

> "Foster care means 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."
>
> **Art. 2**, *Minor Protection (Alternative Care) Act*

The selection of this designated person has to be order either by the **court** or by a particular **administrative decision**.

To take up the mantle of fostering connotes acting as a substitute for a parental figure, thus promoting a child's development, growth, and nurture. **Art. 1 of Cap. 602** delineates that the scope of Act is to safeguard, protect and give priority to the **best interests of minors** and to ensure the **permanence of care** given to minors.

Permanency

Art. 2

Permanence of care given to minors can be **relational**, **physical**, and **legal**.

In terms of **relational permanency**, the law underscores the importance of a minor feeling **loved**, **protected**, **safe**, and **supported** by the individuals with whom they share significant relationships with.

Physical permanency focuses on ensuring **stability in the physical environment wherein the minor resides**, thus meeting the basic needs of shelter and establishing a stable home for the minor.

Legal permanency encompasses the establishment and maintenance of legal arrangements associated with the minor's permanency. This involves addressing matters related to the **care and custody of the minor**, emphasising the necessity of a robust legal foundation to safeguard the minor's well-being and rights.

The Fostering Service

The primary objective of the **Fostering Service** is to provide children who are unable to reside with their biological family with a **familial environment**. If integration is not feasible, fostering might be employed as a lasting solution. Thus, children are afforded the chance to dwell within a family setting where they receive love, care, security, reassurance, and stability. Moreover, the fostering arrangement offers children with diverse opportunities to enhance their complete developmental potential.

After the pertinent Minister issues a care order for the care and custody of minors, responsibility is delegated to the **Director for Alternative Care (Children and Youths)**. And this delegation remains in effect unless it contrasts with the best interests of the minor.

Unaccompanied Minors

Art. 21

First of all, an **unaccompanied minor** is a minor who arrives in Malta **without the presence of an adult** accountable for their wellbeing. This classification also extends to minors who remain without effective care by such an adult, encompassing any situation wherein a minor is left unaccompanied even after their entry into Malta. Essentially therefore, the term connotes all minors lacking the supervision or guardianship of an adult, whether upon initial arrival or subsequent to their entry into the country.

If any individual encounters a person claiming to be an unaccompanied minor, they are obligated to refer that minor to the **Principal Immigration Officer**. Subsequently, the Principal Immigration Officer is required to promptly notify the **Director for Child Protection**. The Director, upon receiving such notification, is responsible for registering the claimed unaccompanied minor and issuing an identification document within **72 hours**.

The Director is then tasked with seeking provisional measures from the Court to preserve the **best interests of the minor** – as per the circumstances of the case. Additionally, the Director appoints a **representative to assist the minor** throughout any pertinent legal pursuits.

The Fostering Board

Art. 38

The Fostering Board comprises 7 members appointed by the pertinent Minister. The board is tasked with evaluating prospective foster carers and their capability of providing adequate fostering service. This determination is guided by the **Home Study Report** – which is a document prepared by a social worker that outlines the capabilities of the prospective carer.

The law also creates a **mechanism** whereby foster carers endure ongoing assessment to ensure that they are kept on their toes and in adequate shape for their role.

Foster carers are **registered** and forwarded a **document of authentication**, thus ensuring clarity in legal and custodial matters. And in issues of **complaints** towards foster carers, each case is analysed circumstantially by the **Director for Alternative Care** (**Children and Youths**).

The Fostering Board also assumes the responsibility of **conducting hearings** involving prospective and current foster carers. Additionally, and if deemed to possess sufficient understanding, the minor involved may also be heard during these proceedings. The Board holds the discretion to involve any other relevant individuals based on the circumstances of the case.

As per written and natural law, the Board is mandated to provide written reasons for its determinations.

The Fostering Board is subject to judicial review by an **Appeals Board** consisting of 3 people.

Choosing a Foster Carer…

Art. 49

Individuals interested in becoming foster carers apply with the **Children's Directorate** (**Alternative Care**), and Director for Alternative Care (Children and Youths) is obliged to provide training to the prospective foster carer, thus ensuring that individuals are adequately prepared for the responsibilities involved.

Subsequently, the Director is required to **assess** the prospective foster carer and determine their suitability for the role. This assessment involves evaluating various factors – such as the applicant's **living conditions**, **parenting capabilities**, and **overall ability to provide a safe and nurturing environment** for children in foster care.

Simultaneously, the Director is mandated to compile a **Home Study Report** detailing the situation of the prospective foster carer – such as **medical information**, **recommendations by social workers**, and **other data deemed necessary by the Fostering Board**. The Home Study Report is then submitted to the Fostering Board for further consideration.

In the process of creating the Home Study Report, a designated social worker appointed is tasked with conducting **unannounced home visits** to the prospective foster carer to ensure an authentic assessment of the mentioned foster carer's living environment. Naturally, the prospective carer is expected to be hospitable and not refuse any of these visits.

If the Home Study Report starts indicating that a prospective foster carer might not be suitable, the social worker is required to compile a **preliminary** report, which is then submitted to the Fostering Board. The Board reviews the preliminary report and provides a decisive direction, thereby informing the social worker on the appropriate course of action.

The Matchmaking Process

Art. 50

The Director for Alternative Care (Children and Youths) is tasked with several considerations when matchmaking prospective foster carers with minors in need of foster care. Thus, the Director **evaluates the individual needs of the minor** whilst **assessing the capabilities and experience of the foster carer** when compared to the requirements of the mentioned minor.

The Director also makes reasonable efforts to **try and keep siblings together** at the same residence, as well as **striving to keep a parent under the age of eighteen years living with their child in the same residence**, whenever possible.

Naturally, the Director considers any and all **reports made by social workers** in the process and is also mandated to deliberate on whether any **relatives** of the minor are capable of providing care.

The Foster Care Agreement

Art. 51

Foster care is established through a **written agreement** between the Director for Alternative Care (Children and Youths) and the foster carer, which is subject to modification through subsequent agreements between the same parties. Thus, the contents of the agreement are NOT permanent (unless stated otherwise). The **care order**, **care plan**, and **voluntary placement order** are all annexed to this agreement, which is ultimately signed off by the foster carer and the social worker.

Disclosure of the agreement to the parents of the minor occurs only if the Director deems it in the best interests of the minor. Moreover, the foster care agreement includes the **right of the foster carer to travel with the minor**.

In case of **disagreements** regarding the foster care agreement, any party involved can request a direction from the **Review Board**.

The agreement can be **terminated** by either the Director or the foster carer for specific reasons such as a shift in the best interests of the minor. However, termination can only occur after informing the key social worker of the intent, and an alternative care plan is formulated and approved by the Review Board.

Monitoring the Foster Carer

Art. 52

The Director for Alternative Care (Children and Youths) is tasked with assigning a social worker to monitor foster carers registered with the agency, who thus prepares a **Review Report** of the foster carer in question. The report is required to be generated at least once annually during the first three years of the minor's placement in foster care, and subsequently every two years thereafter.

The primary objective of these reports is to assess whether the foster carer is fulfilling their obligations as outlined in both the pertinent legislation and the foster care agreement. And to compile the Review Report, the social worker is obliged to conduct necessary visits to the residence of the foster carer.

Rights & Obligations of the Foster Carer

Art. 53

The foster care agreement delineates a set of duties for foster carers, such as:

1. **Facilitating contact** between the minor and their family and any other person deemed to be in the best interests of the minor by the Review Board.
2. **Keeping sensitive information** about the minor in their care confidential.
3. **Assisting the minor financially**.
4. **Cooperating** with all relevant entities and individuals.
5. Ensuring that the minor receives all **treatment** necessary.
6. **Attending reviews** before Review Board with the minor.

7. Creating a **conducive environment** for the minor.
8. Respecting the **minor's religion**.
9. **Reporting incidents**.
10. Participating in any **training** tailored for foster carers.
11. Managing the **minor's bank account** as a *bonus paterfamilias*.
12. Complying with all **legal duties**.

Adoption of Minors Under Foster Care

Art. 54

The law lays out conditions under which a **foster carer may request the adoption of a minor who has been under their care for more than 5 years**. To initiate this process, the foster carer must file an application with the **Court of Voluntary Jurisdiction**.

On an exceptional note, if there are **3 Positive Review Reports** on the fostering of the minor, the Court of Voluntary Jurisdiction may consider a request for adoption even if the minor has not yet been in the care and custody of the foster carer for the specified 5-year period.

There are no age-based restrictions for adoption. Thus, the provision ensures that individuals, regardless of their age, may pursue adoption under the specified conditions.

However, there is a crucial condition for adoption under **Art. 54** – which states that the **granting of adoption is dependent on ensuring the widest possible rights of access to the minor by the biological parents and siblings by consanguinity**. And this condition is to be upheld as long as it aligns with the best interests of the minor.

As a general rule, **adoption of people over 18 years of age is not allowed**. However, an 18-year-old may still be adopted under **Art. 115 (2)** of the Civil Code if he **has been under foster care for the previous 5 consecutive years**, and if he **explicitly consents to the adoption**.

Miscellaneous

Passports

When a minor is taken out of the care and custody of an individual, and a case is subsequently assigned to a key social worker, the key social worker is immediately tasked with facilitating the issuance of a **passport** for the minor – which is safeguarded by the Director for Alternative Care (Children and Youths). When obtaining a passport is not feasible, the social worker in question must strive to attain alternative travel documents for the child.

Education

When it comes to matters concerning the education of the minor, the consent of a single individual who holds the lawful care and custody of the minor shall be deemed sufficient.

Offences

Any **unauthorised individual** or **organisation** involved in **arranging the placement of a minor in foster care** is deemed to be committing an offence. And upon conviction, the offender may even face a punishment of imprisonment.

Individuals who seek or provide pa**yment or other rewards for foster care arrangements** are also in contravention to the law.

The **publication of information** related to alternative care, foster care, or individuals involved in the care of minors is also prohibited.

Use of Force

Individuals found guilty of committing certain actions against foster carers may face penalties which, upon conviction, may pertain to fines or imprisonment.

Firstly, the act of **threatening** or **coercing** an authorised alternative carer to surrender a minor placed in their care is considered absolutely illegal. Additionally, **taking a minor away from an alternative carer** without the requisite written approval from the Fostering Board, court, agency, or any other relevant authority is also expressly prohibited.

Equally, the act of threatening or compelling an alternative carer to **violate the provisions of the Act** constitutes an illegality. Finally, **forcibly entering the premises** of an alternative carer through violence or against their will is, once again, completely illegal.

Abscondment

If minors under alternative care are found absconding from their residence, the law grants the authority to any member of the Police to **apprehend the minor** without the need for a warrant and to return them to the premises specified in the protection order.

It is also an offence for any person who knowingly compels, incites, assists, aids, or abets a minor under a minor protection order to abscond or be absent from their residence.

Transitory Periods

Any legal action initiated before the implementation of the present Act is determined based on the legal provisions that were in effect at the time of filing. Thus, there is a clear drive to maintain consistency and fairness by applying the legal rules and procedures that were in place when the legal proceedings were initiated, even if a new law has come into force.

Cases that were already in progress before the **Children and Young Persons Advisory Board** under the previous Act are transferred and heard by the Child Care Review Board following the enactment of the current Act.

CASE LAW: ***'Kutzner v. Germany'***

In this case, the court ruled that **taking away parental rights and putting a child in foster care due to the parents' perceived intellectual incapacity was deemed a violation of Art. 8**. The court considered this intervention in family life to be a significant intrusion that could not be justified.

CASE LAW: ***'Zhou v. Italy'***

The issue here revolved around whether the mother's consent and her capability to care for the child were to be considered in light of another person's intention to adopt the mentioned mother's child.

Ultimately, it was evident that the mother only required a bit of childcare support, and that she was not unfit to carry out her parental duties. Thus, the court determined that the measures taken were **disproportionate**, resulting in a violation of **Art. 8**.

CASE LAW: ***'Omorefe v. Spain'***

The case revolves around the foster care and subsequent adoption of a child, leading to the biological mother being **unable to maintain contact with her son**.

In 2009, Ms Omorefe requested authorities to take her one-year-old-son into care due to personal and family difficulties. Despite her insistence that the measure should not sever her contact with her son, visitations were suspended three months after the child was taken into care.

The Court was unconvinced by the justifications provided by the domestic authorities for the minor's pre-adoption foster placement and subsequent adoption, especially considering Ms Omorefe's clear opposition. It was noted that her contact rights were limited to the initial three months, suggesting a preconceived intention by the authorities to place the child with a foster family for adoption from the outset. The Court observed that the **authorities did not explore alternative, less drastic measures available under Spanish law, such as temporary placement or simple placement, which would have respected the foster parents and avoided raising false hopes**.

As a result, the Court concluded that the **Spanish authorities failed to take appropriate and adequate measures to uphold Ms Omorefe's right to maintain contact with her child**, thereby violating her right to respect for private and family life.

CASE LAW: ***The Terna Cases***

The **Terna** group of cases focuses on **authorities' shortcomings** in making satisfactory efforts to uphold the applicants' visitation rights as stipulated by judicial decisions within marital separation and foster care proceedings, resulting in violations of **Art. 8**.

Although Italian law provides adequate legal resources to enforce specific measures ordered by the judiciary, the Court identified a systemic issue indicated by the recurrence of multiple judgments against Italy on this matter. **The Court expressed broader apprehension about the foster care system, highlighting its potential for indefinitely prolonging placement into public care, originally intended as a temporary and urgently needed measure**.

CHECKPOINT

Substitution of Natural Parents

↓

Permanency

Relational Permanency

Physical Permanency

Legal Permanency

↓

The Fostering Service

Role of ascertaining a Familial Environment for the Child

↓

Unaccompanied Minors

↓

The Fostering Board

Home Study Report

Hearings

Appeals Board

Mechanism for Ongoing Foster Care Assessment

Foster Carers are Registered

↓

Choosing a Foster Carer

Application must be sent to Children's Directorate (Alternative Care)

Director assesses Capabilities and Resources of prospective Foster Carer

Unannounced Visits

Preliminary Report

↓

The Matchmaking Process

Needs of the Minor + Aptitude of Carer

Siblings are sought to be Kept Together

Minor Parents are sought to be Kept Together

↓

The Foster Care Agreement

Written Agreement

Care Order, Care Plan, and Voluntary Placement Order

Disclosure of Agreement

Disagreement

Termination

↓

Monitoring the Foster Carer

Review Report

↓

Rights & Obligations of the Foster Carer

Facilitating Contact between Minor and Natural Family

Maintaining Sensitive Information

Assisting the Minor Financially

Cooperating with Authorities

Ensuring any and all of the Minor's Treatment

Attending Reviews

Creating a Conducive Environment

Respecting the Minor's Religion

Reporting Incidents

Participating in Training for Foster Carers

Managing Child's Bank Account as *bonus paterfamilias*

Complying with Legal Duties

↓

Adoption of Minors Under Foster Care

Foster Carer may Request the Adoption of a Minor after 5+ Years of Caring for Him

3 Positive Review Reports

Adoption ONLY allowed IF the Widest Range of Rights of the Minor to Access his Natural Family are Preserved

Adoption of Legal Major ONLY allowed IF he has been under care for 5+ Years AND Consents to it

↓

Miscellaneous

Passports

Education

Offences

Use of Force

Abscondment

Transitory Periods

Kutzner v. Germany

Zhou v. Italy

Omorefe v. Spain

The Terna Cases

Adoption

Adoption is a **protective measure** wherein an orphaned or definitively abandoned child is bequeathed the opportunity to find a permanent family.

The **United Nations Children's Fund** whipped up 3 strains of definitions for adoption:

Domestic Adoption: this refers to the adoption process of a parent and a child of the **same nationality**, thus residing in the **same country**.

Intercountry Adoption: this encompasses the al**teration of the child's habitual country of residence**, irrespective of the nationality of the adopting parents.

International Adoption: this entails the **adoption of a child by parents of a nationality different from that of the child**, regardless of whether they currently reside (or will continue residing) in the child's habitual country of residence.

The **2016 EP Briefing Document** highlighted that the topic of adoption gives rise to various **human rights considerations**. Ultimately, it is emphasised that adoption, within the context of child protection systems, should be viewed as one of many several care options; it should be deemed appropriate only when keeping the child with their family is not feasible, and efforts should always be maximised to identify stable, family-based care within the child's country of origin before contemplating international adoption.

Malta

The landscape of adoption in Malta has undergone a transformation, progressing from an **unregulated private affair** to the adoption of children from various countries, and more recently, to a system characterised by **regulation**, adherence to **good practices**, and meticulous **record-keeping**.

Overseeing both local and intercountry adoptions, the **Social Care Standards Authority** plays a pivotal role in regulating this domain. Collaborating with several Ministries and entities (ex. ***Agenzija Tama***), the Authority strives to enhance the regulation of adoption practices in pursuit of improved standards.

Adoption

Art. 113

> ""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 under this sub-article, includes an intercountry adoption…"
>
> **Art. 113**, *Civil Code*

The **Court of Voluntary Jurisdiction** is competent of handling applications and cases of adoption. Adoption may only occur one the pertinent court issues an **Adoption Decree** – which is administered following a recommendation made by the **Adoption Board**.

Adoption Decree

Art. 114

An Adoption Decree can be sought jointly by **two spouses**, **civil union partners**, or **cohabitants** in a *de facto* or registered cohabitation. Importantly, the decree **CANNOT be obtained by only one of the mentioned partners**.

However, an **exception** is made when the person to be adopted is the natural offspring of one of such partners. In such cases therefore, the Adoption Decree may be granted even if the application is submitted solely by the natural parent – as long as the natural parent has reached legal majority. Ultimately, an Adoption Decree cannot be issued to authorise more than one applicant.

The issuance of an Adoption Decree is contingent upon certain age criteria, specifically that the applicant must be at least **28 years old** and be a minimum of **21 years older,** but NOT more than **48 years older** than the person intended for adoption. An exception to this age requirement is provided in cases wherein the applicant seeks court authorisation to adopt **siblings**. In such instances, the presence of the required age difference for at least one of the children is considered sufficient. Furthermore, the adoption must be deemed to be in the best interests of all the siblings involved.

Re-Adoption

An Adoption Decree is permissible for an individual who has already been the subject of such a decree at a moment prior. In the context of an application for an adoption decree concerning such an individual, the adopter is considered the parent of that person for all the purposes outlined in the Civil Code.

Adopting Legal Majors

When dealing with an individual aged 18 years or more, the law specifies that **neither a recommendation from the Adoption Board nor the appointment of a social worker or children's advocate is mandated for adoption to occur**. This exemption streamlines the adoption process for individuals who have reached majority at law.s

Restrictions of Adoption Decrees

An Adoption Decree is NOT granted in certain circumstances:

1. **For a person who has reached the age of 18** – EXCEPT if the person wanting to adopt him/her is the **natural parent**; OR if there is **joint adoption** by a parent and his spouse who have been caring for the person they want to adopt in their residence for at least 5 continuous years, furnished with the consent of the person subject to adoption; OR if there is adoption by a **foster carer** who has provided care for the person to be adopted for a consecutive period of at least 5 years, also with the consent of the person to be adopted.

2. For a person who has taken **solemn religious vows**.

3. Unless the child gives his/her consent if he/she is **11 years old or older**.

4. **Unless every living parent of the person to be adopted gives their consent**, even if the parent is not yet 18 years old.

5. Unless the person who gave birth to the child, if alive and not yet 18**, gives their consent in cases wherein the child is born out of wedlock**.

6. If only **one of two spouses** applies for adoption.

The Court of Voluntary Jurisdiction

Before an Adoption Decree is issued, the court must follow certain procedures. For starters, it must heed any **feedback given by those entrusted with the care and custody** of the child intended for adoption.

In cases wherein a person is born out of wedlock, the **court must listen to the parent who has not given birth to the child**; as long as that this parent has acknowledged the person to be adopted as their own child – because the court must be satisfied that this parent has contributed to the child's maintenance and has demonstrated a genuine and ongoing interest in their well-being.

If the person to be adopted is under the care of a **tutor**, the court must hear the tutor or any other person providing care and custody. **This ensures that those directly involved in the child's life are heard.**

The court must also listen to the **child's advocate** and **social worker**.

Pre-Adoption

Unless the person wanting to adopt is already a parent of the child, an Adoption Decree can only be made if the child has been continuously in the care of such an applicant for at least **3 months before the Adoption Decree date**. This 3-month period **does NOT include any time before the child turned 6 weeks old**. However, before the Adoption Decree, the applicant can still ask the court for **temporary care and custody** of the child.

For **international adoptions**, if the adoption is done following all procedures stipulated **Adoption Administration Act** and is certified **lawful by the other country**, it is thus deemed valid in Malta – even if the child has not been residing continuously with the adoptive parent for 3 consecutive months prior.

During this 3-month period, the **pertinent agency** in charge of the adoption placement must take all necessary steps to make sure that the placement with the applicant is in all the **best interests of the child**.

Power to Dispense with Consent

Art. 117

The court has the authority to **waive the need for consent or a required hearing** under particular circumstances.

For instance, the court may get away with dispensing consent if the person required to give consent is **incapable of doing so**, or if the parent is **unfindable**, has **abandoned**, **neglected**, has **mistreated the child**, or has per**sistently neglected or refused to contribute to the child's maintenance**, or **demanded payment for granting consent**.

Dispensation can also occur if **either parent unreasonably withholds consent**, may be **deprived of parental authority**, the **child is not in the custody of either parent** with no hope of reunion, the parent **absconded unjustifiably from having contact with the child for at least 18 months**, or it is in the **best interests of the child**.

Dispensation with a court hearing happens if the person who needs to be heard **cannot be found** or is **incapable of expressing their views**.

For special and exceptional reasons (and taking into account the interests of all parties involved) the court bears the prerogative of deciding whether or not it is appropriate to waive a hearing and consent requirement.

Additionally, the court can dispense with the **consent of the spouse of an adoption applicant** if it finds that the spouse whose consent is needed is **missing**, is **incapable of giving consent**, or the spouses have permanently **separated**.

Furthermore, the court, following a request by a children's advocate on behalf of a child aged 11+ who wishes to be adopted, may dispense with any required consent or hearing for adoption.

Evidence of Consent of the Person to be Adopted if He/She is Absent

Art. 118

In cases where a parent or the person intended for adoption does not participate in the proceedings related to an application for an Adoption Decree, and the purpose is to obtain their consent for the decree, a **document indicating the individual's consent to the Adoption Decree** and their understanding of its nature and consequences is considered **sufficient evidence**; provided that the person in whose favour the Decree is sought is named in the document.

This applies to both before and after the execution of the commencement of the proceedings. If the document is **attested** therefore, it serves as adequate evidence of the person's consent without requiring further proof of their signature.

The person to be adopted must be **at least 6 weeks old** at the time of document execution, and the document must be attested on that date by a Commissioner for Oaths, an advocate, a notary, or, if executed outside Malta, by a person of a prescribed class.

Ultimately, the consensual document of the person to be adopted is considered sufficient evidence **only if the person in whose favour the Decree is sought is named in the document**.

A document claiming to be attested in this regard is thus presumed to be so attested and executed on the specified date and place, unless evidence to the contrary is presented.

Court Responsibilities

Art. 119

Before approving an adoption, the court must check for a few important things, such as the fact that everyone whose agreement is needed for the adoption must agree and understand what the adoption means.

For the natural parents, it is crucial that they know that **agreeing to the adoption will permanently take away their rights to the person being adopted**.

The court must also make sure that if the adoption is granted**, it will be good for the person being adopted**.

The court also considers the **suggestions made by the Adoption Board**. This helps ensure that the adoption is done with everyone's best interests in mind and follows the rules set by the court.

Welfare of the Adoptee

When deciding if granting an Adoption Decree would be in the best interest of the person to be adopted, the court considers various factors. This includes looking at the **health of the person applying for adoption**, which may be confirmed by a certificate from a registered medical practitioner in certain cases specified by the law.

The court also considers the **wishes of the person to be adopted**, also weighing their age, understanding, and religious beliefs, as well as the religious beliefs of their parents.

The court also has the authority to set specific terms and conditions in an Adoption Decree – such as requiring the adopter to make certain provisions for the person to be adopted if deemed fair and necessary by the court. This ensures that the adoption process is tailored to the individual needs and circumstances of those involved, promoting fairness and appropriateness in the adoption arrangement.

The Open Adoption Agreement

If a child is at least 11 years old and it is in their best interest, the court, when issuing the Adoption Decree, can approve an **open adoption agreement** that has also been endorsed by the Adoption Board.

This agreement allows the child to maintain contact with their parents or natural family. However, the court must make sure that the agreement was entered into with the **consent of the child and the involved parties**.

Any changes to the open adoption agreement cannot take effect until the court approves them. This provision aims to prioritise the well-being and consent of the child in adoption arrangements, particularly in cases of open adoption where ongoing contact with birth parents or family is allowed.

The Special Curator

When someone applies for an Adoption Decree, the court chooses a designated individual to serve as a **special curator**. This curator's responsibility is to **protect the interests of the person to be adopted** when presenting the case before the court.

In the same scenario, the court has the option to appoint a **child's advocate** and/or a **social worker** either on its own initiative or at the request of someone with a legitimate interest, including the child to be adopted.

Rights & Duties

The person for whom the Adoption Decree is granted is legally recognised as the child of the adopter or adopters, much **akin to a child born to them in lawful wedlock**. No other individual is considered a legal parent, and **family ties are traced through the adopter or adopters**. Ultimately therefore, **natural relatives** of the person for whom the Adoption Decree is issued lose all legal rights and obligations concerning that individual.

If the person under consideration for adoption is under the care of a **tutor**, the tutor's responsibilities cease, and within 3 months of the Adoption Decree, the tutor must provide an account of their administration to the adopter.

In cases of **open adoption**, the natural parents retain the right to maintain contact with the person for whom the Adoption Decree is issued. Otherwise, the court is obliged to **inform the relevant authorities** that the Adoption Decree has concluded a care order if the adoption is for a child under a care order established by the Children and Young Persons (Care Orders) Act.

An adopted child has the same inheritance rights as his or her sibling.

Surnames

Upon the issuance of an Adoption Decree the person for whom the Adoption Decree is granted **will adopt the surname of the adopter**. If the Adoption Decree is in favour of two spouses, the person will assume the sur**name of the adoptive father**, and the **adoptive mother's surname may be added**.

In cases where the Adoption Decree is for two spouses who married after the enactment of the **2017 Marriage Act**, the person being adopted will assume the **family name of the spouses**.

If the person to be adopted is a child below the age of 3 years, the adopter, with the approval of the court, **may choose to give the child a new name**.

Right to Information

Art. 127A

Both the **person who has adopted** AND **an adopted individual who has attained 18 years of age** may request a copy of the pertinent Adoption Decree, as well as details about the adopted person's natural family and adoption placement.

An adopted legal major also has the right to petition the court for permission to obtain a copy of their **original birth certificate** from the Public Registry.

Before issuing an order regarding the above requests however, the court will listen to the applicant and any other individuals it deems relevant in the given circumstances.

Prohibition of Publication

Art. 128A

It is prohibited for any person, without the written approval of an accredited agency, to publish, whether in newspapers, periodicals, or any other printed materials, or through broadcasting, television, public exhibition, or any other means, any advertisement, suggesting that:

- **A child is available for adoption**.
- **A person plans to adopt a child**.
- **A person intends or is willing to arrange for the adoption of a child**.
- The name of any **applicants applying for adoption**.
- The **name** of any **parent**, **curator**, or **tutor** of the child to be adopted.
- Any **details capable of revealing the identity** of the aforementioned persons.

The Minor Protection (Alternative Care) Act

Cap. 602

This limb of legislation provides that if a minor has been in the care and custody of a foster carer for more than 5 years, the **foster carer can seek the adoption** of the minor by submitting an application to the Court of Voluntary Jurisdiction.

However, in exceptional circumstances – and only after **3 positive Review Reports** on the fostering of the minor have been issued – the Court of Voluntary Jurisdiction may consider a request for adoption even if the minor has not been under the care of the foster carer for more than 5 years.

Adoption under this Act is contingent upon ensuring that the biological parents and siblings by **consanguinity have extensive access rights to the minor**, provided that such arrangements align with the **best interests of the minor**.

This Act also permits that, after an application by the **Director for Alternative Care** (**Children and Youths**) or any other interested party has been submitted, the court may issue a decree allowing a minor under a **protection order** to be freed up for adoption, even without the consent of the parents.

Alongside this application, the Director must submit an **updated care plan**, providing recommendations for the ongoing care of the minor either with the prospective adoptive parents or alternative carers until other carers are identified according to the care plan.

Overseas Adoption Order

The Civil Code defines "**overseas adoption**" as an adoption conducted in Malta or in a State listed in the **Second Schedule** of the mentioned Code. And this adoption must align with the **Convention on Protection of Children and Cooperation in respect of Intercountry Adoption**.

In this context, an overseas adoption involves the **relocation of a child** habitually residing in one contracting State to the Convention to another contracting State.

An adoption only qualifies as an overseas adoption if it creates a **permanent parent-child relationship**, and it **satisfies all requisites of the mentioned Convention**.

The International Legal Framework

The **UN Convention on the Rights of the Child** has been approved by all EU Member States.

Additionally, the **Hague Convention** has been ratified by **24 EU Member States**, while the remaining four (Croatia, Estonia, Lithuania, **Malta**) are in the process of joining at the moment of writing.

Notably, countries that often send children for adoption to the EU and have not ratified the Hague Convention normally manage intercountry adoption through **individual agreements**.

Furthermore, the **European Convention on the Adoption of Children** has been ratified by **8 EU Member States** – including **Malta**. This revised convention establishes standards for domestic adoption.

The Adoption Administration Act

Cap. 495

This Act takes care of delineating certain **administrative procedures** for adoption cases.

It gives life to certain pertinent bodies, such as the **Adoption Board**, which is assigned the role of reviewing Home Study Reports, ensuring that the placement of the child is the best possible one, assessing the competence of the prospective adoptive parents, and offering advice to the Minister.

The Act also necessitates the existence of an **Appeals Board** – which reviews decisions made by the Adoption Board.

Moreover, this legislation mentions **Post Adoption Reports** – which must be made by the adoptive parents after adopting the child in question.

CHECKPOINT

Adoption as a Protective Measure

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Malta

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Adoption

↓

Adoption Decree

↓

Re-Adoption

↓

Adopting Legal Majors

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Restrictions of Adoption Decrees

↓

The Court of Voluntary Jurisdiction

↓

Pre-Adoption

↓

Power to Dispense With Court

↓

Evidence of Consent of the Person to be Adopted if He/She is Absent

↓

Court Responsibilities

↓

Welfare of Adoptee

↓

The Open Adoption Agreement

↓

The Special Curator

↓

Rights & Duties

↓

Surnames

↓

Right to Information

↓

Prohibition of Publication

↓

The Minor Protection (Alternative Care) Act

↓

Overseas Adoption Order

↓

The International Legal Framework

↓

The Adoption Administration Act