

# Principles of Civil Law

## Lecture Title: Effects of Marriage, Personal Separation and Divorce

Lecturer: Dr. Carina Nagiah

Date: 10th October 2023



**Diploma in Law (Malta)**



CAMILLERI PREZIOSI  
ADVOCATES

MAMO TCV  
ADVOCATES

# Who is regulated by the Civil Code?

- The Civil Code regulates **PERSONS**.
- Persons could be of two types:
  - i. The Natural persons (i.e. humans, and therefore the Civil Code regulates aspects of family law, succession law etc)
  - ii. The Legal persons (i.e. Organisations, NGOs, Foundations etc)



## Natural Persons under the Civil Code include:

1. Effects of Marriage under Maltese Law
2. Personal Separation
3. Divorce
4. Filiation
5. Adoption
6. Parental Authority
7. Minority and Tutorship
8. Majority, Guardianship, Interdiction, Incapacitation
9. Absentees
10. Acts of Civil Status



# Effects of Marriage in terms of Law

- Reciprocal duties of Spouses: The Law promotes the unity and stability of the family.
- Obligations of Spouses:
  1. Equal rights and equal responsibilities during marriage
  2. Spouses owe each other fidelity and moral and material support.
  3. Duty to contribute towards needs of the family.
  4. Both spouses are bound, each in proportion to his or her means and of his or her ability to work whether in the home or outside the home as the interest of the family requires, to maintain each other and to contribute towards the needs of the family.



# Matrimonial Home

- **Definition of Matrimonial Home:** The matrimonial home shall be established where the spouses may by their common accord determine in accordance with the need of both spouses and the overriding interest of the family itself.

There could be two scenarios, as far as ownership is concerned:

- Scenario where the Matrimonial Home is jointly co-owned
- Scenario where the Matrimonial Home is owned by one of the spouses.

In either scenarios, the law is clear, in the sense of transfer of the the matrimonial home to third parties is only possible:

1. Either with the consent of other spouse or
2. If consent is unreasonably withheld with the authority of the competent court
3. In a judicial sale by auction by the creditors of both or one of the spouses



# Matrimonial Home *continued*

- Can a spouse change the lock of the Matrimonial Home pending separation proceedings?
- The answer is a clear NO. This applies even in cases where the matrimonial home is solely owned by one spouse.
- There is possibility of obtaining a Court Order pending proceedings.
- What happens if one spouse changes the lock without the consent of the other? This amounts to a criminal action, under Article 85 of the Criminal Code:

*85.(1) Whosoever, without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, shall, of his own authority, compel another person to pay a debt, or to fulfil any obligation whatsoever, or shall disturb the possession of anything enjoyed by another person, or demolish buildings, or divert or take possession of any water-course, or in any other manner unlawfully interfere with the property of another person, shall, on conviction, be liable to imprisonment for a term from one to three months.*

- *Il-Pulizija vs. B. Piscopo* (decided 21<sup>st</sup> July 2022 per Mag. Dr Charmaine Galea)



# Maintenance towards Children and Vice-Versa

- Parents are bound to look after, maintain, instruct and educate their children;
- The children are bound to maintain their parents or other ascendants, who are indigent.

Powers of the Court in such cases and how does this work?

It shall be lawful for the court, in urgent cases, to condemn any of the persons liable for maintenance, in whatever degree, to supply maintenance, reserving to such person the right to claim reimbursement from such other persons as, according to the said order, were bound to supply such maintenance.



# Other Obligations of Maintenance: Siblings

The liability for maintenance shall extend to Siblings, of the full or half-blood, only in default of other persons liable for maintenance.

Where a sibling has received maintenance, and, within ten years of the last supply thereof, becomes able to repay the amount so received, that sibling shall be bound to repay such amount to the person supplying the maintenance, provided the demand for reimbursement be made within the said time.





# What does maintenance cover?

- Maintenance shall include food, clothing, health and habitation.
- In regard to children and other descendants, it shall also include the expenses necessary for health and education.
  
- Concrete examples:
  1. Different Judges = different orders as to quantum
  2. Cost of Living increase
  3. Half expenses or Not?
  4. Lump sum Payment

# Obligations of Parents towards Children

- 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.
- During personal separation proceedings or care and custody proceedings, this leads to issue of Maintenance towards the Children.
- Both parents are bound 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.



# Maintenance towards Children

- There is no pre-determined sum and there are no guidelines.
- In the case *Georgina Schembri pro et noe vs Dino Schembri* (413/2000/1) deciża fit-28 ta' Novembru 2002, the Civil Court (Family Section) ruled that:

*“L-obbligi ta’ manteniment tal-konjugi huma regolati bl-artikolu 3 tal-Kap16...jirrizulta mid-disposizzjonijiet tal-Liġi, li l-ġenituri għandhom l-istess obbligi versu l-ulied tagħhom, u għalhekk it-tnejn li huma għandhom jikkontribwixxu għat-trobbija tal-istess, aktar u aktar meta illum il-mizewwġin huma f’posizzjoni ta’ ugwaljanza u għandhom l-istess drittijiet, u allura anke skont l-artikolu 2 tal-Kap 16, “jerfgħu responsabbilitajiet indaqs matul iż-żwieġ tagħhom” (Ara ukoll *Jennifer Portelli pro et noe vs John Portelli* (Rik Nru 2668/1996) deciża fil-25 ta’ Ġunju 2003).*

# Maintenance towards the Children *continued*

- Possibility of one parent to have maintenance deducted automatically from one's salary:

*Hija il-fehma konsiderata ta' din il-Qorti illi wara li qiset ic-cirkostanzi kollha tal-kas, inkluż l-introjtu taz-zewg genituri, illi r-retta alimentari xierqa għall-minuri għandha tkun ta' €300 fix-xahar, mifhum illi hawn non si tratta ta' missier illi qiegħed fuq paga minima. Di piu', din il-Qorti ma jidhrilix, f'dan l-istadju tal-proceduri, li din ir retta alimentari, għandha b'ordni ta din il-Qorti tigi direttament maqtugħa mill-paga tal-intimat il-ghaliex dan jista ikollu konsegwenzi pegorattivi fuq l-employment history tal-intimat. Kemm-il darba, wara ordni ta' hlas ta' retta alimentari jirrizulta illi l-intimat naqas repetutament li jhallas tali retta, allura kien ikun hemm ragunijiet validi għal tali ordni.*

(Rikors Medjazzjoni Numru: 1194/2020JPG in the names JC vs DA, dated the 18th December 2020)



# Maintenance towards Spouses

- Despite the Civil Code, provides for an obligation of spouses to maintain financially one another, upon separation, there is an improved mentality with respect to this, and this owing to the fact, that today the trend is that both spouses work independently outside home.
- Issue of older people separating. This trend does not apply.
- Issue Social Security Contributions
- The Court in the judgment AB vs CDB, decided on 24th June 2021, per Madame Justice Abigail Lofaro (Pending Appeal) held:

*ħadmet* *Fid-dawl ta' dan il-Qorti ma hiex f'posizzjoni illi serenament tasal għall- konkluzzjoni illi l-konvenuta rikonvenzjonanti jeħtiġielha fil-prezent tigi mantnuta mill-attur, u dan tenut kont illi: (i) l-konvenuta dejjem u hija finanzjarjament indipendenti, (ii) il-konvenuta fil-prezent għadha taħdem bħala għalliema fuq bazi full-time b'introjtu tajjeb u mill-atti ma rrizultax li għandha xi impediment milli tibqa' taħdem, u (iii) sa minn Settembru 2014, u ċjoe' meta l- attur ma baqgħax jirrisjedi fid-dar matrimonjali, il-konvenuta qatt ma resqet talba sabiex pendente lite għal kawza ta' separazzjoni tingħata manteniment għaliha.*

*Għaldaqstant il-Qorti f'dan l-istadju, u rebus sic stantibus, ma tarax li l-konvenuta għandha tipperċepixxi manteniment minn għand l-attur u dan ġialadarba hija finanzjarjament indipendenti u m'għandha l-ebda l-mpediment milli taqla' l- għixien tagħha b'mod indipendenti bħalma għamlet għal dan l-aħħar zmien. Madanakollu u fi kwalunkwe l-kaz, il-Qorti tikkjarifika li minkejja tali ordni, dan ma għandux ifisser li l-konvenuta qiegħda b'xi mod titlef il-jedd tagħha li fil-futur titlob manteniment minn għand l-attur u dan f'kaz ta' tibdil fiċ-ċirkostanzi li jikkonstringu lill-konvenuta titlob lill-zewġha għajnuna finanzjarja permezz ta' manteniment.*



# Choice of Surnames following Marriage

- The law has been regularly been changed in this regard, and in terms of an amendment made in 2020, the situation is:

The spouses shall, upon marriage, elect:

- (a) to adopt for both of them the surname of either one of the parties to the marriage; or
- (b) to adopt for both of them the surnames of both parties in the order of their choice; or
- (c) to adopt, for any one of the spouses, the surname of the other spouse, after which that spouse may add his or her surname; or
- (d) to retain, for any one of the spouses, his or her surname, after which that spouse may add the surname of the other spouse; or
- (e) retain their own surname



# Choice of Surname *continued*

- There are limitations though:
- The combination of the spouses' surnames shall not result in a surname which is longer than the combination of four surnames.
- When the surname of any one or both of the spouses already has a combination of two or more surnames, the order of the surname of that spouse shall be retained, and the spouses shall not change such order and, or drop any part of their own surname.



# Surname of Children

- Act No. LXII of 2020 had relaxed tremendously the choice of surname to be given to children.
- Children today may assume the surname of both parents, or of one of them, provided that a joint application be filed to the Public Registry.
- This means that there could be a situation where children are given the surname of the Mother only; provided that there is an agreement beforehand of the two parents.







## Diploma in Law (Malta)



CAMILLERI PREZIOSI  
ADVOCATES

MAMO TCV  
ADVOCATES

# Separation

- How can one obtain separation?

Two methods:

1. A Notarial Deed
2. A judgment

Pros and Cons?



# Mediation Proceedings

Mediation procedure is not regulated by the Civil Code, as there is a separate legal instrument, that is: SUBSIDIARY LEGISLATION 12.20

Any party wishing to proceed to initiate a suit for personal separation or divorce against the other spouse shall first demand authority to proceed from the Civil Court (Family Division), the Court of Magistrates (Gozo) (Superior Jurisdiction)(Family Division) as the case may be, each of such courts hereinafter in this regulation called the "Court", by filing a letter, in the case of personal separation, or by filing an application, in the case of divorce, as the case may be, to that effect in the registry of the Court addressed to the Registrar, stating the name and address both of the person filing the letter as well as that of the other spouse, and requesting the Court to authorise him or her to proceed. Such letter shall be signed and filed by the party personally or by an advocate or legal procurator on behalf of such party.

Where authority to proceed for personal separation or divorce is granted by the Court, it shall be lawful for either spouse to bring a suit before the Court, or counter claim for personal separation or divorce, as the case may be, on the same or any other of the grounds mentioned in the Civil Code as if such leave referred to both parties on all of the said grounds.

Before granting such leave the Court shall summon the parties to appear before a mediator, either appointed by it or with the mutual consent of the parties, and 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, may appoint a children's advocate to represent the interests of any minor children of the parties



# What happens at Mediation?

- Mediation Sittings are held at the Family Court
- Without Prejudice and in confidence
- Assistance Of Lawyers
- Opportunity to seek Court Orders pendente lite
- Validity and strength of such court orders
- What happens if parties reach an agreement? = CONTRACT
- What happens if parties cannot reach an agreement? = Authorisation to file a court case



# Role of the Mediator

- The Mediator shall in the first place attempt to reconcile the parties. During this stage the mediator shall hear the parties.
- Where parties fail to reconcile the mediator shall mediate between them in an effort to reach an agreement to enter a deed of personal separation by mutual consent.
- Where the mediator manages to reconcile the parties he shall make a note to that effect in the records of the case, and transmit the records to the judge who shall thereupon close the proceedings.
- Where the parties have not reconciled, but they have through the office of the mediator or otherwise agreed to enter into a deed of personal separation by mutual consent, the mediator shall transmit to the judge a draft of the deed of personal separation, together with any comments thereon by the advocates or legal procurators of the parties, the children's advocate, if any, and his views, for the grant of the authorisation by the judge.



# Grounds for Separation

- By separation, the obligation of cohabitation of the spouses shall cease for all civil effects.
- Separation may be granted on any of these grounds:
  - i. Adultery
  - ii. Grounds of of excesses, cruelty, threats or grievous injury on the part of the other against the plaintiff, or against any of his or her children
  - iii. on the ground that the spouses cannot reasonably be expected to live together as the marriage has irretrievably broken down
  - iv. if, for two years or more, he or she shall have been deserted by the other, without good grounds



# Actions of Personal Separation are extinguished by:

1. Reconciliation of the spouses or
2. By the death of one spouse during separation.

Nonetheless, if the case of personal separation gives rise to rights to heirs, the personal separation case may be continued.

Example: if the spouse who is separating from the other spouse nominated one of his children as heir, the heir may have an interest in pursuing the case of personal separation for liquidation of community of acquests.



# Domestic Violence

Domestic Violence is defined as: all acts or omissions including verbal, physical, sexual, psychological or economic violence causing physical and, or moral harm or suffering, including threats of such acts or omissions, coercion, or arbitrary deprivation of liberty, that occur within the family or domestic unit, whether or not the perpetrator shares or has shared the same residence with the victim, and shall include children who are witnesses of violence within the family or domestic unit.

This definition is not found in the Civil Code, but in Chapter 581 of the Laws of Malta, Gender Based Violence and Domestic Violence Acts.

What constitutes domestic violence?

- i. Physical Abuse
- ii. Verbal Abuse
- iii. Psychological Abuse
- iv. Financial deprivation
- v. Sexual Abuse Etc





# Domestic Violence *continued*

Where domestic violence is involved the court may, of its own motion before or after hearing the parties, issue a protection order under article 412C of the Criminal Code and, or a treatment order under article 412D of the same Code and the provisions of those articles shall mutatis mutandis apply to an order issued under this article as if it were an order issued under the corresponding article of the said Code



# Orders given *pendente lite*

## A. Who to reside in the matrimonial home?

During the pendency of the action for separation, either spouse, whether plaintiff or defendant, may leave the matrimonial home and may, whether or not he or she has left the matrimonial home demand that the court shall determine who of the spouses if any shall reside in the matrimonial home during the pendency of such action.

## B. Maintenance

During the pendency of the action for separation, either spouse, whether plaintiff or defendant, may demand from the other spouse a maintenance allowance in proportion to his or her needs and the means of the other spouse, and taking into account also all other circumstances of the spouses.



# Orders given *pendente lite* *continued*

## C. Children

During the pendency of the action the court shall give such directions concerning the custody of the children as it may deem appropriate, and in so doing the paramount consideration shall be the welfare of the children:

Provided that in cases where there is evidence of domestic violence, the Court may limit or deny access to the children if such access would put the children or the other parent at risk



# Best Interest of the Minor Children

This is the paramount notion in Family Law

The Civil Court (*Family Section*) in the case: **CM v MM** deciza mill-Onorabbli Qorti tal-Familja, nhar it-30 ta' Gunju 2015, fejn il-Qorti tenniet hekk:

*“Fi proceduri gudizzjarji li jincidu fuq id-drittijiet ta’ minuri, il-Qrati taghna ghandhom setghat pjuttost wiesgha u flessibbli sabiex iharsu bl-ahjar mezz possibbli d-drittijiet tal-persuni taht l-eta’ magguri. Dan naturalment in omagg ghall-principju kardinali illi l-persuni l-aktar vulnerabbli fis-socjeta’ ghandhom jircevu l-akbar protezzjoni possibbli mill-organi kollha tal-istat.” F’dik l-istanza il-Qorti kompliet hekk: “Meta si tratta ta’ drittijiet tal-minuri vis-à-vis d-drittijiet tal-genituri l-Qorti hija fid-dover li tqis dejjem dak li hu fl-ahjar interess tal-minuri u dan peress li fil-maggor parti tal-kazijiet li jitressqu ghad-decizzjonijiet tal-Qorti tal-Familja, kull decizzjoni immankabilment thalli effett duratur fuq il-hajja tal-minuri u fuq il-hajja ta’ dawk ta’ madwar il-minuri.”*

On a similar note, in the case **AB vs CD** decided on the 23rd February, 2018 (230/16AL):

Il-Qorti għaldaqstant, għandha s-setgħa illi jekk ikun fl-ahjar interess tal-minuri, tafda wieħed biss mill-genituri bil-kura u l-kustodja tal-minuri u dana ai termini tal-Artikolu 56 tal-Kodiċi Civili. Illi kif kellha l-okkażjoni ttenni din il-Qorti diversi drabi, l-interess tal-minuri huwa iprem mid-drittijiet tal-genituri. **“Il-Qorti tirrileva illi filwaqt li dejjem tagħti piż għad-drittijiet tal-genituri, l-interess suprem li żżomm quddiemha huwa dejjem dak tal-minuri, kif anke mgħallma mill-ġurisprudenza kostanti tagħna hawn ‘il fuq iċċitata.”**



# How does the best interest of the Child apply in practice?

1. Care and Custody award
2. Visitation rights and access
3. Supervised access
4. Residence of the Minor Children
5. Travel of the Minor Children
6. And any other aspect which could be debated



# Effects of Separation

The spouse who shall have given cause to the separation on any of the grounds referred to above shall forfeit:

- the things which he or she may have acquired from the other spouse by a donation in contemplation of marriage, or during marriage, or under any other gratuitous title;
- any right which he or she may have to one moiety of the acquets which may have been made by the industry chiefly of the other spouse after a date to be established by the court as corresponding to the date when the spouse is to be considered as having given sufficient cause to the separation.
- 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.



# Effects of Separation *continued*

## Liquidation of Community of Acquests

1. Firstly we need to define what is community of acquests
  - Income and whatever the parties acquire during marriage
  - Issue of bank accounts
  - Vehicles
  - BUT Donations and inheritance does not make part of community of acquests



# How does the Court liquidate the Community of Acquests?

1. Firstly parties have to bring forward proof such as: bank representatives, Transport Malta representatives, Malta stock exchange, Jobs plus et.
2. The Parties may ask for the appointment of experts like architects, accountants, etc.
3. On the basis of the proof collected, the Court will order the liquidation and split of community of acquests.





# Matrimonial Home *continued*

In pronouncing the judgement of separation, the court shall on the demand of either of the parties, order, according to circumstances:

- that any one of the parties shall be entitled to reside in the matrimonial home, to the exclusion of the other party, for the period and under those conditions as it considers appropriate; or
- that the matrimonial home is to be sold, where it is satisfied that the parties and their children shall have adequate alternative accommodation, and that the proceeds of the sale shall be assigned to the parties as it considers appropriate; or
- where the matrimonial home belongs to both parties, to assign the matrimonial home to any one of the parties, which party shall compensate the other party for the financial loss suffered



# Matrimonial Home *continued*

- What happens in personal separation regarding the matrimonial home?
  1. Valuation of the Property
  2. Rights of Credit of one spouse or of both spouses
  3. Cases where the Matrimonial home is owned by one spouse
  4. Sale to third Parties
  5. Cases of Domestic Violence (urgent requests to the Court)
  6. Changing of Locks

# Matrimonial Home *continued*

- Judgment in the names AB vs CDB (184/2017AL), decided on 24th June 2021, per Madame Justice Abigail Lofaro (Pending Appeal)
- The Family Court has wide powers to determine the fate of the Parties:
- *Il-Qorti tevalwa li: “(i) l-attur nstab ħati għat-tkissir taz-zwieġ, stante adulterju u nġurji gravi, (ii) l-attur għandu introjtu tajjeb minn Mount Carmel Hospital, (iii) għandu residenza alternattiva ġewwa “Flat XXXXXXXXXXXX” li tagħha jhallas il-kera u ilu jagħmel dan sa mill-2015, (iii) il-konvenuta ma nstabietx ħatja għat-tifrik taz-zwieġ, (iv) il-konvenuta m’għandhiex residenza alternattiva u lanqas il-fondi neċessarji sabiex takwista fond residenzjali alternattiv, u (v) il-konvenuta fl-affidavit tagħha stess talbet illi għandha tibqa’ tgħix ġewwa l-fond matrimonjali in kwistjoni “almenu sakemm ibni jispicċa l-istudji kollha tiegħu”.<sup>94</sup> Fid-dawl ta’ dan, il-Qorti temmen li jkun ġust illi l-konvenuta rikonvenzjonanti flimkien ma’ uliedha u ad esklużjoni tal-attur, tingħata d-dritt ta’ abitazzjoni tad-dar matrimonjali għal zmien massimu ta’ ħames (5) snin mid-data li din is-sentenza tgħaddi in ġudikat.*

*Dan il-perjodu huwa bizzjed kemm għall-konvenuta sabiex tibda taħseb u ssib residenza alternattiva, u kif ukoll għall-attur sabiex jagħmel tajjeb għall-aġir adelturuz tiegħu fil-konfront ta' martu b'dana illi ma jigix ipprivat ingustament u indefinittivament minn dak li ai termini tal-ligi jappartjeni lilu. Wara dan it- terminu ta' ħames (5) snin, il-proprjeta' in kwistjoni għandha titpoġġa għall-bejgħ fis-suq miftuħ bl-għamara li hemm fih, bi prezz maqbul bejn il-partijiet jew bi prezz stabbilit permezz ta' average ta' valutazzjoni ta' 3 estate agents li jingiebu wieħed minn kull parti u wieħed bi ftehim bejniethom b'dan li kull parti jkollha d-dritt li takkwista n-nofs sehem indiviż tal-parti l-oħra għall-istess prezz offrut lil terzi jew għal kwalunkwe prezz ieħor miftiehem bejn l-istess partijiet. Ir- rikavat għandu jigi maqsum ugwalment bejn il-partijiet."*



# Matrimonial Home *continued*

- Can a spouse change the lock of the Matrimonial Home pending separation proceedings?
- The answer is a clear NO. This applies even in cases where the matrimonial home is solely owned by one spouse.
- There is possibility of obtaining a Court Order pending proceedings.
- What happens if one spouse changes the lock without the consent of the other? This amounts to a criminal action, under Article 85 of the Criminal Code:

*85.(1) Whosoever, without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, shall, of his own authority, compel another person to pay a debt, or to fulfil any obligation whatsoever, or shall disturb the possession of anything enjoyed by another person, or demolish buildings, or divert or take possession of any water-course, or in any other manner unlawfully interfere with the property of another person, shall, on conviction, be liable to imprisonment for a term from one to three months.*

- *Il-Pulizija vs. B. Piscopo* (decided 21<sup>st</sup> July 2022 per Mag. Dr Charmaine Galea)



# Power to Decide the Fate of Children

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



- The Court may, for grave reasons, at any time during the cause for separation, and or, divorce, or when the parties are separated and, or divorced, upon the demand of one of the parties, or of its own motion declare that the other party is not fit to have the custody of the minor children of the parties, and where the Court issues such a declaration, the party so declared, upon the death of the other party, shall not be entitled to assume the custody of the minor children without the authorisation of the Court:
- Provided that evidence of domestic violence shall constitute a grave reason for the purposes of this article.





# Power of the Court to Suspend Proceedings

The court may, where it shall deem it expedient so to do in the interest of the spouses and the children, order the suspension of the action of separation for such time as it may deem proper, and give such interim directions as circumstances may require.

The decree ordering the suspension of the action, or giving such interim directions, shall be subject to appeal





# Separation by Mutual Consent

(1) Personal separation may, subject to the authority of the court by means of a decree in accordance with article 35, be effected by mutual consent of the spouses, by means of a public deed.

(2) The court shall, before giving its authority, admonish the parties as to the consequences of the separation, shall endeavour to reconcile them, and may revoke, modify or add those conditions it may deem fit.

(3) This decree shall have the same effect of the judgment given by the competent court.

What does a deed of consensual separation contain?

1. All aspects regarding the Minor Children
2. Liquidation and split of Community of Acquests



# Surname following Separation

The spouses may, on separation, choose to revert to their surname at birth or to the surname at the time of their marriage.

In the case of a consensual separation, a declaration of such choice shall be made in the public deed of separation, and in the case of a judicial separation, by a note filed in the records of the case before final judgment.

The court may, at the request of one of the spouses, which may be made at any time before judgment, prohibit the other spouse from continuing to use the former's surname after separation, where such use may cause grave prejudice to the spouse requesting the prohibition.



# Third Party interests and Reunion

Personal separation shall only be operative in regard to third parties from the day on which the judgment or the public deed, as the case may be, shall have been registered in the Public Registry.

The spouses separated whether by a judgment or by mutual consent may at any time reunite, and thus put an end to the effects of separation, wholly or in part, saving any right which third parties may have acquired.

Voluntary cohabitation shall operate as a reunion, and shall restore the obligations of cohabitation and of maintenance arising from marriage

Any other effect of the separation, however, shall not cease except in virtue of a public deed.

*Example:* Assignment of Property on separation contract is not reversed unless the Parties do not enter into a public deed.

In all cases, the effects of the separation shall not cease in regard to third parties, except from the day on which the deed is registered in the Public Registry.



# Divorce

Divorce was introduced in the Civil Code through Act XIV.2011.9 in 2011.

The Law provides that

Each of the spouses shall have the right to demand divorce or dissolution of the marriage. It shall not be required that, prior to the demand of divorce, the spouses shall be separated from each other by means of a contract or a judgement.

2) The divorce or dissolution of the marriage shall be granted by virtue of a judgement of the competent civil court, upon the demand of one or the other of the spouses, or by a decree of the same court where the spouses shall have agreed that their marriage should be dissolved.

(3) All demands for divorce shall be brought before the Civil Court (Family Section). The decrees and judgements of divorce shall be pronounced in open court.



## The Requirements for Divorce are:

Divorce shall not be granted except upon a demand made jointly by the two spouses or by one of them against the other spouse, and unless the Court is satisfied that:

- upon a demand made jointly by the two spouses, on the date of commencement of the divorce proceedings, the spouses shall have lived apart for a period of, or periods that amount to, at least 6 months out of the preceding year:
- Provided that when the demand is made by one of the spouses against the other spouse, on the date of commencement of the divorce proceedings, the spouses shall have lived apart for a period of, or periods that amount to, at least one year out of the preceding two years; or
- on the date of commencement of the divorce proceedings, the spouses are separated by means of a contract or court judgment; and
- there is no reasonable prospect of reconciliation between the spouses; and
- the spouses and all of their children are receiving adequate maintenance, where this is due



# Differences between Separation and Divorce

## 1. Divorce is No Fault:

Where an application for divorce is made by one of the spouses, it shall not be necessary for the spouse making the demand to impute to the other party any fault leading to the making of such demand

2. The Effects are different: while divorce enable one to re-marry, mere separation does not enable one to re-marry



# Possibility to convert separation proceedings into divorce

Each party in a cause for separation may, at any time during the cause, but not after the cause has been adjourned for judgement, demand, by means of an application, that the demand for separation made in that cause be instead considered as a demand for the pronouncement of divorce.

In such scenario, the Court shall convert the first plea, from separation to divorce, while continue to take cognisance of the other pleas.



# Duties of the Lawyer in cases where the applicant is not already legally separated

The advocate assisting the applicant shall, before commencing divorce proceedings, where the spouses are not separated by means of a contract or a court judgement:

- (a) discuss the possibility of reconciliation with the applicant and give the applicant the names and addresses of persons qualified to offer assistance in the process of reconciliation between spouses; and
- (b) ensure that the applicant is aware of the option of personal separation as an alternative to divorce
- (c) The lawyer is bound to present a Note in the same acts confirming that he has informed his / her client of the above





Where a demand for divorce is made to the Family Court by either of the spouses, or by both spouses after having agreed that their marriage is to be dissolved, and where the spouses are not separated by means of a contract or a court judgement, before granting leave to the spouses to proceed for divorce, the court shall summon the parties to appear before a mediator, and this for the purpose of attempting reconciliation between the spouses, and where that reconciliation is not achieved, and where the spouses have not already agreed on the terms of the divorce, for the purpose of enabling the parties to conclude the divorce on the basis of an agreement.

The said agreement shall be made on some or all or of the following terms:(a) the care and the custody of the children;(b) the access of the two parties to the children;(c) the maintenance of the spouses or of one of them and of each child;(d) residence in the matrimonial home;(e) the division of the community of acquests or the community of residue under separate administration



# Inadmissable Evidence

Any verbal or written communication made between the spouses or made by a third party in the course of an attempt at reconciliation or for the purpose of an agreement being reached between the spouses, shall not be admissible as evidence during divorce proceedings



# Effects of Divorce

1. Spouses shall have the right to remarry
2. The pronouncement of divorce shall have no effect upon the rights and obligations of the parties as parents in respect of their children or upon any agreement reached between the parties in respect of the custody of their children
3. The pronouncement of divorce shall have no effect upon the rights of third parties arising out of any agreement or obligation already concluded, or still to be concluded, by the divorced parties



*continued*

4. The obligation of cohabitation of the parties shall, for all civil effects, cease.
5. The right of the spouse to the succession of each other.

### **Effects of Re-Marriage**

- When the party receiving maintenance, whether by virtue of an order of the court or by virtue of a contract of separation, remarries or enters into a personal relationship which brings about an obligation of maintenance by a third party in favour of that party, the same party shall forfeit the right to receive maintenance payable in respect of that party by the other party in the divorce, with effect from the date of the remarriage or of the commencement of the other relationship.





## Diploma in Law (Malta)



CAMILLERI PREZIOSI  
ADVOCATES

MAMO TCV  
ADVOCATES