CVL2015
LAW OF PERSONS

The European Law Students' Association

MALTA

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Law Of Persons

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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***.

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.

It is also worth noting that through its various articles the law here ultimately seeks to promote unity and stability as much as possible in each and every family and thus aims to provide the most amicable solutions for any conflict that presents itself in said families.

> ***2.*** *(1) The Law promotes the unity and stability of the family.*
>
> ***Article 2***

Maintenance

19. *(1) Maintenance shall include food, clothing, health and habitation.* *(2) In regard to children and other descendants, it shall also include the expenses necessary for health and education.*

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 **custod**y; 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.

The elements of **food, clothing and health** are self-explanatory. Habitation refers to the paying off 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 school up to the age of 23, as long as the child reads for a full-time **master's degree.**

Therefore, although the maintenance of one's child stops at 18 years of age, the threshold by which the longevity of maintenance is demarcated is extended until the age of 23 if the child pursues a full-time education.

An example of a situation begetting maintenance:

A separation of parents where one parent compensates the other parent by giving him/ her a lump sum of money to spend on their child. In return, the latter parent satisfies his/her duty by **having the child live with them.**

Here, the two essential elements of time and money are given to the child. Though the law does not provide a direct definition of what an 'adequate' monetary contribution connotes.

Causes for separation

Law speaks of instances where legally a person may petition to separate from their spouse and maintain inheritance.

The first cause for separation is **adultery**, which is an extra-marital affair proven 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 explicit behaviour, and the onus of proof here naturally burdens the shoulder 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

Important to note that if the spouse commits adultery and is broken up with, then the unfaithful spouse MAY NOT demand maintenance. This is laid out in **article 48(1)(d).** Naturally if both spouses commit adultery, they are both vetoed from their right of demanding maintenance.

Most important to note is the fact that if there is a child in question caught in the crossfire of a parental separation the child in question may never be left without maintenance, regardless of whether the parent looking after him committed adultery or not.

Maria Agius Dolores vs Joseph Agius
The husband cannot benefit himself and put himself in a better position (and worsen that of the plaintiff) by claiming that the wife is guilty of adultery in a maintenance case without taking the necessary action for separation.

Maria Dolores sive Doris Scicluna vs G Scicluna
Adultery can be proven through circumstantial evidence and presumptions, provided that these are serious, precise, and consistent, in such a way such that: "li ma jhallu ebda dubju f'min ghandu jiggudika."

Another ground on which a spouse may demand separation is *"on the grounds of excesses, cruelty, threats or grievous injury on the part of the other against the plaintiff, or against any of his or her children"* which is accounted for in article 40 of the civil code. This is due to the fact that the spouses can't expect to live together as the marriage has "*irretrievable broken down*".

40. *Either of the spouses may demand separation on the grounds of excesses, cruelty, threats or grievous injury on the part of the other against the plaintiff, or against any of his or her children, or on the ground that the spouses cannot reasonably be expected to live together as the marriage has irretrievably broken down:*

Provided that the court may pronounce separation on the ground that the marriage has ***irretrievably broken down*** *notwithstanding that, whether previously to or after the coming into force of this article, none of the spouses had made a demand on such ground.*

AB vs CB (90/2006 NC) CCFS - 27 October 2011:
This conduct of the defendant towards his wife, exercised over a period of time, constitutes both **'abuses'** as well as **'serious insults'** towards her in the terms of **Article 40** of **Chapter 16**, and constitutes the main cause for the personal separation.

Jennifer Portelli pro et noe vs John Portelli
In order for the request for separation to be accepted, it is not necessary for there to be excesses, abuses, threats, or serious insults; however, any one of these elements is sufficient, as long as it is of such a nature that it deeply violates the conjugal coexistence.

Another valid reason is **desertion** wherein one spouse abandons the other for a time period **exceeding two years, without good reasons.**

"...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

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.

How to pay maintenance

Maintenance normally paid on a monthly basis. However, in cases of separation, the law does not preclude the possibility of paying 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
2. **A shared amount** of maintenance covering health, education and extracurricular activities of the child in question. These shared elements are paid equally by both parents though it is important to note that this notion isn't covered by law. It is also worth noting that the equal split can change depending on the ***circumstances of the case***.

This is captured in article 54(5) of our civil code

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

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

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

The judge builds a **formula** where the amount being paid 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. A so-called '**clean break'** is thus induced between the parties.

A clean break is ultimately *discouraged* when children are caught in the crossfire of separation. Why is this so?

Firstly, it is seen as a means to severe ties with the child.

Secondly and more importantly, is the potential misuse of funds that comes about in giving a lump sum in this situation as there is **no ultimate control over the funds paid as both the courts and the debtor lose control of the money paid.** There would be no regulation for example if the mother decides to spend the money on something other than the child's needs.

Thirdly, there could be a change in circumstances. This could be the children starts living with the father, the mother dies, the child dies, the circumstances of the mother changes. It is easier for a court to contemplate adults particularly the recipient of the maintenance to 'take the risk' of self-support upon exhaustion of the capital sum. A court is less likely to allow for such a risk when the maintenance so exhausted would have been exhausted pre-maturely possibly by an extravagant parent.

Maintenance normally carried out by cheque or bank statement to keep a record and thus cash isn't a very popular medium by which maintenance is satisfied.

Failing to pay maintenance amounts to a **contravention** in our criminal code, with one being able to file a police report in such events. The punishment may amount to a **custodial sentence** not exceeding **3 months**. Maintenance in this case must not be paid within 15 days from the day in which the sum should have been paid to qualify as **maintenance**.

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

> **The Police vs Publius Said (Appeal – 25 September 2003):** The purpose of the legislator, when introducing this contravention into the **Criminal Code** in 1983 (with the amendment of 1986), is both to apply pressure on recalcitrant debtors to honour their obligations and not only to prevent the breach of court orders, decrees, or judgments, orders that must always be strictly observed, but also to prevent the breach of contractual stipulations between spouses.

> **The Police vs Marco Attard**
> For the purposes of a criminal case, when the charge involves a contravention under paragraph (z) of **Article 338** of **Chapter 9**, it is irrelevant whether a separation case has been filed or whether an extension of the original decree was requested.
>
> Since the order contained in that decree was not expressly revoked or otherwise altered by the **Second Court** or the **First Court** (and unless proven otherwise by reconciliation or by a declaration from another competent court that the decree or order was null), the order for the payment of maintenance remains valid for all purposes and effects under **Article 338(z)** of the **Criminal Code**.

Maintenance pendente lite

Maintenance pendente lite translates to maintenance '**pending litigation'**. We understand it is 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 is a form of compensation before the case closes since it is possible that a case stretches on for quite some time. Therefore, for example, any funding needed to sustain a child residing with one of the separated parents may be **fulfilled through this interim measure.**

Principle of proportionality comes into play wherein the budget for maintenance is calculated in proportion to the **salary, assets** and **benefits** of the funding party as well as the **needs of the other spouse.**

There is also a law which provides for maintenance pendente lite to be simply given '***for bare subsistence'*** by means of **article 25(1)** though this is rarely invoked as maintaining someone to the simple extent of '*bare survival'* would be too crude a lifestyle to suffer for a long time whilst patiently waiting for the court proceedings to end.

If **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**.

The Police vs Carmelo Farrugia:
The judgement bore the fact that if maintenance pendente lite expires whilst court proceedings are still ongoing **then the duty to pay maintenance will persist until the proceedings draw to a close.**

In the case ***ABC vs DC*** (290/2007 RGM), the court stated that in establishing the considerations that pertain to maintenance *pendente lite*, the **reason why the marriage ended (if the husband filed for divorce or if the wife did) is normally not taken into consideration at such stage, before the judicial process even begins, unless such reason or evidence is submitted before the court.** The court also noted that such considerations are not extensive, since at such an early stage during proceedings the amount of evidence that is admissible is scarce.

Maintenance in kind

A dead letter of the law-which means although it is written in the law and technically enforceable it is **never practiced in reality.** It has largely <u>never been accepted by the courts.</u>

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

> "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**

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

Also worth noting that the courts <u>never allow for siblings to be separated</u> and posted in different households so normally they all 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 their children (if any).

> "**Both spouses are bound**, each **in proportion to his or her means** and of his or her ability **<u>to work</u>** whether **<u>in the home OR outside the home</u>** as the interest of the family requires, **<u>to maintain each other and to contribute towards the needs of the family.</u>**"
>
> **Art. 3, Civil Code**

"in proportion to his or her means". VIP. Payment is in proportion to the means of the person giving it. Here, only active income is taken into consideration and not assets.

The role of the **housewife** or **househusband** started being regarded as actual 'work' in **1993**. Therefore, from then on one was and is still able to 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 pays on a **day-to-day** basis whilst the person not living with the child **pays monthly**.

Duty of spouses towards their children

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

"(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

Children are to be maintained legally by their parents until the age of ***18 years old, the age of majority,*** though in certain situations this age is extended even further.

It is also worth noting that through article 7(2) we see how in cases where the parents of the children are not able to maintain and educate their children the responsibility of doing such falls on the other ascendants.

(2) In default of the parents, or where the parents do not possess sufficient means, the liability for ***the maintenance and education of the children devolves on the other ascendants.***

Article 7 sub-article 2 of the civil code

The most notable exception is that of pursuing studies where the age of maintenance is extended 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 pursuing a **full-time** academic endeavour.

If the education at any point stops after attaining 18 years of age, then the maintenance received shall also come to a halt-for as long as the education hiatus 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 or not of whether they become majors at law. This is enunciated **in article 3B of the civil code.**

(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

A parent's duty to maintain his child subsists both during marriage and subsequently **independently of any marital problems existing between the souses.**

Marina Galea vs Mario Galea
The Duty of the parents to pay maintenance to the children born in marriage, per 3B (1), 3B (2), and 3, is a duty as much as it is a right of the child not to be deprived of the necessities attached to health and education in today's world.

In the case NCW v MM the *'defendant has never contributed financially towards the child's upbringing and that he does not seem to have any interest in the child.'* The defendant failed to perform the obligations set out under Article 3B of the CivilCode and contribute towards the child's needs.

There is no age specified in sub-article (b) as naturally permanent disability does not halt itself upon reaching a certain age. Therefore, the law does not mention an age here because of the highly possible **element of permanency.**

The mentioned disability **must impede one's capacity of maintaining a job.** If a disabled person is still potent enough to maintain a job, then the courts may decide whether or not he is entitled to maintenance from his parents.

The casus classicus is the case of ***Valenzia vs Valenzia*** (court of appeal)

In this case the child had ***spina bifida*** which meant he was confined to a wheelchair and meant he had a boat load of complications. The father here, was refusing to pay maintenance beyond the age of 23 for his son and refused to pay for his wheelchair, whilst also making the argument that his son was in fact fully capable of having a job despite his disability.

The law in this case was seemingly slightly distorted with the burden of proof being placed on the son to prove that he was in fact incapable of working instead of the other way round. Whether the child got maintenance or not was converted into a case of trial and error.

The court agreed with the father's perspective stating that the child ***"irid jaqbad ir-riedni f'idejh u jipprova jahdem"***. Thus, the disabled son was entitled to just a single year of maintenance from his father.

Calculating the Amount of Maintenance

N.B It is worth noting that this sub-section not only deals with children and descendants but also ascendants

"(1) Maintenance shall be ***<u>due in proportion</u>*** *to the* ***want of the person*** *claiming it and the* ***means of the person*** *liable thereto."*

Art. 20 (1), Civil Code

Article 20 raises the issue of proportionality. 20(1) explicitly says that maintenance shall be due in proportion according to the want of the person claiming it and the means of the person liable. Though the word 'want' here can be taken to mean 'need' in this article.

Angela Conti vs Lawrence Bonnici
The Court shall leave it up to the Court to, after appreciating the facts of the case on a **Case-by-Case basis**, decide upon the amount of maintenance due proportionally to the needs of the spouse requesting (plaintiff) and the means of the spouse to pay (defendant).

The law does not give a maximum or a minimum of the amount of maintenance one is obliged to pay. As a result, a custom has been established by our courts at **200 euros per month** and half of health, education and extra-curricular activities. This amount fluctuates depending on **the rate of inflation or deflation** per annum, as found in first schedule of **chapter 158 of the laws of Malta**.

Naturally the amount of **maintenance increases if there is more than one child.** Normally it multiplies up until there are 3 children in the picture though this is not an established custom and is dictated by the fact that the amount of maintenance is decided on a ***case-by-case basis.***

Reconsideration is possible through **article 2249 of the COCP** where the person feels the amount, he has to pay is unjust.

Without money, maintenance naturally cannot be given as in sustaining elements such as food, clothing and health a steady flow of money must be achieved, ensuring as much as possible that a child is bequeathed a life untainted by the ravages of parental separation.

What renders an amount as acceptable and sufficient for attaining the above goal?

In **Germany**, they have the **dusseldorfer tabelle**. It serves as a calculator-like function that determines maintenance. In Malta, we don't have this, but maintenance is calculated on a ***case-by-case basis***.

Maltese system is less static than the German system, with a great amount of **discretion being left in the hands of the judge** and his interpretation of the situation. Though bereft of mathematical certainty, the Maltese system achieves something which the German system fails to achieve which is **true consideration for the child and his needs.** If a judge feels the child requires more than just a mathematical derivative of his parents' salary, he will get exactly that.

Dietary needs, disabilities, sports commitments. Etc are all factored into the Maltese system, which is one, as we have said, decided on a ***case-by-case basis.***

(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.

As seen through sub article 2 of this article it shall be identified **whether or not the claimant is able to provide for their own maintenance** by giving regard to their ability to exercise a profession, art or trade. It would make a huge difference if the claimant was able to exercise some kind of r**enumerating profession.**

They too thus must undergo certain scrutiny and assessment with regards to their **capacity for self-sufficiency.**

Case 137/2008
In this case, article 20(2), which states that the claimant's **ability to work** is considered by the court in establishing maintenance, played a very important role. This is because the mother, despite the child being 14 years of age, did not provide convincing reasons as to why

she was not working, despite her capability and ability to work. This was considered in establishing maintenance.

*(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, art, or trade, to his salary or pension payable by the Government or any other person, and to the **fruits of any movable or immovable property and any income accruing under a trust.***

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

(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.

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.**

(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.

Movable or immovable property is also mentioned here as regard must be taken to the value of the properties owned by the person claiming maintenance.

Obligations for maintenance (Article 54)

Part of sub-title III -Of personal separation

***54.** (1) The spouse against whom the separation is pronounced shall not, as a result of such separation, be relieved from the obligation of supplying maintenance to the other spouse, where, according to the provisions of Sub-title I of this Title, such maintenance is due.*

Speaks of maintenance in relation to a spouse after separation

*(2) The amount of maintenance referred to in sub-article (1), and the maintenance due to children in the event of separation, **shall be determined having regard to the means of the spouses, their ability to work and their needs, and regard shall also be had to all the other circumstances of the spouses and of the children, including the following**:*

(a) the needs of the children, after considering all their circumstances;

The law is here acting in the best interest of the children to ensure that all circumstances of a child are taken into consideration when it comes to fixing the amount of maintenance

(b) any disability, as defined in the Equal Opportunities (Persons with Disability)Act, whether such disability is physical or mental;

(c) circumstances of illness which are of such seriousness and gravity as to

compromise the ability of the spouses or of the children to maintain themselves;

(d) whether the ability of the party to whom maintenance is due to have earnings of whatever nature was diminished by reason of that party having, during the marriage, taken care of the household, the other party and the upbringing of the children of the marriage;

Technically there is nothing wrong with the wife which hinders her from seeking work. However, this rule was often criticised as a person who has been out for a sufficiently long time tends it to find it more difficult to integrate back and one's employability may have sufficiently deteriorated due to the outdated skills and lack of adequate training.

(e) every income or benefit which the spouses, or any of them, receive according to law, other than social assistance that is not contributory which is paid to them under the Social Security Act:

Provided that for the purposes of this paragraph the disability pension payable in terms of article 27 of the Social Security Act shall be taken into consideration;

This means that the ordinary retirement pension (inter alia) is to be taken into consideration.

(f) the accommodation requirements of the spouses and of the children;

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

This is also an innovative concept that the courts will have to interpret and take into consideration when determining the quantum of maintenance and may include insurances which were being paid by one of the spouses and which would have covered both spouses had they remained married.

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

The court may order that the maintenance be paid directly from one's salary and the court may inform any relevant 3rd parties (usually the employer) to pay this portion directly to the spouse or the children entitled to receive maintenance.

The court may do this where there is no express demand by the spouse or children entitled to receive maintenance.

Reference to **article 381 of the COCP** is made which speaks of **garnishee orders.** This basically means that the 3rd party concerned would be bound by a court to release that money directly as ordered by the court.

Spira Zerafa vs France Zerafa

The exception contemplated in **Article 381(3)** of **Chapter 12**, which authorizes the deduction of maintenance directly from the salary by order of the Court, applies only in the context of a **maintenance case**, i.e., in contentious proceedings before the **First Hall** of the **Civil Court**. Therefore, a decree from the **Second Hall** concerning maintenance **pendente lite** is not sufficient to issue an order under **Article 381(3)** of **Chapter 12**.

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

This can mitigate the contingency of having problems such as inflation impinge on the amount of maintenance.

54(5) deals with the payment of lump sums from one spouse to another, in view of making the spouse financially independent or less dependent on the other spouse and enable the spouses to live independently of one another. As we know the law does provide the possibility when it deals with the supply of maintenance to children.

54(6), 54(7), 54(8) provide more details on the issue of the lump sum.

When maintenance can be revised/amended

1.Supervening changes. Article 54(9)

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

These are cataclysmic events impacting one's life, altering it along the way-for better or for worse. This might include a change in employment, a loss of an asset, signing new contracts etc. Supervening changes may occur on both the **claimant** and **defendant**'s end. In light of such circumstances the law allows the court to **vary the amount of maintenance** or **stop maintenance** from one spouse to another.

When a **lump sum** has been paid, however, there is **no refund of maintenance**.

Additionally, where a lump sum maintenance payment has only been partially fulfilled of the obligation, the liability of the person to the other person only ceases with respect to what is left to be paid up.

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.

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

In cases where 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 a time period wherein said person was absolved from paying due to a lack of means.

In cases of a **self-inflicted negative** supervening change such as a sudden resignation from one's position, one does no become absolved from his obligations to pay maintenance. Thus, one cannot spite the person he is bound to play by inducing a self-imposed supervening change.

'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.

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.

Charmaine Zahra Case The First Hall of the Civil Court asserted that: "Unemployment is not, per se, a reason to release the husband from the obligation of maintenance towards his wife and children. This is even more so, especially where, as in this case, **the unemployment is voluntary**."

2) When the person supplying maintenance becomes unable to do so

21. *(1) Where the* ***person supplying maintenance becomes unable to continue to supply such maintenance****, in whole or in part, he may demand that he be released from his obligation, or that* ***<u>the amount of maintenance be reduced</u>****, as the case may be.*

The person owing such maintenance in view of the fact that he is unable to pay the current amount of maintenance, may demand that he is **released from his obligations** or that the amount of maintenance **be reduced.**

John Debono vs. C Debono llum Xerri (Appeal – 24 April 2015): where it is stated:
"It must be said that with regard to the maintenance agreed between the spouses through a contract in a consensual separation, our Courts, since the time of Sir Adriano Dingli (Vol 9, page 463), have consistently held that maintenance fixed by a separation contract cannot be altered, unlike maintenance fixed by the Court."

3)Upon the claimant's departure from destitution

(2) The same shall apply where the indigence of the person receiving maintenance shall cease, wholly or in part

Zahra vs Zahra

This is because Article 21 is found in Sub-title (2) of the First Title of the Civil Code, which expressly regulates the rights and duties between ascendants, descendants, and siblings. It is a sub-title that specifically governs the relationships between these persons, and at no point, nor in any of its provisions, does it appear to regulate the relationship between spouses.

The test, in order to assess whether there is a need for a revision of maintenance, requires, more than simply changing the circumstances generally, **a comparative study of changes in the means of the spouse obligated to pay maintenance and the needs of the spouse entitled to receive it."**

When maintenance ceases:

1.Spouse leaves matrimonial home (Article 6)

Spouse maintenance ceases

6. *The duty of one spouse to maintain the other shall cease if the latter, having left the matrimonial home, without reasonable cause refuses to return thereto.*

The spouse to whom maintenance is due leaves the matrimonial home without a reasonable cause and unjustifiably never returns.

This article concerns cessation of duty to pay maintenance to their spouse and not the duty to pay maintenance to their spouse for a child. The difference between the two should be highlighted.

2. Claimant contracts Marriage (Article 27)

Spouse or child maintenance ceases

27. *(1) The obligation of any person to supply maintenance to another shall cease if the person in whose favour such obligation is established, shall contract marriage, notwithstanding the opposition of the person liable as aforesaid, provided such opposition be made on good grounds, and the demand from the release from such obligation be made by the person objecting within the time of six months following the celebration of the marriage.*   *(2) Such opposition shall only be operative if it is made by means of a judicial act to be served on each of the parties intending to contract the marriage, and filed in the registry of the civil court, in the island in which the person objecting, or either of the said parties, resides.*

When the person to whom maintenance is due contracts marriage + if the other person (who owes maintenance) establishes an opposition on good grounds towards the paying of such maintenance within 6 months following the celebration of the marriage

This article thus stipulates requisites which must be met for the cessation of maintenance inter partes to be met.
1) The person to whom maintenance is due contracts marriage with another
2) The person owing maintenance objects to the marriage
3) On good grounds
4) Within 6 months that the marriage is celebrated

The demand has to made via **judicial act** and thus filed in the **registry of the civil court.**

*28. For the purposes of the last preceding article, **the want of the necessary means of subsistence**, having regard to the position of the party to whom the opposition refers, or **the***

***bad character of the other party**, shall be deemed to be a good ground of opposition to the proposed marriage.*

3.Refusal of maintenance on a ground of disinheritance (Article 32+623)

Child maintenance ceases

32. Besides the ground referred to in article 27, parents or other ascendants may refuse maintenance to children or other descendants on any of the grounds on which an ascendant may disinherit a descendant.

The reasons that maintenance may cease are the same reasons that one may be disinherited. The reasons for disinheritance, and so for the ceasing of maintenance are found under article 623 of the Civil Code

***623.** Saving the provisions of article 630, the grounds on which a descendant may be disinherited are the following only:*
(a) if the descendant has without reason refused maintenance to the testator;
(b) if, where the testator has become insane, the descendant has abandoned him without in any manner providing for his care;
(c) if, where the descendant could release the testator from prison, he has without reasonable ground failed
(d) if the descendant has struck the testator, or has otherwise been guilty of cruelty towards him;
(e) if the descendant has been guilty of grievous injury against the testator;
(f) if the descendant is a prostitute without the connivance of the testator;
(g) in any case in which the testator, by reason of the marriage of the descendant, shall have been, under the provisions of articles 27 to 29, declared free from the obligation of supplying maintenance to such descendant.

In these cases, the obligation to maintain the child ceases though the maintenance between spouses does not.

Disinheritance also does not need to take place. Article 32 cites that one can refuse maintenance to a child on the same grounds where disinheritance may subsist though it does not mean that actual inheritance be instituted here.

4. When one spouse gives cause to separation (Article 48)

***48.** (1) The spouse who shall have given cause to the separation on any of the grounds referred to in articles 38 and 41, shall forfeit -*

(d) the right to compel, under any circumstances, the other spouse to supply maintenance to him or her in virtue of the obligation arising from marriage.

The child always receives maintenance unless the law says otherwise. We must remember that there are obligations between the spouses and obligations between the spouses and the child. If a parent commits adultery, the obligation for one spouse to pay another ceases, but the obligations of the parents to the child do not cease. The maintenance of one spouse to another is different to the maintenance of the spouses to the child.

In this case, thus, when there is adultery, and by means of article 38, the other spouse demands separation, the obligation of maintenance between spouses ceases. That of the child, however, remains.

Cause to Separation, which ceases maintenance between spouses by means of article 48

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

Thus, in the case of separation on the grounds of adultery, the maintenance between spouses ceases, meaning **the partner who gave cause to the separation has no right to compel the other to supply him or her with maintenance**. The same applies to article 41, desertion. That between spouses and children remains unaffected.

Maria Dolores sive Doris Scicluna vs G Scicluna
This case holds that adultery has always been the harshest ground on which separation occurs as permitted by the law. Adultery can be proven by means of presumptions, only when there is no doubt left that there was such adultery in the context of all the circumstances of the case.

40. *Either of the spouses may demand separation on the grounds of excesses, cruelty, threats or grievous injury on the part of the other against the plaintiff, or against any of his or her children, or on the ground that the spouses cannot reasonably be expected to live together as the marriage has irretrievably broken down:*

Provided that the court may pronounce separation on the ground that the marriage has irretrievably broken down notwithstanding that, whether previously to or after the coming into force of this article, none of the spouses had made a demand on such ground.

The law regards adultery and desertion as the gravest causes of the breakdown of the marriage and this has been restated with uniformity in jurisprudence. It consequently imposes upon the court forfeiture of the rights mentioned in 48 in such circumstances. Article 40 groups together failures which at first glance do not appear to possess the same gravity and range from grievous injury to incompatibility. The law does however allow the court **in section 51, discretion whether to apply article 48 in different circumstances.**

41. *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.*

When the ground for separation is any one of the aforementioned articles, then the spouse may request that the maintenance to his ex-spouse ceases

When Maintenance may be denied to children born out of wedlock

Section 93 contains an important provision in that if parents acknowledge the child to be theirs by virtue of 87 or 86(or 86A) then such parents are bound by the same duties to supply maintenance to the child as children born in wedlock.

Parents of children born out of wedlock can deny payment of maintenance in 2 such cases:

Article 96: When the child does not obey the parent's direction on conduct and education

***96**.The parent, whether he or she has acknowledged the child or not, may deny maintenance if such child refuses, without just cause, to follow the directions of the parent in regard to his conduct and education.*

Article 97: When the child refuses to live in his habitation home

***97.** It shall also be lawful for the parent, whether he or she has acknowledged the child or not, to deny maintenance to the child, if such child refuses to live in the house which the parent for just cause and with the approval of the court has appointed for his habitation, as also in any other case in which according to law it is competent to a parent to refuse maintenance to a child conceived or born in wedlock.*

Repayment of maintenance (Article 1147)

This only applies in the case where the natural father has been established and the person who supplied the maintenance was not the natural father of the child.

***1147.** (1) Every payment implies a debt, and what is paid without being due may be recovered.* *(2) Nevertheless no action for recovery shall lie if the payment was made in discharge of a natural obligation.*

Parental authority

Introduction

Parental authority is a combination of rights, obligations and powers that the law gives to the parents with respect to the person and the property of their unemancipated children. (Keziah Sammut Thesis)

In roman law the prevailing principle was that of the father (the paterfamilias) who had absolute power, including the power of life and death, over his children. Such ideas have been abolished over the centuries, yet the concept of parental authority is still alive and has an important place in our civil law.

Prior to 1993, the children were subject to paternal authority, meaning parental authority was vested **exclusively in the father**. In old British judgements like ***Re Agar Ellis vs Lascelles (1883)*** the courts even agreed with the father's right to enforce his religion onto his children and not their mother's religion.

Today parental authority conversely is vested in both parents and is **different from the notion of child custody.** To put this in more practical terms, it is possible for one parent to have custody of the child even though both will continue to exercise parental authority. The word '**responsibility**' would probably be more appropriate than authority. In fact, one will likely conclude that parental authority brings rise to a number of responsibilities on the part of the person exercising it.

Though **maintenance can continue to be given to a bulk of children until the age of 23, parental authority strictly ceases at the age of 18, and one becomes a major at law.**

Parental authority vs Care and custody

The rights that accrue from parental authority are superior in that they relate to performing the acts of civil life on behalf of the child

Generally parental authority can be seen as taking decisions on behalf of the child whilst custody is taking decisions for a child.

In a nutshell custody is a **decision-making right,** it is the right of a parent to take decisions for a child of whom they have custody. It is the empowerment given to the person entrusted with the care of the child in order to take care of the child. It isn't a physical reality in Malta as it is for example the USA. In Malta that concerns the topic of residence.

In Malta custody is a question of what decisions you can make for your child. For example, parents with custody can take decisions insofar as **health, religion and education** is concerned. For example, whether the child should go to a private or public school, have an operation at mater dei or capua?

To lose parental authority your acts are either viewed as being dangerous to the child, mismanaging property or not being able to manage property. This is tackled in article 154.

Custody takes into account practical consideration such as residence whereas stripping someone of parental authority only takes place in drastic situations.

(22/2009 RGM) (Civil Court, Family Section) 26.02.2015

In light of the observations and considerations already made, the Court is of the opinion that, in the particular circumstances of this case, taking into account the **frequent and irreconcilable contrasts between the parties, it is not in the best interest of the minor for the care and custody of the minor, that is, the role of the parent, to be entrusted and exercised by both parents together. With a history of continuous conflict over a period of years between the two parents, the Court has no doubt that it is not in the best interest of the minor for the care and custody to be entrusted to both parents jointly.** In these circumstances, it is indicated that the care and custody should be entrusted exclusively to the mother of the minor.

The parties' conduct was such that because of the acrimony between them the court held that it would not be in the best interest of the minors child that the parties jointly exercise custody and parental authority over the minor child.

(24/2012 RGM) 28.05.2015

In this case, the court delved into the difference between custody and parental authority. It particularly established that "JEHTIEG RAGUNIJIET GRAVI U SERJI SABIEX GENITUR JIGI MCAHHAD MIS-SETGHA TA' GENITUR.", which depicts the seriousness that is connoted by the cessation of parental authority.

A careful examination of article 56 shows that the law distinguishes between custody of the children on the one hand and parental authority on the other. In chapter 16 the phrase 'care and custody' is utilised only in the title which deals with adoptions. Strictly speaking therefore, the court should decide in the first place about the custody of a child and therefore with whom the minor should reside and in the second place about whether it should strip either of the parents of parental authority.

In the context of a personal separation article 56(5)of chapter 16 stipulates that the court can strip either one of the parents or both of parental authority "*where circumstances so require*" the court believes that the legislator wishes that where both parents are not going to live together the discretion of the court regarding parental authority is wider than that established in article 154 referred to above. This is because whilst article 154 sets out the circumstances in which parental authority can be revoked, article 56 allows for the revocation of parental authority where the particular circumstances of the case so require. Amongst other circumstances which the court in such cases should be considered is certainly the interests of the minor child.

Residence

In Malta the notion of a **primary residence** and a **primary carer** is that which is recognised. While a child may have 2 parents therefore, one parent is typically designated as the primary carer either as a matter of fact or by legal designation.

One must understand that the home of the **primary carer** is informally referred to as the **primary residence.** Thus, becoming the official and primary residence of the child-thus becoming the domicile wherein they receive letters and correspondence. It is customary in Malta that parents live with their mothers as is the custom in many other countries like Greece where judges held a subconscious bias towards mothers in deciding such affairs.

Custody and residence are distinct issues. Residence is usually singular whilst custody is typically shared.

Custody in Malta <u>is typically shared</u> unlike the USA meaning both parents have the right to make decisions on behalf of their children.

Challenging custody is a challenging process in Malta with it only being revoked in certain situations-with domestic violence being the sole reason explicitly stated. Substance abuse, parental lacking, mental soundness or residence being uninhabitable and unsanitary may also be considered.

Custody in Malta

56. *(1) On separation being pronounced the court shall also direct to which of the spouses custody of the children shall be entrusted, the paramount consideration being the welfare of the children.*

Sylvia Meli vs Philip Vassallo, the Court of Appeal

25..11.1998 the Court enunciated as follows:-
"In this case the court must to do what is in the sole interest of the minor child. In its decision whether the care and custody of the child should be given to one parent or the other the Court must solely be guided by what is most beneficial to the child.

(2) It shall be lawful for the court, if it considers such measures to be strictly necessary, having regard to all relevant circumstances, to direct that the children ***be placed in the custody of persons in loco parentis, of third parties, or in alternative forms of care****.*

(3) It shall be lawful for the court to give any such directions in the judgment of separation, although in the action relating thereto no demand has been made respecting the custody of the children.

(4) The court may, at any time, revoke or vary such directions respecting the children, where the interests of the children so require.

(5) The court may moreover where circumstances so require, determine that one or both of the parents shall be deprived wholly or in part of the rights of parental authority.

Parental Authority / patria potesta*:*

The inherent notion of parental authority as already mentioned stems from the concept of ***patria potestas***-which refers to the power a parent has over his descendants. This underscores a principle deeply rooted in historical legal traditions, the inherent authority parents have over their children.

131. *(1) A child shall be subject to the authority of his parents* ***for all effects as by law established.***

(2) Saving those cases established by law, this authority is exercised by the common accord of both parents. After the death of one parent, it is exercised by the surviving parent.

The child is subject to the common accord of their parents irrespective of whether they are together or separated. Both parents have an equal say in deciding matters such as food, clothing, habitation, health, education etc. The article provides for exceptions stating, "saving those cases established by law". This same sub-article provides that **after the death of one parent, authority is exercised by the surviving parent.**

(3) In case of disagreement between the parents on matters of particular importance, either parent may apply to such court as may be prescribed by or under any law in force from time to time indicating those directions which he or she considers appropriate in the circumstances.
(4) The court, after hearing the parents and the child if the latter has reached the age of fourteen years, shall make those suggestions which it deems best in the interest of the child and the unity of the family. If the disagreement between the parents persists, the court shall authorise the parent whom it considers more suitable to protect the interest of the child in the particular case, to decide upon the issue, saving the provisions of article 149.

These 2 articles provide for cases of disagreement between the parents on particular matters of importance, where parents can either apply to the court of voluntary jurisdiction which will make suggestions in the best interests of the child and the unity of the family. The court will hear both parents and the child if they are above the age of 14 years old. If after the suggestions the impasse continues, **the court will grant whom it considers to be the more suitable to protect the best interest of the child in the particular case to decide the issue.**

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.

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.

The prevailing view is that as children grow older (but are still minors in terms of law), the children should themselves have a major say in the decisions involving them. For instance, a 16-year-old child is entitled to choose what career path he wants to follow even s/he is still under parental authority.

This idea is reflected in a number of British judgements, which make reference to the famous Lord Denning judgement of ***Hewer v Bryant*** (1969) when held that paternal right "is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice".

Likewise in Gillick v West Norfolk Wisbech Area Health Authority (1986), the Court said that. "Parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision".

An interesting local judgement is ***'Director of Social Welfare Standards vs. Nigel Barton' (Court of Appeal- Superior) (03/12/2010***).

A married couple had two boys, who were still minors, when they divorced. The boys were born in the United Kingdom and were habitually resident in England. The divorce decree made no provision to the care and custody of the boys, who remained living with their mother, while the father had visitation rights. Eventually, the father moved residence to Malta.

In January 2010, the mother agreed to send the boys to Malta to spend a few days with their father. The father failed, however, to return the boys and eventually informed the mother that the children would remain living with him. Later the younger boy returned to the UK according to his wishes, but the older boy, aged 15 years and a half, chose to stay in Malta. **The older boy strongly objected to returning to England. He stated that he was better cared for in Malta.**

The Court noted that the boy strongly objected to returning to the UK and that he was happy in Malta where he had made many friends and had a part-time job. **The Court said the boy was mature enough to take decisions and appreciate the consequences of his decision**. The Court was not bound by the Child Abduction and Custody Act (Chap 410) to order the return of the child where there was a grave risk that his return would expose him to physical or psychological harm, or otherwise place the child in an intolerable situation.

(5) In the case of an imminent danger of serious prejudice to the child either parent may take such measures which are urgent and cannot be postponed.

Speaks of situations of imminent danger where either parent may take such measures which are urgent and must not be postponed. This includes emergency operations.

An interesting case concerning this is ***'Miriam Camenzuli vs. Joseph Camenzuli'*** (26/07/1997).

The parents had been separated and their son needed to undergo an ear operation. His mother made the necessary arrangements for this operation to take place without consulting the boy's father. The father was aggrieved at this as he felt that his consent should have been sought before the operation took place, and further claimed that he was not bound to pay for such an operation on the basis that it was a "cosmetic surgery and not a health expense”. The Court ruled in favour of the mother and said that this operation was not cosmetic and that delaying the operation could have led to more harm being caused to the child.

(6) With regard to third parties in good faith, each of the spouses shall be deemed to act with the consent of the other where he or she performs an act relative to parental authority relative to the person of the child.

With regards to 3rd parties in good faith each spouse is assumed to act with consent of the other.

The Effects of parental authority on the person of the child:

Duty of obedience and to live in the parental home.

Article 132. It articulates the **obligations and restrictions placed on a child** in relation to parental authority. Most importantly, there exists a fundamental principle found in **132(1)** that a **child is obliged to obey their parents in all matters permitted by law**. Thus, obeying one’s parents is expected by law and not just society.

132. *(1) A child shall obey his parents in all that is permitted by law.*

132(2) says that a child may not without the consent of his parents, leave the parental home, or any such designated residence. The provision ensures that the child’s movements are subject to parental approval.

In article **132(3)** it provides that the parents have a **right to recall him** and if necessary, **demand assistance from the police**.

Article 133 introduces circumstances where the **court may grant permission for a child to leave the parental house**, if the reason for leaving it is just. This is also done maintaining the confidentiality of the reasons behind the decision, vital for children living in a harmful domicile.

In **133(2)** we see that where delay is detrimental to the child in question, it shall be lawful for any magistrate to give the requisite order to the said court which may confirm, revoke or vary this order.

Article 134: Alternative care of the child

This piece of legislation has been in our law since **1784 code de rohan** but jurisprudence has not come about until very recently. This article is one that permeates serious consequences.

> ***134.*** *(1) It shall be lawful for the parents, if they are unable to control the child, to remove him from the family, assigning to him, according to the means of the parents, such maintenance as is strictly necessary.*

This article comes into play when parents are unable to control their child and thus seek to remove him from the family. Though maintenance is still assigned to the child, according to the parents' means as is strictly necessary.

A complementary mechanism is found in **134(2)** where with the approval of the courts, **the parents may place the child in an alternative form of care for a duration outlined in the court decree. The court here is vested with the authority to determine the most suitable form of care for the circumstances at hand with the parent bearing the financial burden for the expenses associated with alternative care** with the overarching aim of facilitating the child's discipline and education during this temporary placement.

134(3) even provides that the parents' demands may be done ***verbally.*** This article mays seem cold and inhuman though this swift approach underscores the practical nature of this provision.

134 as a provision stands in somewhat contrast to article 96 **as article 96 allows the parents to deny maintenance to the child in the case that the child is not**
obeying the parents' orders in their authority and in the education of the child.

> *96.The parent, whether he or she has acknowledged the child or not, may deny maintenance if such child refuses, without just cause, to follow the directions of the parent in regard to his conduct and education.*

Article 135: Legal representation of the child

> *135. The parents jointly represent their children, whether born or to be born, in all civil matters.*

This legal limb makes it very clear that parents jointly represent their children, **whether born or to be born**, in all civil matters. This may be alluding to the fact that children are considered as such even before they are born.

Article 136: Power of Administration

136. *(1) The parents jointly administer the property of their children, whether born or to be born, except such as has devolved on such children on condition that it shall be administered solely by one of the parents or by third parties.*

The parents jointly administer the property of their children that are born or to be born except such property that has devolved on the children on such condition that it shall be administered solely by one of the parents or third parties.

(2) Acts of ordinary administration may however be performed by either of the parents without the intervention of the other.

With regards to administration the law distinguishes between **acts of ordinary administration and acts of extraordinary administration.**

Acts of ordinary administration may be performed **by either of the parents without intervention** from the other, though the law does not specify what these acts of ordinary administration are.

(3) Acts of extraordinary administration which must be performed by the parents jointly include -

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

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 granting of personal rights of enjoyment over immovable property, the acceptance of inheritances, legacies, and donations on behalf of the child.

The list given is <u>**indicative not exhaustive**</u>

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

Parents may not, without authorisation of the court:

- **Alienate immovables or movables** <u>by operation of the law</u> belonging to the child
- Contract **loans** or other debts
- **Hypothec or pledge** the child's property on his behalf
- Enter into a **suretyship** on his behalf
- Enter into a **compromise** on his behalf
- **Submit a dispute to arbitration** on his behalf

"in any such case the court may, at the request of the parents, authorise one only of the parents to represent the child on the relative deed."

(5) In case of disagreement between the parents the provisions of article 131 shall apply.

Specifically sub articles 3 and 4 shall apply.

Article 137: Inheritance

137. *(1) Any inheritance devolving on the children, shall be accepted by the parents with the benefit of inventory, unless such inventory is dispensed with by the court.*

(2) If one of the parents is unable or unwilling to accept such inheritance, the inheritance may be accepted by the other parent with the authority of the court. If both parents are unable or unwilling to accept such inheritance the court may, upon the demand of the child or of any of his relatives, authorise the acceptance thereof either by the child himself, if he has attained the age of fourteen years, or otherwise by a special curator to be appointed by the court.

Any **inheritance** passing to the children is required to be accepted by the parents and this acceptance is accompanied by the **benefit of inventory**

If one of the parents is **unable or unwilling to accept the inheritance** then one of the parents may, with authority of the court, make the decision to accept the inheritance

If both are unable or unwilling, then if the child has attained the age of 14 the **court may authorise the child to accept the inheritance himself.**

Article 139: Conflicting Interests

139. *In case of conflicting interests between the children, or between the children and either parent, the competent court shall, according to circumstances, appoint one or more special curators:*

Provided that it shall be lawful for either parent to decline to represent any of the children against another or against the other parent.

In cases of conflict between the children or between the children and parent the court is able to appoint curators to represent the children.

Article 140: Parents to render account of administration

140. *(1) The parents are bound to render to the child, on the latter attaining majority, an account of the property and the fruits of those things of which they have not the usufruct; and of the property only and of the administration thereof in regard to things of which they have the legal usufruct.*

When the child attains majority, the parents must render the account of their administration to their child. With respect to property held in usufruct, accounts have to be rendered with respect to the property of the child. Whereas with respect to the property over which the parents had no usufruct, the accounts have to be rendered not just with respect to the property of the child but also with respect to the fruits of the property.

***141.** (1) The parents shall have the usufruct of such property as devolves on the child by succession, donation, or any other gratuitous title, including property derived from entail.*

Parents shall have the usufruct if the property devolves on children through:

1.succession
2.donation
3.any other gratuitous title

There are certain instances however when the parents do not have legal ususfruct, such when it was bequeathed or donated expressly stating as such, or when the succession/donation was done with intention that the child makes a career out of it. This is found in **article 142.**

How Parental Authority ceases or is deprived

The moment one becomes a parent one is endowed with parental responsibility. However, this responsibility is not of an immortal nature and ceases in two ways:

1.Ipso jure(by operation of the law)
2.By forfeiture

Cessation means it comes to a **natural end** whilst forfeiture connotes a person has **lost access to a particular right** after having acted in an unjustifiable way. Therefore, forfeiture is considered to be punitive.

Article 150 deals with the cessation of parental authority.

150. Parental authority ceases *ipso jure* in each of the cases following:

(*a*) on the death of both parents or of the child;

(*b*) when the child attains the age of eighteen years;

(*c*) on the marriage of the child;

(*d*) if the child, with the consent of the parents, has left the parental home and set up a separate domestic establishment;

(*e*) if the parents fail to make, in favour of the child, the registrations referred to in articles 2038 and 2039; sohowever that where only one parent has failed to make such registration, parental authority shall not cease in relation to the parent who has not so failed;

(*f*) if the surviving parent remarries or, in the case of an adoptive parent, if after the adoption he marries or remarries, without having first made an inventory of the property of the child and obtained from the court the requisite leave to continue in the exercise of the rights of parental authority.

These circumstances lead to cessation ***ipso iure***.

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
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 without making inventory for the child and without requisite leave to continue in the exercise of the rights of parental authority

If a parent loses parental authority because it ceases, can they get it back?

151. *In any of the cases referred to in paragraphs (e) and (f) of the last preceding article, it shall be lawful for the court, if it deems it expedient in the interest of the child, to reinstate the parent in the parental authority wholly or in part upon his performing that by reason of the omission of which he had forfeited such authority.*

There are some things that can be remedied. If the parent died, there is no remedy to win back parental authority, obviously, but certain ceases are not permanent. The reinstating can be done wholly or in part and done if it deems it to be in the **best interest of the child.**

According to **article 152,** the court may, on good cause, dispense with the inventory under 150(f) and direct instead that a mere description of property is made, which shall be verified on oath by the parent.

When parent may be deprived of parental authority

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

(a) if the parent, ***exceeding the bounds of reasonable chastisemen****t,* ***ill-treats the child, or neglects his education****;*

N.B; A vague term because we are given no clue as to what '*reasonable chastisement'* means.

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

How can one prove that a parent is not performing these obligations, with regards to 3B?

Marina Galea vs Mario Galea
The Duty of the parents to pay maintenance to the children born in marriage, per 3B (1), 3B (2), and 3, is a duty as much as it is a right of the child not to be deprived of the necessities attached to health and education in today's world.

In the case ***NCW v MM*** the *'defendant has never contributed financially towards the child's upbringing and that he does not seem to have any interest in the child.' The defendant failed to perform the obligations set out under Article 3B of the CivilCode and contribute towards the child's needs.*

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

In LB v Dr Christopher Chircop noe. the court removed parental authority from a father deemed to be disinterested, vesting exclusive care and custody with the mother but upholding the obligation to pay monthly maintenance to the child."

Moreover, in ***FTKPD v RKPG*** the court considered that in ordinary circumstances <u>both parents are of utmost importance</u> within the child's upbringing however in a situation where the husband **not only abandoned his wife and child but was dominant and possessive and frequently abused his wife both emotionally and physically, the court had no option but to grant parental authority and exclusive care and custody of the minor child to the wife.** In extraordinary cases where the father was incarcerated and the mother was a drug user, the court has also removed parental authority from both parents, reflecting on the wishes of the child and this being proven to be in his best interest." (***'AB as an 'ad litem' curator for his son CB v. DB')***

The court may reinstate the parent on the exercise of the rights of which he has been deprived, when the cause of such deprivation ceases to exist. Thus, the deprivation of parental authority is not always permanent. This is outlined in article 154(4).

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

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

RT Vs IL (284/2018 JPG)
Plaintiff was guilty of perpetrating a number of sexual offences on Respondent's daughter A, who at the time was still a minor. And thus, the respondent's request was acceded to, **and the court ordered that Plaintiff is to be divested of parental authority over the minor child NLT.**

Title VII of Part 2 of Book First of the Criminal Code refers to *sexual offences*. Let's say if there is a woman who is raped and who has a child. She carries the child and gives birth. The rapist finds God and decides that he wants to reform and apologises and demands the child to be his. Does he have any rights over the child. **He does have parental authority until it is removed**. What happens if he genuinely reforms, can he fight for 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.

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.

155. *The usufruct of the property of the child shall cease upon the forfeiture of any of the rights of parental authority and shall only be re-acquired upon the full restoration of parental authority.*

Usufruct of property ceases upon forfeiture of any of the rights of parental authority.

156. *(1) Where a minor, who has attained the age of sixteen years, has been authorized under article 9 of the Commercial Code, to trade, or, not being a trader, to perform certain acts of trade,* ***such minor shall, in regard to all matters relating to his trade, or in regard to such acts, be considered as being of age.***

For all other means and purposes though he shall still be subject to parental authority.

Filiation

The **exercise of determining who the father of a child is.** It is the establishing of paternity.

There are two important presumptions to keep in mind when dealing with filiation.

1.***Mater certa semper est.*** The mother is always known. She who gave birth is always the mother.

68. *A child born* ***not before one hundred and eighty days*** *from the celebration of the marriage,* ***nor after three hundred days*** *from the dissolution or annulment of the marriage, shall be deemed to have been conceived in wedlock.*

Law tends to favour the possibility that a child is deemed to have been born in wedlock rather than out of wedlock, by presenting us with the possibility that a child born within 180 days(around 6 months) from the consummation of marriage(if its within 180 days after the marriage) will be considered to be in wedlock while it considers a child born up to 10 months after the marriage to be in wedlock.

2.***Pater is est quem iustae nuptiae demonstrant.*** The father is **he who is married to the mother.** If there is no marriage there is no presumption.

67. *A child* ***conceived in wedlock*** *is held to be the* ***child of the spouses****.*

This article provides us with the ***rebuttable presumption*** **that a child conceived in wedlock is held to be the child of the mother's husband.** This was rebutted in cases like ***Stephen Healy vs Clyde Farrugia Vella et***

Stephen Healy vs Clyde Farrugia Vella et Denegata paternita' (repudiation) is the action to rebut the legal presumption created by section 67 -*pater is est quem justae nuptiae demonstrant*. This case also held that no one, not even the child or the natural parent, may bring an action to rebut this presumption if the child's possession of status is in conformity with the status attributed by his act of birth as per s 81.

Jean domat in his book '**The civil law in its natural order'** holds: 'The child which is born of a married woman is presumed to be the husband's: and **it is held for the legitimate unless the contrary is proven'**. Evidence that this rebuttable presumption has long been in our civil law. There is also a reference to English law in this book and the latin maxim '*filatio non potest probari'*, again seeking to favour the presumption of legitimacy. This is true except in cases where the husband hath a physical impossibility of procreation or was under the age of 8.

Wedlock

Even under roman understanding children born in wedlock were considered to be **legitimate**, whereas children born outside wedlock were deemed **illegitimate** and denied a set of rights including that of inheritance.

This distinction remained up until 2004 there was a distinction in the law between legitimate and illegitimate children. The former pertained to children born **in wedlock** whilst the latter concerned those born **outside wedlock**. Illegitimate children were discriminated against by the law up until 2004 where the distinction was removed by virtue of **Act XVIII of 2004**.

"All children, whether born in or out of wedlock, shall enjoy the same social protection."
Art.25 Universal Declaration on Human Rights

This was duly supplied by the **convention of the legal status of children born out of wedlock.**

'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.

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**.

This was battled out in the following case:

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 otherwise and registered the child under Mr Dadouch's name. **The Court asserted that**
section 67, that holds that the child born in wedlock is the child of the spouses, is, in fact, a juris tantum presumption. This means that if evidence can be brought to show the contrary, then the presumption falls.
This case also held that the mere testimony and statement of the mother is not sufficient as evidence to counter the presumption that her husband is the father, as per 67.

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.

Ciantar Caledonius Noe vs Direttur tar-Registru Publikku et, 21/10/2002 - CIVIL COURT, FIRST HALL

Ghalkemm id-dikjarazzjoni ta' l-omm mhix sufficcjenti biex teskludi l-paternita` ta' zewgha (Artikolu 70(2)), b'danakollu meta din l-istess dikjarazzjoni tkun akkoppjata ma' elementi u provi ohra bastanti ghal konvinciment dan kollu ghandu jinduci biex tingheleb il-presunzjoni tal-legittimita` tal-minuri sancita fl-Artikolu 67 tal-Kap. 16, u li konsegwentement it-talba ghall-korrezzjoni mitluba fl-Att tat- Twelid ghandha tigi akkolta.

Although the mother's declaration is not sufficient to exclude the paternity of her husband (Article 70(2)), nevertheless, when this declaration is accompanied by other elements and evidence that are sufficient to convince, this should lead to overcoming the presumption of legitimacy of the minor established in Article 67 of Chapter 16, and consequently, the request for the correction of the Birth Certificate should be accepted

Natural parentage

70A. *(1) Whenever the clarification of natural parentage of a child is required:*
(a) the spouse may require the spouse who gave birth and the child;
(b) the spouse who gave birth may require the spouse and the child;
(c) the child may require both parents; and
(d) the alleged natural parent may require both spouses and the child,

to consent to a genetic test of parentage and to acquiesce to the taking of a genetic sample appropriate for the test, which sample must then be taken according to the then current provisions of the law.

This is a very important article. **Prior to 2015, which was when 70A was added to the Civil Code, the Courts did not take genetic & DNA evidence into consideration.** 70A holds that even the ***child himself may bring an action for filiation***. This ties in with the Parliamentary Speeches and Minutes that preceded the inclusion of this article, which confirmed that the presumption that the mother's husband is always the father does not hold as strongly today as it did before. Parliament asserted that the child had the right to know who his parents are, and so the child is given the possibility to file an action to determine filiation - by virtue of 70A (c).

Parliamentary speech of the 16.11.2011: *Illum id-dinja inbidlet u filwaqt li qabel ic-centru kien din id-difiza, illum qeghdin naraw illi* ***hija iktar importanti illi l-wild, il-persuna, tkun taf anzi li ghandha dritt tkun taf, min huma l-genituri taghha."***

(2) On the application, mentioned in sub-article (1), of a person entitled to clarify, the Civil Court (Family Section) ***may require any of the spouses, the child, and the alleged natural parent, as appropriate, to consent to a genetic test of parentage, and to acquiesce to the taking of a genetic sample appropriate for the test,*** *which sample must be taken according to the current provisions of the law:*

Provided that where the said consent is not given by the parties, the Civil Court (Family Section) ***must substitute that consent that has not been given and order acquiescence in the taking of a sample****.*

Sub-article 2 says that the civil court "***must substitute that consent that has not been given and order acquiescence in the taking of a sample."*** Thus, the court does not require the consent of the parties in order to seek clarification of parenthood, and politely forces a person to perform 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 draw inference from that resistance and draw conclusions based on that fact, as seen through sub-article 3 of this article.

Unfortunately, there are also cases where since the persons being approach has departed the country **the DNA testing is rendered impossible.**

(3) In the absence of genetic and scientific evidence, the Civil Court (Family Section) may consider any other evidence presented which it deems to be relevant, including the ***drawing of inferences from the fact that a person did not provide a genetic sample, despite being ordered to do so.***

(4) The Civil Court (Family Section) shall dismiss the application if and as long as the clarification of the natural parentage ***would result in a considerable adverse effect on the best interests of the minor child, which would be unreasonable for the child, even taking into account the concerns of the person entitled to bring the action.***

"would result in a considerable adverse effect on the best interests of the minor child":

Here we are saying that we can reserve and prevent someone's rights in order to protect the rights of the child. If the best interest of the child is at risk, the Court may dismiss the entire application, as per 70A (4).

Related also to sub-article 2 we have the Case of ***Diane Abdilla vs Francesco Saverio*** which puts just this into practice. Before the Constitutional Court, Saverio argued that the Court's order for him to submit to genetic sampling breaches upon his right to private and family life as per the European Convention on Human Rights article 8. However, the Constitutional Court asserted that this right may be breached and reserved, for in doing so the Courts are able to determine and clarify his identity and his natural parentage in relation to the child in question, which takes precedence.

Victor Buttigieg vs Director for the Public Registry

This is a very important case pertinent to 70A. There was a dispute, in this case, relating to whether the court had legal grounds to unbury a deceased man in order to take genetic sampling to determine and clarify his natural parentage in relation to the child in question as per 70A. The court, in determining that this was permissible, referred to parliamentary minutes and speeches preceding the 2015 amendments, adding 70A. Such speeches held that **the rights of**

the child to know his parents were so vital that it would justify the breach of another's right to private life in the case that the person does not provide consent to prove parentage. In fact, 70A (2) allows the court to substitute the person's consent if it means that it would clarify whether that person is the father or not of the child.

Additionally, it was contended that 70A was added to promote 3 main motives, **the raison d'etre behind the introduction of article 70A.**

1) The child has a right to seek and determine who his parents are
2) The court and parents have a duty to enforce the child's rights
3) Scientific innovation and promotion of the use of technology in relevant court cases.

Article 78: Registration of Birth.

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

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

S 79 is a very important provision that holds and asserts that in the case where no act of birth or no parochial register exists to prove that a child was born or conceived in wedlock, then continued possession is sufficient. The requisites required to prove continuity of possession of a child born or conceived in wedlock is then governed by the ensuing articles.

'John Zammit v. Direttur tar-Registru Pubbliku'
The court here stated that:

"...it is a well-known fact that [...] the registration of birth and marriage certificates, as well as death certificates, is of great importance for the civil life of society, since many citizens' rights depend on those records."

Therefore, this highlights the **important implications beheld by one's registration of birth** – because it directly effects the rights of the citizen concerned.

Article 80: Possession is proven by a series of facts - V Important

Provides more insight on what the law means in article 79

80. (1) Such possession shall be established by a series of facts which, collectively, go to show the connection of filiation and relationship between an individual and the family to which he claims to belong.

(2) Such facts are chiefly the following:

(a)In the case of spouses who have contracted marriage before the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017 that the individual has always borne the surname of the father of whom he claims to be the child;*
(b)In the case of children born to spouses who have contracted marriage after the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017, that the individual has always borne the Family Name of the spouses of whom he claims to be the child;
(c) that the parents have treated the child as their own, and have, as such, provided for the child's maintenance, education, and establishment in life;
(d) that he has been constantly acknowledged as such in society;
(e) that he has been acknowledged as such by the family.

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

Article 80 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
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
4. Acknowledged as such in society
5.Acknowledged as such by the family

The combination of these factors may lead to a person establishing the continued possession of status of a child, conceived or born in wedlock.

(Very important) Article 81: No person can claim a status contrary to that attributed to him by the act of birth

You cannot claim that you are someone else's child if the birth certificate proves otherwise

81. (1) No person may claim a status contrary to that which is attributed to him by the act of birth as a child conceived or born in wedlock and the possession of a status in conformity therewith.
(2) Likewise, it shall not be lawful to contest the status of a child conceived or born in wedlock in respect of a person who possesses a status in conformity with his act of birth.

'Tauss v. Director of the Public Registry'.

The Court here quoted jurist **<u>Ricci</u>** and said that:
"The presumption that the child registered in the birth certificate is the child of the mother'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 demonstrant,*** meaning that the father is he whom the lawful marriage points a finger at.

Joseph Ellul vs Dr Anthony Cutajar et noe 10/12/2002 – FHCC

"From this, it is clear that if a son or daughter has the status of legitimate offspring, and also possesses the same status in accordance with the birth certificate**, no one can challenge this status** based on Article 77, even if the physical impossibility indicated in the same article is proven.
The mother's declaration, although alone not sufficient, still carries its weight."

'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.

Therefore, the court did in fact hold that 70A allowed the digging up of a deceased person in order to clarify parentage via genetic samples. However, the crux of the case lied within s 81.

S 81 holds, very clearly, that no one can contest the act of birth if it is in conformity with the possession of status which is proven by a series of facts stipulated by s 80. Therefore, this provision barres any action that contests such act of birth, so long as the act is in line with this possession. Therefore, even if genetic samples and testing proved contrary to the act of birth, if there was still the continuous and cumulative series of facts which established possession of status, then the act of birth still remains unchanged.

The case also referred to the parliamentary speeches preceding the introduction of 70A in 2015 wherein the parliament held that there has been a shift in the position surrounding the legal presumption *pater is est quem justae nuptiae demonstrate*, wherein **in Roman law, this presumption served as a defence for the father's title over his child, while in today's world the presumptions serves more of a right for the child to know of his parents' identities.**

82*. In default of the act of birth and the possession of status, or if the child shall have been registered under a false name, or as being born of parents uncertain, or in case of supposition or substitution of a child, although in these last two cases, there exists an act of birth in conformity with the status possessed by the child, the proof of filiation may be made by any other evidence admissible according to law.*

This provides certain circumstances where the proof of filiation may be made by any other evidence admissible according to law.

This applies:

(i)in default of the act of birth and the **possession of the status**
(ii)if the child has been registered under a false name or as being born of parents uncertain
(iii)in the case of supposition or substitution of a child

Last two cases, filiation may be brought even if there is an act of birth in conformity with the status possessed by the child

Lia Diana Noe vs Melikechi Mohammed et

When the two extremes mentioned in Article 81, Chapter 16 – that is, the act of birth and the possession of status – do not coincide, the presumption ceases to be absolute, and therefore, the legitimate paternity resulting from the act of birth can be excluded by evidence of facts that can be assessed by the judge, as established by Article 82 of the Civil Code.

Jesmond Zammit vs Anthony Rapa et FHCC - 18 January 2000
where it was stated:
This means that according to the provisions of Article 82 of Chapter 16 of the Laws of Malta, if there is a lack of a birth certificate or possession of status (as defined in Article 80 of Chapter 16), or if the child was registered under a false name... the proof of filiation can be established by other evidence that can be brought forward according to the law. In other words, if the possession of status does not match the birth certificate, the evidence arising from the Public Register certificate is not contestable.

Article 83 complements the previous article by saying that *"proof to the contrary may be made by evidence tending to show that the claimant is not the child of the woman he alleges to be his mother, or, where the maternity is proved, that he is not the child of the mother's husband."*

Proof of the contrary of his legal paternity. This is only a child trying to establish his paternity. To the contrary of filiation can be made by evidence showing that the claimant is not he child of the person he alleges has given birth to him or not the child of the other spouse

Thus, if a person wants to challenge the paternity of a child born in wedlock, he must show that such person does not hold a status in conformity with his act of birth (so as to free oneself from the absolute nature of Article 81) and then proceed to bring proof to show that the husband is not indeed the father of the child in terms of Article 83.

Finally, **Article 84** provides that "*no prescription shall run for an action for a child to establish his proper filiation*"

Article 85 in abbreviated terms means that if the child dies after having attained the age of 23, his heirs or descendants may not seek to have them declared as being born in wedlock.

Article 86: Children conceived and born out of wedlock

<u>(The rules regarding children out of wedlock are significantly less stringent)</u>

When speaking of wedlock, again we refer to s 68 **(180 days - m - 300 days)**

86. *(1) A child conceived or born out of wedlock may be acknowledged by the parents, either jointly or separately:* *Provided that where the person acknowledging himself to be the parent who did not give birth is a minor, the acknowledgment is null:*

The parents whether joint or separately have the **right to acknowledge their child as their own.**

An important proviso exists in the fact that if the person acknowledging themselves as the parent but did not give birth, is a minor, then the acknowledgement is considered **<u>null and void.</u>** The father thus either has to wait until he attains the age of 18 or until he gets married to make that acknowledgement. This is where one sees human rights rear its head again.

The second proviso distinguishes between situations where the father acknowledges the child together with the mother, and situations when a man wants to acknowledge a child, and the mother is not cooperating with him.

In the first case, the father can acknowledge the child at the Public Registry. If the child had previously been registered as being the child of an unknown father, then the parents may enter into a public deed to acknowledge the child and later on notify the Director of Public Registry to make the necessary amendment in the birth certificate.

If the father is acting unilaterally, then according to the second proviso to Article 86, a judicial letter must be served to the mother (or her heirs if she is dead), to the child if s/he is of age and other interested persons, and such persons shall have 2 months within to which to state whether they agree or disagree.

According **to the third proviso to Article 86, if the mother or the child (if he is of age) do not agree to the proposed acknowledgement**, then an application may be made before the Court (by the father or any interested person) asking for a court declaration that the person making the acknowledgment is the child's father and to make the necessary registration relating thereto. Obviously, in such cases, the Court will not always adhere to this request but will consider the particular circumstances of the case.

Article 86A is also an addition brought about by **<u>Act XV of 2012</u>**(act 15) and it has finally laid to rest the dilemma of whether a mother could bring an action against a man to have him registered as the father of her child. With this new article, it is now clear that both the mother **as well as the child** may do so.

86A. *(1) The parent who gave birth to a child conceived or born out of wedlock who is not acknowledged by the parent who did not give birth, and that same child, may at all times make a judicial demand in order that there may be established the parent who did not give birth and for the court to order the registration of the parent who did not give birth in the relative acts of civil status.*

(2) The judicial demand referred to in sub-article (1) may also be sought by the heirs or the descendants of the child if the same circumstances as those which are referred to in article 85 will exist.

Moreover, *heirs or descendants* could seek this legal remedy if circumstances outlined in article 85 are present.

87. *(1) The acknowledgment of a child conceived and born out of wedlock may be made in the act of birth, or by any other public deed either before or after the birth.*
(2) Any declaration of parenthood made otherwise by either of the parents, or by both, or by a minor, can only be admitted as evidence of filiation in an affiliation suit.

The acknowledgement 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. (**article 87)**

Importantly the law specifies that the **acknowledgement 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 parents. (**article 88**)

Article 90

90. *(1) The parent who has acknowledged a child conceived and born out of wedlock shall have in regard to him all the rights of parental authority other than the legal usufruct.*
(2) If the interests of the child so require, the court may order that only one of the parents shall exercise the rights of parental authority;
(3) The Court may also restrict the exercise of the aforementioned rights and, in serious cases, exclude both parents from the exercise of these rights.
(4) The Court may also restrict the exercise of the aforementioned rights where one or both of the parents are convicted with one or more of the offences listed in Title VII of Part II of Book First of the Criminal Code.

This article 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 up bringing.

Thirdly article 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.

The last provision again underscores the commitment of the legal framework to provide 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.

Surnames

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

92. *(1) If a child conceived and born out of wedlock has been acknowledged by the parent who did not give birth, that child shall assume the surname of any of the parents, or the surname of both parents, in the order they choose.* *(2)A child who has not been acknowledged by the parent who did not give birth shall assume the surname of the parent who gave birth.* ***(3)*** *If the child conceived and born out of wedlock has been acknowledged jointly by both parents on the Act of Birth, the surname by which that child shall be known shall be declared in terms of article 292A.*

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**, as specified in sub article 3 of this section.

Article 92(2) as we have seen stipulates the following: *A child who has not been acknowledged by the parent who did not give birth shall assume the surname of the parent who gave birth.*

292A. *The person giving notice of the birth shall also deliver a declaration by the parents of the child indicating the surname to be used by the child in terms of article 4(3) or of article 92, and such surname shall be registered in the column under the heading "Name or names by which the child is to be called and Surname" in the act of birth immediately after such name or names.*

Where no such declaration is made **in the case of a child conceived and born in wedlock the father's surname** shall be presumed to have been so declared and in the case of a child **conceived and born out of wedlock the maiden surname of the mother** shall be presumed to be the surname so declared.

Marcello Basile-Fasolo, known as Marcello Basile Cherubino vs. Director of the Public Registry – COA 1594/2001 – 19 April 2005: "In the case under examination, the appellant is seeking to drop his father's surname – from Basile Fasolo to just Basile – and to add his mother's surname. In the considered opinion of this Court, what the appellant has effectively done – as he has, in fact, for some time now referred to himself and identified himself with third parties as Basile Cherubino – contravenes **Article 4(3) of the Civil Code**, both as it was when the appealed judgment was given ('Children of marriage take their father's surname, after which they may add their

mother's surname') and as it is today, following amendments introduced by **Act XVIII of 2004** ('Children of marriage take their father's surname, after which they may add, according to Article 292A, their mother's surname or the surname of a deceased father'). Therefore, the appellant cannot claim that this Court and the civil registry should in any way facilitate what is clearly contrary to the 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.**

Of the Presumptions that a person was conceived or born in Wedlock (articles 101+)

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

This article as amended in **2004** brought about a significant change in the status of children born out of wedlock, when their parents later marry or when the court with voluntary jurisdiction, issues a decree. This article previously stated *"may be legitimated*" instead of the current "*shall be deemed iuris et de iure to have always been conceived or born in wedlock*".

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 **iure et de iure.**

Thus, the status of these children born outside marriage is considered to be an absolute legal truth, with their status being on par with children born within the confines of a legal marriage.

The **2004 amendment** thus expresses a clear legal intent to confer unequivocal legitimacy to children born out of wedlock in certain circumstances, **aligning their status with that of children born within the confines of legal marriage.**

***102.** The presumption arising out of subsequent marriage in accordance with the preceding article shall not take place unless the children have been acknowledged by both parents by means of a declaration in the act of marriage, or otherwise as provided in sub- article (1) of article 87, or unless their paternity and maternity have been declared by a judgment of the court:*

*Provided that the family name chosen by the parents upon their marriage may also be adopted by the children who shall be deemed **iuris et de iure** to have always been conceived or born in wedlock by virtue of that marriage.*

This article outlines the condition under which the presumption of legitimacy may come into effect. The presumption is reliant upon certain actions by the parents namely:

→Both parents must acknowledge child through **a declaration in the act of marriage, or otherwise by article 87(1), OR**

→ the presumption also holds **if the maternity and paternity of the child was declared in a court judgement**

103. *Children deemed to have been conceived or born in wedlock by subsequent marriage of their parents* ***shall be vested with the rights of children conceived or born in wedlock as from the day of the celebration of the marriage****, if they shall have been acknowledged on that day or previously, or if their filiation shall have been declared before the marriage by a judgment of the court.*

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 marriage.

This effect depends on certain conditions: <u>the children must have been acknowledged on the day of marriage or before</u> it, or <u>their filiation must have been declared through a court judgement prior to the marriage.</u>

110. *Subject to the provisions of article 92, a child in whose favour there is a presumption in virtue of a decree of the competent court shall assume:*

(a) the family name adopted by the spouses in terms of article 4, where the presumption has taken place upon the demand of either one of the parents, or both parents together; or

(b) the surname of any of the parents, or the surname of both parents, in the order they choose, where the presumption has taken place upon the demand of either one of the parents, or both parents together, and their marriage was contracted prior the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017; or

(c) the surname chosen by both parents in virtue of Form Y contained in Part II of the First Schedule to this Code, as appropriate.

Surname to be assumed by child presumed to have been conceived or born in wedlock in virtue of decree of court

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.**

Like we said last time, if someone is registered as someone's father on birth certificate, they have rights of parental authority, but they also have obligations. There is a string of obligations, inheritance, maintenance etc.

Article 69: When the Husband May NOT Repudiate

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:

These are the grounds where you are precluded from saying that this child wasn't born in wedlock. You are claiming the child wasn't born in wedlock and thus wasn't a legitimate child.

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

Remember, wedlock children are defined by s 68 as children born not before 180 days from the celebration of the marriage and not after 300 days after the dissolution of the marriage. Additionally, a child is given a juris et de jure presumption that he was always born and conceived in wedlock if he is initially born out of wedlock but then his parents decide to marry, only if both parents acknowledge their parentage over the child, by means of the act of marriage or by means of s 87(1) which deals with the act of birth in the cases of children born out of wedlock. The latter can also take place in any public deed. (S 101 and 102).

The purpose of section 69 is to mitigate the legal norm which allows repudiation of a child born less than 180 days after the marriage, disallowing by excluding repudiation either in the event that there was awareness of the pregnancy prior to marriage or on the grounds that the father acknowledged oneself to be the parent. The legislator is therefore introducing into law and in favour of ultimate legitimacy *per subsequens matrimonium*, certain logical deductions from which one would assume that the spouse was indeed the natural father of the child.

Why can the husband not disavow a child that is born non-viable?

Baudry-Lacantinerie lists two reasons.

First, the non-viability of the child often results from premature birth, and thus, any inference that might be drawn from the date of birth to claim that conception occurred before the marriage loses its validity.

Second, a child born non-viable, like a stillborn child, is considered as having never existed in ***re rerum natura*** (in the natural order); no rights could be attached to its existence, especially inheritance rights (Article 725). The birth of such a child therefore harms no one, and the husband has no interest in disavowing it.

When husband may repudiate the child

With a look into the sub articles, it becomes evident that all these sub articles co concern cases of adultery in different ways though it is not explicitly mentioned like it is in sub article (d).

Article 70 (1) speaks of the cases when a husband may repudiate ('jinnega') a child conceived in wedlock;

> ***70. (1) Any spouse, except for the spouse who gave birth to the child, may bring an action to repudiate a child born in wedlock:***
>
> *(a) if he proves that during the time from the 300th day to the 180th day (roughly 10 months to 6 months), before the birth of the child, he was in **the physical impossibility of cohabiting** with his wife on account of his being away from her (ex: abroad or in prison), or some other accident; or*
>
> *(b) if he proves that during the said time he was **de facto or legally separated** from his wife. Provided that he may not repudiate the child, if there had been, during **that time, a reunion, even if temporary between him and his wife***
>
> *(c) if he proves that during the said time he was afflicted with **impotency** even if such impotency was only an impotency to generate. Thus, the impotency can be an impotency to generate or impotency to have sexual intercourse); or*
>
> *(d)if he proves that during the said time his wife had **committed adultery** OR she had concealed the pregnancy and the birth of the child, and*
>
> *(e) if such spouse produces evidence of any other fact which may also be genetic and scientific tests and data that tends to exclude such parenthood.*

Article 70 (1)(a) One is able to notice that our law with regards to our continental counterparts(Italian civil code 235, and French and German law) in that it does not merely require evidence that the spouses had not cohabited, but it requires evidence that the spouses were "in the physical impossibility of cohabiting". Thus favouring the presumption of pater is est quem iustae nuptiae demonstrant.

The book '**IL Filangieri. Rivista periodica mensuale'** says it is a legislative principle, enshrined in **Article 165 of the Italian Civil Code**, that the husband can bring an action to challenge paternity in cases of his wife's **adultery**, particularly when there is also **concealment of the birth**, and according to some writers, even when there is the **moral impossibility of cohabitation** during the period between the **three-hundredth** and the **one-hundred-and-eighteenth day before the birth.**

Only Tissot, with one of his usual philosophical eccentricities, has wanted to deny that infidelity in marriage can ever be seen as a violation of a legal duty and made into a crime.

Adultery is proven through presumption and circumstance, *li ma jħallu l-ebda dubju morali f'moħħ min għandu jiġġudika.*

George Baldacchino v. Jane Baldacchino', 2001.
This case held that:

"The necessity of genetic tests and evidence [...] is almost imposed where the plaintiff's action is based on subparagraph (c) of Article 70(1) of the Civil Code.
[...]
This same Court, as presided over, in several judgments delivered recently, declared that the concepts of 'absence' and 'physical impossibility' should be interpreted in such a way that, where evidence shows that the parties were separated even de facto and had no intimate relations during the period mentioned in the same Article 70(1)(a), then these elements were sufficient, also in light of the fact that it was in the interest of every concerned person, including minors, that their true paternity be known."

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.

Peter Zammit vs Maria Zammit', 1960.
"**"For reasons that are eminently of public order, a husband does not have an action for denial of paternity in the case of his wife's adultery. As an exception to this rule, the law grants the husband this action when the adultery is accompanied by the concealment of the birth. As such, this exception is to be interpreted rigorously.
In order for the requirement of concealment to be established, it must be incontrovertibly proven that the wife took steps to ensure that her husband would not be aware of the birth.**

In this case, it was not proven that the defendant concealed the birth of the child. Although she did not inform the plaintiff about the birth, when she was pregnant, she continued to live in the same place she had before, just a short distance from the plaintiff's residence; she continued to go out, as witnessed by others, without hiding her pregnancy, to the extent that the plaintiff became aware of it; she did not give birth in some foreign place or in secret, but at her own home; and she herself declared the child, as shown by the birth certificate

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.

Just one of these scenarios suffices for the father to bring the action for repudiation. As the court said in ***Djelassi Nureddine vs Saliba Josette et. (2002)***

"huwa bizzejjed li l-attur isehhlu jissodisfa mqar wahda minn dawn l-erba cirkostazi".

It is worth noting though that at the time of this case there were 4 scenarios that would suffice though now this has been extended to 5 with the addition of sub article (e). (d) had seemingly been split into 2 with genetic and scientific tests having its own separate sub article. This was maybe done with a view to permit repudiation in cases of artificial insemination done without or even with consent from the father which technically does not fall under the category of 'adultery'.

Therefore:
70 a - physical impossibility during 300 days to 180 days before birth of wedlock child.
70 b - de facto or legal separation unless there was a reunion, even if temporary
70 c - impotency
70 d - adultery or concealment
70 e - genetic tests or scientific evidence that prove otherwise

Any one of these situations may be used as grounds for an action for repudiation on a child who has been born and conceived in wedlock as per s 68 or s 101 and 102.

George Baldacchino vs Jane Baldacchino et
This case asserted that the separation stipulated by **70b** need not be legal but could also be de facto. De facto, meaning that practical, without the need of the separation to be actually and legally concluded, separation, referring to the separate habitation of both spouses, is enough to suffice. It was also asserted that the two parties "*ma kellhomx relazzjonijiet intimi fil-perjodu msemmi fl-istess* ***Artikolu 70 (1) (a)****"*. With regards to subarticle c, it was also determined inter alia that **medical testing would be necessary to prove impotency.**

Peter Zammit vs Maria Zammit et
In this case, the court asserted that the man does not have action to repudiate on the grounds of adultery **unless the adultery was accompanied with concealment**. This case held that there must be adultery **and** concealment, not adultery or concealment. This was changed in 1993.

***Cauchi vs Cauchi 21/10/2002* - CIVIL COURT, FIRST HALL**

The action for denial of paternity must still proceed based on the circumstances outlined in the hypothesis (b) of Article 70(1) of Chapter 16, that is, if it is proven that between three hundred and eighty days before the birth of the child, the man was de facto or legally separated from his wife. **With this amendment, the legislator departed from the rigid state of the law as it was before 1993, where the man had a remedy only if, during the specified period, he was legally (not just de facto) separated from his wife (Article 83(b) of the law before the promulgation of Act XXI of 1993).**

Article 75- Procedurally speaking, parties seeking repudiation must perform the necessary legal step. 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 or under any disability to be sued 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.**

Time Barring Repudiation

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

Andrea Abela vs Giuseppa Abela noe et it-terminu stabbilit mill-ligi ghall- ezercizzju ta' 1-azzjoni ta' denegata paternita' huwa ta' terminu ta' dekadenza •• Il-ligi taghti lir-ragel mizzewweg id- dritt li jirrifjuta jirrikonoxxi tarbija bhala tieghu fil-kaz ta' adulterju ta' martu flimkien mal-habi tat-twelid lilu; dan id-dritt pero' ghandu jigi ezercitat fi zmien 3 xhur preskritt mill-ligi

There is a 6-month prescriptive time-barre in which you may issue an action for disavowal.

This 6-month prescription, as will be tackled in Mizzi vs Malta below, is a law that seeks (raison d'etre) to promote the resolving of uncertainty. Therefore, the interests of the child are prioritised, and as Mizzi vs Malta states, such time-barres are necessary in a democratic society. However, a proviso to this section seeks to strike a balance between the child's rights and the rights of he who
seeks disavowal.

Provided that, without prejudice to the provisions of article 70(4), the Family Court may, upon an application of any one of the spouses and, if possible, after having heard all the parties interested, and after having considered the rights of the applicant and of the child, at any time authorise the applicant to institute an action to disown a child born in wedlock to the other spouse:

This proviso thus allows the courts, after considering and understanding the rights of all the parties involved, to authorise the spouse to institute an action for disavowal ***"AT ANY TIME".***

<u>Mizzi vs Malta VIP</u>

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

Convention for the Protection of Human Rights and Fundamental Freedoms 1950, but this was overturned on appeal.

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

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

Following this judgement, in 2008, **two provisos** were inserted which provide that:

First Proviso: - *If the husband wants to bring an action for disavowal after the lapse of these time periods, he may bring an application before the Family Court and such Court may, after hearing all the parties interested (if possible) and after considering the rights of the husband and of the child,* ***at any time****, authorise the husband to institute an action to disown a child born in wedlock to his wife.*

Thus, the law today grants the possibility of an action being instituted several years after the birth of the child. Nevertheless, one has to bear in mind that the law is not granting an automatic right to do so to anyone, **but one needs to obtain the Court's authorization.**

Second proviso: - *It is further provided further that where an action to disown a child is instituted by the husband after the lapse of the periods stipulated in 73 (a), (b) or (c), any judgement whereby the child is disowned* ***shall NOT have the effect of changing the surname of the child or of any other person*** *who took his surname from the child unless the court, (upon the demand of any of the parties'), provides otherwise.*

The reasoning behind this second proviso is to avoid situations where a grown-up person will have to change the surname s/he grew up with by reason of this action for disavowal, as this could have serious detrimental effects on such person's social life and/or on uninvolved third parties such as descendants of the disavowed child.

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.

Provided that, without prejudice to the provisions of article 70(4), the Family Court may, upon an application of any one of the spouses and, if possible, after having heard all the parties interested, and after having considered the rights of the applicant and of the child, at any time authorise the applicant to institute an action to disown a child born in wedlock to the other spouse

Anthony Grima 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.**

Constitutional reference in relation to article 8: right to family life

The court said this:
The legal presumption has a legitimate purpose because it exists to protect the rights and freedoms of the minor, and therefore it safeguards their best interests. The legal presumption is also necessary in a democratic society to ensure legal certainty in family relationships, so that the best interests of the children prevail. Therefore, this Court does not find that Articles 67 and 81(2) of Chapter 16 are in conflict with the fundamental rights of Anthony Grima under Article 8 of the Convention.".

In relation to article 6: right to a fair trial

The court said this:

Ghalhekk din il-Qorti ma ssibx illi l-Art 67 u 81(2) tal-Kap 16 qeghdin jilledu d-drittijiet fondamentali ta` Anthony Grima skond l-Art 6(1) tal-Konvenzjoni.

Onto the second proviso: ***RELATED TO SURNAMES***

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

Paul Borg vs Anabel Borg pro et noe (COA 146/2011 27 February 2015)

This Court agrees with the position taken by the appellant Director. There is no doubt that the request is being made in the best interest of the minor, and her accommodation as indicated in the verbal of 3rd February 2015 cannot cause harm or prejudice to anyone

S 70 (3) - Genetic test for parentage

Section 70 (3), like section 70A (2), holds that the Court may require any of the spouses, the child, and the alleged natural parent, as appropriate, to consent to a genetic test of parentage, and to acquiesce to the taking of a genetic sample appropriate for the test, which sample must be taken according to the current provisions of the law:

Provided that where the said consent is not given by the parties, the Civil Court (Family Section) must substitute that consent that has not been given and order acquiescence in the taking of a sample.

This is in line with the parliamentary speeches and minutes leading up to 70A, which emphasise upon **the Child's rights to seek clarification of his parents**.

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. Article 70(4).

Mother's declaration 70(2)

Article 70 (2) provides "**the declaration of the spouse who gave birth to the effect that the husband is not the father of the child shall be given consideration in an action regarding the exclusion of the paternity of the husban**d";

Despite the fact that it is now found in the law that consideration is given to the mother's testimony, it must be made clear that the mother's declaration alone is not sufficient to exclude paternity because she may be doing so for personal reasons or for her own interest, or even for vengeance against the husband.

Even before the amendment in this sub-article*, in a number of judgements, including ***'George Baldacchino vs. Jane Baldacchino et'*** (5* October 2001), and ***'Josianne Giusti pro et noe vs Pierre Giusti et'*** it was deemed that though the mother's declaration **is not**

sufficient to exclude paternity and grant an action for disavowal , such a declaration was deemed to be an important piece of evidence and should be granted its due weight.

70 (2) holds that when the spouse who gave birth declares that the other spouse is not the natural parent, that declaration shall be ***considered*** in the action of the other spouse to repudiate **"ghandha tinghata konsiderazzjoni".** This was confirmed and established in **AC vs Beppe Fenech Adami et**.

***Joseph Camilleri v Sharon Camilleri 31/01/2003* - CIVIL COURT, FIRST HALL** The admission of the mother **has no confessional value**. This is as stated in subparagraph (2) of the mentioned **Article 70** of the **Civil Code**. However, such an admission or declaration that her husband is not the father of her child can be evaluated as an element of evidence within the framework of the other procedural findings, notably **genetic evidence**.

Surnames 70(8)

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.

Heirs

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

This is an important article; if the heirs have a suspicion that the child was not the son/daughter of the deceased, then they may rely on this article to have that child disavowed so that s/he wouldn't be entitled to a share in the deceased's estate. **However, if the time limits mentioned above had elapsed during the father's lifetime and he hadn't yet instituted an action for disavowal, then this remedy may not be sought.**

Concealment: 70(1)(d)

One should immediately keep in mind that prior to 1993, repudiation on the ground of adultery required twofold proof- of adultery **and** of concealment of birth simultaneously. This is what led to cases like peter Zammit vs maria Zammit being decided against the plaintiff who failed to prove that the pregnancy was in fact concealed, despite proof of adultery, with the **reasoning being that the public order should not be disrupted** and that the provision is exceptional when considering the general rule that adultery alone is not sufficient to ground repudiation.

In 1993 the position however changed, and the law now reads as follows;

(d) if such spouse proves that during the said time the spouse who gave birth had committed adultery or that, that spouse had concealed the pregnancy and the birth of the child;

We have seen that article 70 (1) (d) allows, as a ground for repudiation, the proof of adultery **or** of concealment of pregnancy or of birth to suffice. The adultery must be proven to have happened, as per 70 (1) (a), from 300 days to 180 days before the birth of the child, and the child must be born in wedlock (per 86 and 101 and 102) for the action to be brought. This was all reaffirmed in Mizzi vs Malta.

Baudry-Lacantinerie holds that for the concealment of birth **it must appear 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 acknowledgement 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. The circumstances can never be generalised. It is a matter of **circumstantial fact**.

Grazio Mallia v. Dr Joseph Cassar Galea

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.

However, the proof of concealment, as stated in ***Epifanio Vella vs Giuseppa Vella et,*** must be brought through the proof of **positive acts of concealment**. The silence or miscommunication of the spouse who gave birth, therefore, does not subsist. The Court referred to the last time-bar contemplated in section 73, which holds the following:

***73.** Where it is competent for the spouses to bring an action to disown a child, they must bring such action:*

*(c) within 6 months of the discovery of the **fraud**, if the birth was concealed:*

The Court rightfully asserts that the Legislator uses the word **fraud**. This is very important because the legislator shows that the concealment contemplated by law refers to the positive actions done by the spouse who gave birth to prevent the other spouse from knowing of the birth. Therefore, the other spouse must prove that such positive actions were done by the spouse who gave birth.

Who may impeach filiation

***76.** The filiation of a child born three hundred days after the dissolution or annulment of the marriage may be impeached by any person interested.*

Article 76 provides that the filiation of a child born three hundred days **after** the dissolution or annulment of marriage may be impeached by any interested person.

Here there are no time limits like in previous articles.

Article 77

Additionally, in **article 77** we see that 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

The interested person will usually be another man claiming paternity of the child or possibly heirs or relatives of any of the parties involved. The interested person may also be the child's mother.

As the article reads today, the position of any interested party seeking to impeach filiation has been brought closer to that of husband seeking to repudiate a child born to his wife in wedlock.

Of particular importance are the words ***"without prejudice to article 81"***
(reference to *Healey vs Farrugia Vella)*

Stephen Healy vs Clyde Farrugia Vella et
Denegata paternita' (repudiation) is the action to rebut the legal presumption created by section 67 -pater is est quem justae nuptiae demonstrat. This case also held that no one, not even the child or the natural parent, may bring an action to rebut this presumption if the child's possession of status is
in conformity with the status attributed by his act of birth as per s 81.

Act XXIII of 2010 also introduced a few articles immediately after article 77, which were given the numbers articles 77A, 77B, 77C and 77D.

AB vs Director for the Public Registry
In this case, instituted by S 77, the plaintiff managed to produce substantial evidence that he was in fact the natural parent to the child in question. However, he lost the case because he failed to prove that the child's possession of status was different to the status described in the Act of Birth, as governed by section 81. Dura lex sed lex, the status of children born in wedlock (i.e their parents) can only be contested if the act of birth is not in conformity with the possession of status, which is in turn proven by a series of continuous facts as stipulated by s 80.

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.

77C

One is entitled to pursue legal action within a 6 *month period* from birth of the child instances covered by article 77, 77A and 77B

Provided that the Civil Court (Family Section) may, after the sworn application of the person claiming to be the natural parent of the child born in wedlock or the spouse who gave birth and, if possible after having heard all the parties interested, and after having considered the rights of the plaintiff and the child**, at any time** authorise the person claiming to be the natural parent of the child born in wedlock, or the spouse who gave birth to institute an action for the declaration of parenthood as mentioned in articles 77A and 77B:

The two provisos following this article are essentially a reproduction of the **provisos to article 73**, reproducing the remedy available if this time limit lapses.

A(BA)C vs Direttur tar-Registru Pubbliku et (Family Court 88/2011 30 April 2015) – exam important

This case involved a mother who instituted an action under section 77. She wanted to render the other spouse's paternity void and thus repudiate him. The court, however, held that the person who files an action under 77 must have the necessary juridical interest to do so.

The Court established that it was hard to find any juridical interest in the mother who is attempting to repudiate the other spouse and instead mark the child's other parent as "**missier mhux magħruf**". The Court also noticed that the other spouse attempted to forgive and to salvage their marriage. To this the Court rightfully asserted that in the case wherein the other spouse does not initiate any proceedings for repudiation, the spouse who gave birth automatically loses any juridical interest required to file a 77 action. She could have filed a 77B action if she wanted to issue paternity to another man who she had an affair with, but she wanted to mark the child's father as unknown.

Additionally, the Court criticised her action altogether, for it noted that the action was filed when the child in question was already three years of age, and thus the 6-month time bar as per 77C was already expired.

Maintenance

If a successful legal action for ***denegata paternita*** is pursued, and the non-biological father is found to already have advanced 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.

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.

Mario Micallef vs Sandra Micallef
Judgment delivered on the 4th of October 2016, where the court applied Article 1147 of the Civil Code and condemned the defendant to repay the plaintiff the maintenance that he had paid up until the date the judgment was delivered, which declared that the minor was not his natural child.

Cedam: "The recipient receives an enrichment in an absolute sense because the debt did not exist. The most frequent hypothesis occurs when payment is made based on an invalid act."

---------------Alec Carter from now on--------------

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

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.

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.

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.

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. ***'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.

'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.

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. Creating a conducive environment for the minor.
7. Respecting the minor’s religion.
8. Reporting incidents.
9. Participating in any training tailored for foster carers.
10. Managing the minor’s bank account as a *bonus paterfamilias*.
11. 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 payment 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.

'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.

'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.

'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.

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.

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 alteration 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***

> ***113.*** *(1) For the purposes of this Title and of any regulations made thereunder a person shall be deemed to make or participate in arrangements for the adoption of a person if he enters into or makes any agreement or arrangement for, or for facilitating, the adoption of a person by any other person.*

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.

> ***114A.*** *(1) When an application for an open adoption is made, the Court shall refer the case to the Adoption Service within the Directorate of Alternative Care (Children and Youth) who shall invite all parties, including the Children's Advocate, the person or entity entrusted with the care and custody of the minor, where this is not vested in the parents, the parents and the prospective adoptive parents to draw up an agreement of open adoption.*

If no agreement is reached, then a family mediator will be referred to.

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 ***article 115***

An Adoption Decree is NOT granted in certain circumstances:

An Adoption decree is not granted:

1. For a person who has not reached the age of 18 except if the person wanting to adopt is the natural parent, or if there is joint adoption by a person and his spouse who have had the person in their residence and caring for him for at least 5 years and with their consent. Or if there is adoption by a foster carer who has been taking care of the person for the last 5 consecutive years with the person's consent.
2. A person who has taken religious vows
3. Unless the child gives consent should they be 11 or older
4. Unless every living parent of the child gives consent
5. Unless the birth giver who is alive and not yet 18 gives consent when 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 ***article 116***

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 persistently 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*

(1) Where any parent or the person to be adopted does not attend in the proceedings on an application for an adoption decree for the purpose of giving his consent to the making of the decree, then, subject to the provisions of sub-articles (2) and (3) of this article, **a document signifying his consent to the making of such a decree and his understanding of the nature and effect of such a decree shall,** if the person in whose favour the decree is to be made is named in the document or (where the identity of that person is not known to the consenting party) is distinguished therein in the prescribed manner, **be sufficient evidence of that consent**

and of his understanding the nature and effect of the decree, whether the document is executed before or after the commencement of the proceedings; and where any such document is attested as mentioned in paragraph(b) of sub-article (2) of this article, it shall be sufficient evidence as aforesaid without further proof of the signature of the person by whom it is executed

(2) **A document signifying the consent of the mother of a person** to be adopted shall not be sufficient evidence under this article unless -

(a) the person to be adopted is at least 8 weeks old on the date of the execution of the document; and

(b) the document is attested on that date by Commissioner for Oaths or an advocate or a notary or, if executed outside Malta, by a person of any such class as may be prescribed.

(3) A document signifying the consent of the person to be adopted shall not be sufficient evidence under this article unless the person in whose favour the decree is to be made is named in the document.

(4) For the purposes of this article, a document purporting to be attested as mentioned in paragraph (b) of sub-article (2) of this article shall be deemed to be so attested, and to be executed and attested on the date and at the place specified therein, unless the contrary is proved.

In cases where a parent or the person intended for adoption does not participate in proceedings related to an application for an adoption decree and consent is needed, then a document indicating their consent for the adoption decree is sufficient provided that the person who's consent is needed is named in the document.

The person must be at least 8 weeks old on the date of execution of the document, and must be attested on that date by the Commissioner for Oaths or an advocate or a notary, or if outside of Malta someone prescribed of any such class.

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

(2) In determining whether an adoption decree if made will be for the welfare of the person to be adopted, the court shall have regard (among other things) to the health of the applicant, as evidenced, in such cases as may be prescribed, by the certificate of a registered medical practitioner, and shall give due consideration to the wishes of the person to be adopted, having regard to his age and understanding and to the religious persuasion of such person and of his parents.

(3) The court in an adoption decree may impose such terms and conditions as the court may think fit, and in particular may require the adopter to make for the person to be adopted such provision (if any) as in the opinion of the court is just and expedient.

The court considers the health of the person applying for adoption, which may be confirmed by a certificate from a practitioner in certain cases and consider the wishes of the person wishing to be adopted, looking at their age, understanding, religion, and the religion of their parents.

The court can set specific terms in the adoption Decree. They can make the adopter set certain provision for the minor which ensures a tailored process to the needs of the minor being adopted.

The Open Adoption Agreement sub article 4

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 ***article 120***

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 ***article 124***

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 surname 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.