Civil Procedure

Lecture Title: The Court of Voluntary Jurisdiction and the Family Section

Diploma in Law (Malta)

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ADVOCATES

Civil Court (Voluntary Jurisdiction)

CONSTITUTION, VOLUNTARY NATURE AND TERMS OF AUTHORISATION

- The Civil Court (Voluntary Jurisdiction Section) may be considered as the successor of the Second Hall, with the exclusion of family matters, which are now under the competence of the Family Court Section. This new set up of the Civil Court has been made possible due to the amendment to Article 2 of the COCP.
- The new Civil Court sections were established by means of Article 3 of L.N. 396 of 2003, these being:
    - the Family Section,
    - the Voluntary Jurisdiction Section; and
    - the First Hall of the Civil Court.

Civil Court (Voluntary Jurisdiction)

CONSTITUTION, VOLUNTARY NATURE AND TERMS OF AUTHORISATION

The most important factor of the Voluntary Jurisdiction Section is undoubtedly its voluntary: nature.

This characteristic influences the whole rationale revolving around such Court and has affected the provisions regarding its composition, its powers and its functions.

This basically means that the Voluntary Jurisdiction Section will only have jurisdiction if the defendant voluntarily submits himself to the Court, as opposed to the other Courts whereby, if called into suit, the party must unavoidably submit himself to the Court's authority.

However there has been some extension of the contentious element into the Court of Voluntary Jurisdiction. Although the Court is still voluntary, some contentious aspects have been included, as for example, the discussion of the sale of the matrimonial home.

Civil Court (Voluntary Jurisdiction)

CONSTITUTION, VOLUNTARY NATURE AND TERMS OF AUTHORISATION

Three natural, and important, consequences stem from the voluntary nature of this Court:

1. According to Article 39 (4) of the Constitution of Malta: proceedings before the Voluntary Jurisdiction Section are held in private as the rule, and not as the exception, as is the case in the First Hall, Civil Court.
2. Article 35 of the COCP provides that no appeal shall lie from any decree of the Court of Voluntary Jurisdiction; but it shall be lawful for any party, who deems himself aggrieved, to bring an action before the Civil Court, First Hall, for the necessary order.
3. Any order or direction in civil matters, which is made to the Voluntary Jurisdiction Section must be made by means of an application (rikors), signed by the applicant himself or else by an advocate, notary or legal procurator.

Civil Court (Voluntary Jurisdiction)

CONSTITUTION, VOLUNTARY NATURE AND TERMS OF AUTHORISATION

Upon receiving an application, the Voluntary Jurisdiction Section's powers come to the fore, since the Judge, in order to obtain the necessary information regarding the application, is granted certain faculties. These powers include:

1. the power to order the production of documents necessary and relevant to the application;
2. the power to examine on oath or otherwise, the applicant himself or any other person;
3. the power to order any person to appear on a given day, at a stated time, to be examined on the subject-matter of the application; and
4. the power to accept any person who spontaneously appears to give information to the court, amongst others. The last power contrasts with the procedure in the First Hall and other Courts of contentious jurisdiction, as the individual would not be allowed to give evidence regarding the subject matter if he spontaneously appears before the Court.

Civil Court (Voluntary Jurisdiction)

CONSTITUTION, VOLUNTARY NATURE AND TERMS OF AUTHORISATION

1. The first function of the Voluntary Jurisdiction Section is the duty to inform itself, to the maximum of its capabilities, regarding the subject matter of the application.
2. The second function of the Voluntary Jurisdiction Section is to issue a decree. The legislator, also in this case, has ensured that the necessary powers are granted to the Court, in order to perform its 'judicial' functions effectively. It is important to point out that there is technically nothing stopping the court, on good cause being shown, to review or change its decree.

TERMS OF AUTHORISATION

The Second Hall also gives terms of authorisation. This would be the authorisation to enter into a deed e.g. the authorisation of the minors. Moreover when there is a person who is an administrator and he want to sell immovable property he requires the authority of the Civil Court. Here of course we are looking at the procedural and not the substantive aspect.

In addition a decree of the Court of Voluntary Jurisdiction is, as a rule, valid for six months and if it lapses one will have to ask for what is known as an extension (proroga).

Civil Court (Voluntary Jurisdiction)

COMPETENCE

The matters assigned to the Civil Court (Voluntary Jurisdiction Section) are applications falling within the competence of the Civil Court relating to:

- Titles Ill, V, VI and VII of Book First of the Civil Code; and
- Part II of Book Second of the Code of Organization and Civil Procedure.

These cover the following five areas:

1. Adoption;
2. Minority& Tutorship; Majority, Interdiction & Incapacitation;
3. Absentees-Part I -VII-Civil Code; and
4. Of The Mode Of Procedure Before The Civil Court -Voluntary Jurisdiction Section - Book II - Part II - Code of Organisation & Civil Procedure.

Civil Court (Voluntary Jurisdiction)

COMPETENCE

Therefore, as successor of the Second Hall (Civil Court), the functions of the Voluntary Jurisdiction Section hinge around the following matters:

1. The disentail of property by decree
2. The disencumberment of immovable property by the procedure of edicts;
3. The appointment of tutors, curators and other administrators;
4. Interdiction and incapacitation;
5. The presentation and publication of secret wills;
6. Declarations of opening of successions;
7. The publication of inventories;
8. The powers entrusted to it in pursuance of the Trusts and Trustees Act;
9. Issues related to family law - namely adoption, as all other matters have been transferred to the Family Court Section by L.N. 396.2003.

Civil Court (Voluntary Jurisdiction)

COMPETENCE

The competences of the Court of Voluntary Jurisdiction that emanate from Code of Organisation and Civil Procedure (COCP) relate to:

1. Interdiction and Incapacitation;
2. The Publication of the Inventory;
3. The Declaration of the Opening of Succession; and
4. The Appointment of Tutors, Curators and Administrators.

Civil Court (Voluntary Jurisdiction)

INTERDICTION AND INCAPACITATION

1. Article 520 (1): interdiction or incapacitation can be requested on the ground of:
2. insanity;
3. habitual idiocy; and/or
4. frenzy or the prodigality.

The application must contain a statement regarding the facts on which the demand is founded, as well as an indication of appropriate witnesses. Any corresponding documents in support of such demand must be filed together with the application such as the psychiatric report. This statement must then be confirmed on oath.

It is vital to note that the person presenting the application before the Court must have a genuine link with the person whom he is seeking to interdict or incapacitate. Thus only four categories of people can put forward such a request, namely:

1. The spouse;
2. Any person related by consanguinity;
3. Any person related by affinity and who may be called upon to supply maintenance to the person interdicted or incapacitated;
4. The Attorney General, but only in the cases of idiocy or another mental infirmity when no demand has been made by any other person.

Civil Court (Voluntary Jurisdiction)

INTERDICTION AND INCAPACITATION

The Voluntary Jurisdiction Section is granted the power to summon the person whose interdiction or incapacitation is being demanded.

The Court itself may choose to question such person but it may also appoint experts to examine the individual concerned.

In such cases, the Court's main function is to ensure that the allegedly insane person's interests are effectively protected.

Thus, it can appoint a temporary curator during the time of the proceedings. On the other hand, it must appoint a curator if it decides to accept the application and interdict or incapacitate the person involved.

In the application one has to indicate a curator i.e. a person to be nominated curator. Such curator has to enter into a general legal hypothec on one of their properties; but the curator has the right to remuneration, which is decided by the court.

When faced with an application for interdiction, the legislator has ensured that the Voluntary Jurisdiction Section is given a third possibility as opposed to either interdicting the person or else dismissing the application. Thus, the Voluntary Jurisdiction Section can stop short of interdicting the person and instead restrict that person's capacity. This can be done at the Court's discretion, and the individual can be prohibited from:

" ... suing or being sued, from effecting any compromise, borrowing any money, receiving any capital, giving a discharge, transferring or hypothecating his property, or performing any act other than an act of mere administration."

Civil Court (Voluntary Jurisdiction)

INTERDICTION AND INCAPACITATION

The interdiction or incapacitation shall take place from the day of the decree, and any act performed, by the individual, after such decree, or even subsequent to the appointment of the temporary curator, will be null.

A person's interdiction or incapacitation might thus have a serious consequence on third parties, who, in good faith.

As a result, the COCP places due emphasis on the aspect of publicity. Thus, each time a person is interdicted or incapacitated by the Voluntary Jurisdiction Section, a notice specifying the terms of the inhibition is published in the Government Gazette and sent to every notary in Malta by means of a circular letter. Moreover, the Registrar shall, each year before the end of January, cause to be published, in the Government Gazette, a list of persons appearing in the above-mentioned book.

Finally, an act of interdiction or incapacitation will be revoked, when its cause will cease to exist. This revocation can only be affected by another decree of the Voluntary Jurisdiction Section reversing its previous decree.

Civil Court (Voluntary Jurisdiction)

THE PUBLICATION OF THE INVENTORY

The best example would be the acceRtance of the inheritance with the benefit of inventory.

- Article 541 of the COCP states that for a person to officially declare that he is accepting an inheritance, whether testamentary or 'ab intestato', with the benefit of inventory, he must file a note in the Voluntary Jurisdiction Section, Civil Court.

- This is also the case if any person declares that he will not be accepting an inheritance before the making up of an inventory. The person must also swear before the registrar that he will faithfully describe the estate. The administering of such oath will be duly recorded at the foot of the note requesting the making up of the inventory.

Civil Court (Voluntary Jurisdiction)

THE PUBLICATION OF THE INVENTORY

The Court is responsible in ensuring that the inventory is published in an adequate manner.

Thus, it will, by means of a decree, fix the place, day and time for such publication upon an application by the person involved. In such application the person must also nominate a notary, before which the publication will occur.

The Court, in the same decree, will direct that all parties interested in the publication will be present, if they so desire.

The registrar will also publish a notice in the Government Gazette and in a daily newspaper inviting all those parties interested to be present at the publication of the inventory.

- Nevertheless Article 547(2) states that, in any case the inventory, after its publication, may be impugned by any person interested, even though such a person may have been present at the publication.
- It is important to note that the law provides that any inventory i.e. even those unrelated to the institute of succession, which shall be drawn up, at law, under the authority of the Voluntary Jurisdiction Section, must follow the rules set out in the above-mentioned sections of the COCP.

Civil Court (Voluntary Jurisdiction)

THE PUBLICATION OF THE INVENTORY

Here the Voluntary Jurisdiction Section, Civil Court, may make the declaration of the opening of a succession, if it is called upon to do so by any person in whose name a claim thereto is made.

It is vital to note that the Voluntary Jurisdiction Section can open the succession only if no opposition to such claim is made.

Therefore, the legislator lays down specific formalities that must be followed, in order to ensure that, effectively, no opposition to such application has been made. Thus, the law provides that, upon receiving such application to open a succession, the Court shall issue banns. The latter will be:

1. Published in the Government Gazette;
2. Published in at least one daily newspaper; and
3. Posted up at the entrance of the building in which the court sits. Any party wishing to oppose the application must do so, by means of a note to the same Court, within the time period set by the Judge.
4. The fourth publicity requirement occurs by means of a note signed by the Registrar summarising the contents of the banns, which must be affixed, unless the Court orders otherwise, in the place normally reserved for such official notices, in the city, suburb or district of the deceased.

Civil Court (Voluntary Jurisdiction)

THE PUBLICATION OF THE INVENTORY

During the time limit with in which to file an opposition to the claim, and during the hearing of the application, the Voluntary Jurisdiction Section has the power to make any special order to protect the hereditary rights or property of the deceased from prejudice or deterioration.

- If there has been no opposition to the application within the time-limit set by the judge - the Voluntary Jurisdiction Section will examine the applicant's claim, and will open the succession in his favour, if it believes that the claim is justified.
- If a note has been filed opposing the claim - the Voluntary Jurisdiction Section will follow the procedure outlined in Article 485 of the COCP, but in any case, it cannot open the succession in favour of the applicant. The Court will examine the grounds for opposition, and either accept the latter as valid and dismiss the original application or else refer the parties to contentious jurisdiction.

The point here is that any omission or error in the heirs in their shares etc, in no way does prejudice the interest of any affected party.

Civil Court (Voluntary Jurisdiction)

THE APPOINTMENT OF TUTORS, CURATORS AND ADMINISTRATORS

A fundamental function of the Voluntary Jurisdiction Section, Civil Court is to appoint, supervise and, where necessary, revoke the appointment of tutors, curators and other administrators.

Any person may apply to the Voluntary Jurisdiction Section to be a:

A. Tutor or curator for a minor;
B. Curator for an absent person;
C. Curator for a vacant inheritance;
D. Any other administrator, according to law; or to
E. Substitute any executor, administrator, procurator, or counsellor appointed under a will or instrument, who refuses to, dies or is unable to accept such office, but only as long as the law itself does not provide that the substitution is to be made by any other authority or person.

Civil Court (Voluntary Jurisdiction)

THE APPOINTMENT OF TUTORS, CURATORS AND ADMINISTRATORS

Upon accepting the application and therefore, appointing such person, the Voluntary Jurisdiction Section has a number of powers; it would suffice to mention a few:

1. Appoint advocates and accountants to examine and approve the accounts tendered by such individuals;
2. Appoint a practising advocate or a head of a family to fix a maintenance allowance for the individual appointed to be administrator, curator or tutor;
3. Revoke a previous suspension.

Civil Court (Voluntary Jurisdiction)

THE EXECUTION OF ACTS OF THE VOLUNTARY JURISDICTION SECTION

Decrees issued by a Voluntary Jurisdiction Section have the force of law and must be adhered to.

A decree authorising/ acknowledging some status is dependent on a subsequent act by the parties involved, in order to be valid.

The Registrar shall cause every obligation with hypothecation of property entered in the acts of the Court to be registered in the Public Registry within 4 days from the date of such obligation unless another person would have already registered such obligation.

The Notary is to inform the Registrar if notarial deed is published in accordance with decree, and has 15 days to do so, otherwise incur penalty enforceable as civil debt.

Authorisation granted by court is a decree, if something new is required another application is to be made.

Civil Court (Voluntary Jurisdiction)

POWERS OF VOLUNTARY COURT OF JURISDICTION AKIN TO CONTENTIOUS COURT?

Historically, the Second Hall, Civil Court, was envisaged to have a very limited jurisdiction and was consequently granted very little amount of powers necessary to fulfil its limited role.

Along the years, its jurisdiction was increased due to an increase in its powers. The reasons for this are mainly 3:

1. There was an attempt to decrease the workload from the First Hall, Civil Court in certain aspects;
2. The private nature of the Voluntary Jurisdiction Section helped in keeping certain delicate matters out of the public; and
3. The voluntary nature of the Court of Voluntary Jurisdiction was deemed to be of help and an incentive to obtaining satisfactory results and compromises prior to taking a case before a contentious court, in a more costeffective, shorter and less time-consuming process.

Civil Court (Voluntary Jurisdiction)

POWERS OF VOLUNTARY COURT OF JURISDICTION AKIN TO CONTENTIOUS COURT?

The powers of the Court of Voluntary Jurisdiction are still limited, as well as being characteristic of its voluntary nature.

A number of formalities present within the contentious courts are lacking. The rationale is that the voluntary and private nature of the Court allows for certain formalities to be done away with.

The Court of Voluntary Jurisdiction in recent years has been granted certain powers, which are more akin to a contentious court rather than a voluntary court. These exceptions are quite rare, and occur mainly in the family law branch of civil legislation; for example, powers relating to adoption decrees, as adoption decrees may only take place with the authority of the competent court, that is, Court of Voluntary Jurisdiction.

The reason for such an exception is quite clear. In an adoption decree, there is really no contention. It would be uncharacteristic for the Civil Court, First Hall to decide whether a person applying for adoption should be allowed to adopt.

In this instance the Voluntary Jurisdiction Section is more suitable because it is informal and with the help of professionals, the Court can decide whether the adoption will be beneficial for the welfare of the person being adopted and whether the person adopting really understands the nature and effect of an adoption decree.

Civil Court (Family Section)

INTRODUCTION

- The Civil Court (Family Section) and the Court of Magistrates (Gozo) (Superior Jurisdiction) (Family Section) came into being through the enactment of The Civil Courts (Establishment of Sections) Order, 2003 as of the 16th December 2003.

As to the matters which fall within the competence of the said section it has some which previously fell within the competence of the Civil Court, Second Hall, and which therefore are of a non-contentious nature, as well as others which are of a contentious nature and were previously within the competence of the Civil Court, First Hall.

Regulation 4 of the said Order lays down what these matters are. It reads as follows: -

"To the Civil Court (Family Section) shall be assigned those cases falling within the competence of the Civil Court and which relate to matters regulated by:

1. Titles I, II and IV of Book First of the Civil Code;
2. The Maintenance Orders (Facilities for Enforcement) Ordinance;
3. The Maintenance Orders (Reciprocal Enforcement) Act;
4. The Marriage Act; and
5. The Children Abduction and Child Custody Act."

Civil Court (Family Section)

INTRODUCTION

- Title I of the Civil Code deals with the rights and duties arising from the marriage, including personal separation;
- Title II of the Civil Code deals with filiation;
- Title IV of the Civil Code deals with parental authority.

These sections of the Civil Code, along with the other various acts listed above, all fall exclusively and solely within the jurisdiction and competence of the Civil Court (Family Section).

The procedural aspects fall to be regulated not solely by the Code of Organisation and Civil Procedure but also by The Civil Court (Family Section), The First Hall of the Civil Court and The Court of Magistrates (Goza) (Superior Jurisdiction) (Family Section) Regulations (hereinafter referred to as LN 397 of 2003 as amended) which designate particular procedures to be followed and adhered to in specif ic scenarios.

Civil Court (Family Section)

MEDIATORS AND CHILDREN'S ADVOCATES

Children advocates have already been introduced by custom by the Judge and the Court, however the role of the mediator has been a recent innovation. The point to note is that, now, recourse to mediation has become mandatory. In other words, whereas in the past the parties had a choice whether to resort to mediation or not, today there must be mandatory recourse to mediation in basically all areas.

- Regulation 9 of L.N. 397 of 2003 states that disputes between parties whether married or otherwise, concerning the custody and maintenance of, or visitation rights, to their children have to go through compulsory mediation. Furthermore even questions related to maintenance between spouses or variations of any matter regulated by any judgment of personal separation or by a deed of a personal separation, one has to first undergo to the mediation process.

So strictly speaking there is a sort of filter of going to mediation before going to the Family Court.

- Article 3 (1) (a) of L.N. 397 of 2003 defines mediators as "...experts in family matters ... who In the opinion of the Minister have the necessary qualities to undertake the functions assigned to mediators by these regulations". They are therefore appointed by the Minister following, however, consultation with the judge or judges sitting in the Civil Court (Family Section).

Civil Court (Family Section)

MEDIATORS AND CHILDREN'S ADVOCATES

The appointed mediators form a panel that is divided into two lists:

1. A panel consisting of mediators from which the parties by mutual consent may select to act as mediator between them; and
2. A panel consisting of a list of persons appointed by the Court on a roster basis to act as mediators.

Mediators are to discharge the duties of their office faithfully and impartially and (they are) not to divulge any information that may come to their knowledge through the performance of their duties. Questions relating to possible challenges to the mediator or to requests to abstain from acting as such are to be decided by the judge (or magistrate in the case of Gozo) hearing the particular case.

ON WHAT GROUNDS CAN A MEDIATOR ABSTAIN OR BE CHALLENGED?

The regulations referred to above state that these are the same ones on which a judge may be so challenged or request to abstain i.e. the grounds referred to in Article 734 of the COCP. It is important to note that if a party fails to appear for mediation sittings without a justified reason, the Court, in deciding the matters before it, is to take into account also such failure.

Civil Court (Family Section)

MEDIATORS AND CHILDREN'S ADVOCATES

On the other hand children's advocates are experts in family law being persons in possession of the warrant to practice as advocates and which are appointed on a panel in the same manner as mediators.

From such a panel the Court will appoint a children's advocate to follow a given case and see to the interests of any minor children involved.

Children's advocates have to perform their duties in the same manner as mediators and may also be challenged or ask to abstain in the same manner as mediators. .

Civil Court (Family Section)

INSTITUTING PROCEEDINGS FOR PERSONAL SEPARATION

THE PAST SITUATION

Before the coming into force of the relevant provisions of Act XXXI of 2002 and L.N. 396 and L.N. 397 of 2003, which became operative on the 16th of December 2003, the old Article 37 (]) of the Civil Code required a spouse who wished to initiate proceedings for personal separation to first file an application (rikors) in the Second Hall of the Civil Court to obtain leave/authorisation from such court to proceed with the separation.

When the application (rikors) is filed in the Second Hall, the Court will verify such application and only after it grants the required and requested permission/authorisation may the parties proceed to the separation (either before the First Hall of the Civil Court if contentious or under the authority of the Civil Court Second Hall if voluntary

Under this system the judge sitting in the Second Hall had the task/duty to attempt a reconciliation of the parties.

If such reconciliation does not bear the desired fruits and proves ineffectual, consequently the judge proceeds to authorise the applicant to initiate proceedings for personal separation.

Civil Court (Family Section)

INSTITUTING PROCEEDINGS FOR PERSONAL SEPARATION

THE PRESENT SITUATION

The new procedure is contemplated in Regulation 4 of L.N. 397 of 2003 entitled AUTHORISATION TO PROCEED TO INITIATE PROCEEDINGS FOR PERSONAL SEPARATION which provides the following steps:

1. The filing of a letter in the Registry of the Civil Court (Family Section); Such letter must be addressed to the Registrar;
2. The letter must contain and state the name and address of both the spouse filing the letter and of the other spouse;
3. In the letter there must be a request to the Court to authorise the spouses to proceed with personal separation proceedings;
4. Such letter must be signed and filed by the party personally or by an advocate or legal procurator on behalf of such party.

Civil Court (Family Section)

THE MEDIATION STAGE

WHO IS ENTRUSTED TO EXERCISE MEDIATION

Under the old regime, Article 37 (2) of the Civil Code allowed the Judge sitting in the Court of Voluntary Jurisdiction to authorise the applicant to initiate proceedings for personal separation only if the recommendations of the Court of Voluntary Jurisdiction for a reconciliation of the spouses shall prove ineffectual.

Presently, reconciliation is the main task and duty incumbent upon the persons appointed as mediators. These persons will seek to introduce, by means of dialogue with the respective spouses and between themselves, a solution to the dispute/conflict existing between the parties in order for them to resolve such and ultimately reconcile.

MEDIATION IS COMPULSORY

An important fact that must be borne in mind is that mediation is not discretionary either upon the parties or upon the Court. Mediation is obligatory upon everyone who initiates personal separation proceedings.

There is no exception whatsoever, even if the parties have been de facto separated for a substantial number of years or have been victims of domestic violence, still they have to appear before a mediator and go through the mediation process. However as regards the mediation proceedings there is no power vested on the mediator to enforce attendance of the parties as the court does in its sittings.

Civil Court (Family Section)

THE MEDIATION STAGE

FREEDOM TO SELECT MEDIATOR

- Regulation 3 (1) (a) (i) of L.N. 397 of 2003 states that the spouses are allowed to choose a person to act as a mediator between them. However, such selection must be made by mutual consent and not unilaterally. Moreover, such selection must be made from that list of persons who are qualified to act as mediators.

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WHEN MUTUAL CONSENT IS NOT FORTHCOMING

What happens when the spouses do not agree on the selection of a mediator?

- Regulation 3 (1) (a) (ii) of L.N. 397 of 2003 caters for this instance and provides a second list of persons qualified to act as mediators who are appointed by the Court. Thus, in case the spouses fail by mutual consent to decide on a particular mediator, the Court intervenes to appoint one for the parties to take care of the particular case.

Civil Court (Family Section)

THE MEDIATION STAGE

THE CHILDREN'S ADVOCATE

During the sittings held with the mediator there may also be present a children's advocate who is described as a person "...expert In family law" and "...being a person in possession of the warrant to practice as an advocate."

The children's advocate forms part of a panel appointed in the same way as in the case of the panel of mediators.

However a children's advocate will only be appointed where the Court deems it expedient so to do, either of its own motion, or at the request of the mediator, or of either of the spouses, to represent the interests of any minor children of the parties.

During the mediation stage a children's advocate may be appointed to assist and safeguard the interests of any minor child or children of the parties who may be, directly or indirectly, adversely affected by the spouse's personal separation procedures.

Civil Court (Family Section)

THE MEDIATION STAGE

WHEN AND IF MEDIATION SUCCEEDS

The mediator is therefore there to attempt to reconcile the parties. If he succeeds in so doing he is to make a note to that effect in the records of the case (i.e. illustrating/stating that the mediation process has produced positive results).

Consequently he has to transmit the records to the judge who will then close the proceedings.

To this end he is to hear the parties that he may do so in camera - separately or together - in the presence of their advocates or legal procurators, and he may also hear any minor children of the spouses, the child re n's advocate, if any, and the advocates or legal procurators of the parties.

To further aid the reconciliation process anything said during these meetings cannot be produced as evidence in separation proceedings should these become inevitable.

Here we see that when the parties succeed in resolving the diversities that exist between them through the process of mediation and eventually reconcile, the mediation phase comes to an end and also the personal separation proceedings cease to take place because there is no conflict surviving between the spouses. Consequently, if the conflict were settled through conciliation, then the obvious subsequent step would be to terminate the proceedings.

Civil Court (Family Section)

THE MEDIATION STAGE

WHEN AND IF MEDIATION SUCCEEDS

Regulation 6 (a) of L.N. 397 of 2003 entitled CONSENSUAL SEPARATION contemplates the scenario where the parties by mutual consent, without the assistance of a mediator, agree to enter a deed of personal separation.

The procedure in this case is the following:

1. The spouses have to file a note addressed to the registrar signed by their notary (who drafted the deed) and by their advocates or legal procurators;
2. Such note must be filed either in the Civil Court (Family Section) or, in the case of Gozitans, in the Court of Magistrates (Gozo) (Superior Jurisdiction);
3. If the parties mutually agree, they indicate the name of a mediator in such note; and
4. Along with such note there must be attached a draft of the deed.

Civil Court (Family Section)

THE MEDIATION STAGE

WHEN AND IF MEDIATION SUCCEEDS

However, it must be said that such scenario and such procedure do not dispense with the figure of the mediator and the function of mediation.

- Regulation 6 (b) of L.N. 397 of 2003 - the Court, upon receipt of the note shall refer the matter to a mediator, either selected jointly by the parties from the first panel and indicated by them in the note, or assigned by the Court.

Civil Court (Family Section)

THE MEDIATION STAGE

WHEN AND IF MEDIATION FAILS

However, if mediation does not prove to be promising the mediator does not declare that his office Is terminated or that the mediation stage Is over, but:

1. he has to make a further effort and mediate between the spouses so to make them reach an agreement to enter a deed of personal separation by mutual consent.
2. If, in this particular task, the mediator succeeds, he has to transmit to the judge a draft deed of the personal separation agreement along with the comments, if any, of the advocates representing the parties, or their legal procurators and also his (the mediator's) own upon such draft agreement.
3. The draft deed is transmitted for the grant of the authorisation of the judge, which authorisation the judge may also give in camera.
4. It is only if the mediator fails in both attempts that the judge will be able to give the required authorisation.
5. Furthermore, it must be stated that the office and functions of the mediator do not stop merely because the spouses do not either reunite or else do not enter a deed of personal separation.

The mediator may be said to have another third function and this is to assist the parties to try and reach an agreement as to the payment of an amount of maintenance, the residence in the matrimonial home, the custody and visitation rights over or vis-a-vis the minor children.

- All this is spelled out in Regulation 9 (1) (a) of L.N. 397 of 2003.

Civil Court (Family Section)

THE MEDIATION STAGE

DURATION OF MEDIATION

As a general rule, mediation is to endure for two (2) months following the filing of the letter requesting the authority of the Court to initiate personal separation proceedings.

However, the Court may order the mediation period to run for a longer period.

Moreover, mediation may not take all the two (2) months if the mediator is of the opinion that the spouses are unlikely to reconcile or to enter an agreement for personal separation by mutual consent. In such a case the mediator is bound to communicate such in writing to the judge, either before the lapse of the two-month period or before such longer period as aforesaid.

Civil Court (Family Section)

PROVISIONAL ORDERS ISSUED BY THE COURT PENDENTE LITE

A major development has been that, any party may during the pendency of the procedures in the conciliation, mediation, pre-trial or trial stages, request the Court to make such provisional orders or to issue such writ or warrant as may be necessary to safeguard its interest.

To this end it may be necessary to consider amongst others Article 37 of the Civil Code which empowers the Civil Court (Family Section) to issue decrees determining the amount of an allowance of maintenance which will be payable by one spouse to the other pending proceedings as well as who of the spouses is to reside in the matrimonial home during the separation proceedings.

Such decrees shall be deemed as executive titles and therefore enforceable upon the person against whom they are addressed. However, such decrees are always subject to revocation, alteration or review pending the proceedings.

Moreover, with respect to maintenance the Court may direct that such be paid directly to the one spouse from the salary of the other spouse.

Civil Court (Family Section)

THE PRE-TRIAL AND TRIAL PERIODS

- Once the necessary authority has been granted, proceedings are to be instituted within two months unless the Court is satisfied that there are grave reasons that justify the institution of proceedings within a longer span of time.
- Once proceedings are initiated and the written procedures are completed, the Court is to appoint a children's advocate.
- The pre-trial period then starts, and there is a lapse of time to be determined by the Court during which the parties are to produce all documentary evidence and those witnesses whose evidence cannot be produced by affidavit.
- Though the Court determines the length of the pre-trial period, it cannot be longer than one year except in such circumstances that the Court deems to be grave enough to warrant a longer period.
- Once all the evidence and witnesses referred to have been produced, or once the established time limit lapses, the pre-trial period comes to an end and the Court will then fix a date for the trial.

It is interesting to note that if any difficulty is encountered in the liquidation of the community of property between the spouses, the Court may leave such matter to be determined at the end and proceed to give judgment on the remaining questions. The Court may also encourage the parties to enter into an arbitration agreement to solve this question though the agreement would be subject to the approval by the competent court of the arbitration agreement and of the arbitrator to be appointed. During proceedings the Court will retain the power to give such provisional orders as it may deem fit, and may likewise, where grave reasons or change of circumstances so necessitate, alter or revoke such orders. This could be made on demand of either spouse.

Civil Court (Family Section)

OTHER CASES IN WHICH SPECIAL PROCEDURES APPLY

The procedure to be followed in case of a consensual separation depends on how the spouses come to enter into a deed of personal separation.

If the deed of separation is entered into otherwise than in this manner provided by law, then the spouses have to file a note to that effect signed by their notary and their respective advocates or legal procurators in the Civil Court (Family Section).

A mediator becomes involved in the process even here, as he is to advice the Court as to how to proceed in respect of the deed that he is to examine.

Leave from the Court is required not only in the case where one of the spouses wishes to initiate separation proceedings but also in a number of other cases:

1. Disputes between parties, whether married or otherwise, concerning the custody and maintenance of, or visitation rights to their children; or
2. Maintenance between spouses; or
3. Variations of any matter regulated by any judgment of personal separation or by a deed of personal separation; or
4. Variation of any agreement reached in disputes between parties, whether married or otherwise, concerning the custody and maintenance of, or visitation rights to their children.

Civil Court (Family Section)

OTHER CASES IN WHICH SPECIAL PROCEDURES APPLY

In such cases leave from the Court is required to initiate proceedings and a request to such effect has to be made in the same manner as when either spouse wishes leave to initiate separation proceedings.

Prior to the Court granting authorisation to proceed, the parties have to go through a mediation stage in an attempt to help the parties reach an agreement.

The appointment of the mediator and formalities with regards to mediation are the same as in the case of personal separation.

If the mediator succeeds in brokering an agreement, such agreement is to be recorded in writing and filed in the records of the proceedings, which are then to be transmitted by the mediator to the Court.

If, however, the mediator proves unsuccessful he is to inform the Court and leave will then be g ranted to the parties to institute proceedings. However no time limits are provided for as to how long the mediation is to go on.

The proceedings during the pre-trial and trial periods are conducted in the same way as in the case of personal separation though it is up to the Court to give judgment on all points at issue and therefore, unlike in the case of personal separation, it may not suggest to the parties to have recourse to arbitration.

Civil Procedure

Lecture Title: The Court of Voluntary Jurisdiction and the Family Section

Diploma in Law (Malta)

Lecturer: Dr Martina Caruana

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