

Principles of Civil Law

Cohabitation and Matrimonial Regimes

Lecturer: Dr. Rosanna Ciliberti

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Diploma in Law (Malta)



CAMILLERI PREZIOSI

Discussion

Law vs Society – what is the difference ?

Imagine two people cohabiting for 25 years: should they have the same rights as a married couple in terms of inheritance and property division? Why or why not?

Malta historically placed great importance on marriage. Do you think the increase in cohabitation is weakening the institution of marriage, or simply diversifying family life?



Case Study

Joseph and Elena lived together in Malta for **22 years**. They never married, but they shared a home, pooled resources, and raised two children. The house was legally registered in Joseph's name, because he had bought it before they met.

Joseph suddenly passed away without leaving a will. Under Maltese succession law, his property is inherited by his children and not Elena. She is left with no legal claim over the house she had lived in for over two decades, despite having contributed financially and emotionally to the family.



Questions

1. Should Elena have any legal right to remain in the home or benefit from Joseph's estate? Why or why not?
2. Does the Cohabitation Act (provide enough protection in such cases, or does it still leave partners vulnerable?
3. Would marriage have changed the legal outcome here? If yes, does that show the law *privileges* marriage over other family forms?
4. Do you think people like Joseph and Elena *should have registered their cohabitation* to protect themselves, or should the law automatically protect long-term cohabitants regardless?
5. From a human rights perspective, is treating Elena differently from a widow fair?

Questions

4. Do you think people like Joseph and Elena *should have registered their cohabitation* to protect themselves, or should the law automatically protect long-term cohabitants regardless?
5. From a human rights perspective, is treating Elena differently from a widow fair?



Cohabitation

Historical and Legal Model

Traditional Family Models in Maltese Law – Marriage as the core.

Shift in Society – Rise in non-marital relationships.

First Legislative Recognition – Cohabitation Act (2017).

Key Reforms – Cohabitation Act (2020), Chapter 614

Chapter 614 Cohabitation Act

Article 2 “cohabitant” means a person who is continually and habitually living with another person in the cohabitation home as a couple, and who enters into a public deed of cohabitation with the other person, provided that he is not already legally bound to another person;

“cohabitation home” means that home within which the cohabitants live together, belonging to either one of the cohabitants or to both of them, in whichever portion, and whether or not they possess it by title of lease or any other title, whether jointly or separately;

Cont.

“Court” means the Civil Court (Family Section) or any other Court which from time to time, shall have the competence to decide on family matters

“dependent child” means the children of the cohabitants, or of any one of the cohabitants, or in regard to whom any one of them is acting in loco parentis, and who still have the right to receive maintenance from the said cohabitants.



How is cohabitation established?

Article 3

(1) *Persons who have the intention of cohabiting, or persons who are already cohabiting, and who want to be governed by the provisions of this Act, shall regulate their cohabitation by means of a public deed of cohabitation in conformity with the provisions of this Act.*

(2) *The cohabitation shall have effect from the date of the publication of the public deed of cohabitation with regard to the cohabitants, and from when it is enrolled in the Public Registry with regard to third parties.*



Nullity of a public deed establishing cohabitation:

A public deed of cohabitation made between the following persons are null:

- (a) persons, one of whom has not attained the age of eighteen (18) years, unless that person is so authorised in the same way one is authorised to get married.
- (b) ascendants and descendants in the direct line;
- (c) siblings, from the same parents, or from one of the parents;
- (d) the person adopting and the adoptee;
- (e) persons, one of whom is unable to give his consent for the public deed due to civil interdiction or incapacitation, or the lack of the use of reason;

Cont.

(f) persons, one of whom, or both, who are married or are in a civil union, either between themselves or with third parties, whether in Malta, or in any other country;

(g) persons, one of whom, or both, who are bound by a previous public deed of cohabitation in accordance with this Act, together or with third parties;

(h) persons, or anyone of them, who are bound by a registered or unilaterally declared cohabitation in accordance with the Cohabitation Act, together or with third parties;

(i) persons, or any one of them, who are in a relationship with third parties which is already regulated by a foreign law that provides for the rights and obligations between themselves, irrespective of its title,

Cohabitation

De Facto Cohabitation – informal with no registration

Registered Cohabitation – formal recognition through notarial deed and registration

Article 5 (1) Any clause of the public deed of cohabitation that in any way breaches any provision of this Act, or that in any way provides for the manner in which such cohabitation shall be dissolved, shall be considered as null and void.

(2) The parties must declare before the notary that there is nothing precluding them from entering into a valid public deed of cohabitation in accordance with this Act, and the notary is obliged to record this declaration in the said deed.



Cohabitation

3) The parties shall provide the notary with a free status certificate issued in accordance with article 251(3) of the Civil Code, or an equivalent document duly issued by the competent foreign authority, as the case may be, and such certificate or document shall be officially issued not more than ninety (90) days prior to the publication date of the public deed of cohabitation, and shall be attached to the said deed:

Provided that the document equivalent to a free status certificate shall be issued by the competent authority in that country which issued the said document.



Cohabitation

(4) The parties must declare before the notary if they had already entered into any previous public deed of cohabitation together, which act was dissolved, and the notary is obliged to record this declaration in the said deed.

(5) The notary before whom the parties are signing the public deed of cohabitation is obliged to explain in detail to the parties the consequences of the said act, and the clauses by which the parties choose to be bound, and shall declare that he has explained the same in the said deed.



Cohabitation

(6) The notary who publishes the public deed of cohabitation shall, within fifteen (15) working days from the date of the deed, enrol the said deed in the Public Registry, in the Register kept for such purpose by the Director of the Public Registry.

(7) The Director of the Public Registry shall issue a certificate of cohabitation as prescribed in the Schedule, within twenty (20) days from the enrolment date of the public deed of cohabitation in the Public Registry, and a copy of the note of enrolment shall be transmitted to the Director of the Public Registry.



Cohabitation

Article 8 In the public deed of cohabitation, the parties shall decide upon and declare, the applicability of Part III: (*which deals with the community of assets between the cohabitants*)

Provided that if the parties fail to make such a declaration, it shall be presumed that the parties intended to exclude the application of the said Part.



Cohabitation

Article 9 (1) Without prejudice to article 45A of the Notarial Profession and Notarial Archives Act, the cohabitants may, at any time, amend or correct the public deed of cohabitation by means of a subsequent public deed with the authorisation of the competent Court:

Provided that in any case, the Court shall ensure that there is nothing in the amendments that runs contrary to the best interest of the dependent children, or that puts any one of the cohabitants in a vulnerable situation, as the case may be.

(2) In every instance where the Court is requested to give its authorisation for a deed of correction or amendment to the public deed, it shall, if it feels that it is appropriate to ensure that this is not being done abusively by one cohabitant against the other, hear the cohabitants viva voce.



Community of assets between cohabitants

Article 10 (1) In the public deed of cohabitation, the parties may establish the community of assets in accordance with this Part.

(2) Saving any other provision of the law, the right of every cohabitant to the community of assets commences from the date of the publication of the public deed of cohabitation, and ceases upon the dissolution of the cohabitation.



What constitutes the community of assets ?

Article 11 (1) The community of assets between the cohabitants shall only comprise the following:

- (a) the cohabitation home, when the acquisition is made after the public deed of cohabitation, even though the acquisition is made in the name of one cohabitant only, and even when the acquisition was made by moneys or other things which either of the cohabitants possessed prior to the cohabitation, or which, after the cohabitation, were transferred to him under any title of donation, succession, or other title, saving the right of such cohabitant to deduct the sum disbursed for the acquisition of such property:



What constitutes the community of assets?

Provided that the said cohabitation home shall not be included in the community of assets if it was transferred to either of the cohabitants under any title before the cohabitation, notwithstanding that such cohabitant may have been vested with the possession of the property only after the cohabitation:

Provided also that the said home shall not be included in the community of assets when it was transferred to either of the cohabitants by donation or succession, before or after the deed of cohabitation; and



What constitutes the community of assets?

(b) movables found in the cohabitation home, acquired after the public deed of cohabitation, even when such acquisition is made in the name of one cohabitant only, unless those movables were given to either of the cohabitants by a donation, personal gift or devolved upon them by succession from third parties:

Provided that in this article, "movables" shall include the ornamental and decorative movables kept at the cohabitation home, and shall exclude moneys, securities, vehicles, boats, and any movable which is purchased with the purpose of being used exclusively by one cohabitant.



What constitutes the community of assets?

(2) When the community of assets in accordance with the provisions of this article applies between cohabitants, all assets which do not fall under sub-article (1) of this article, shall be considered as assets belonging to the individual party.



What are the basic rights and duties of cohabitants?

Article 13.(1) A cohabitant shall enjoy from the rights listed under sub-article (2), and from other rights referred to in any other law as being applicable to cohabitants.

(2) The rights conferred to a cohabitant are the following, namely that the said cohabitant:

(a) shall have, without prejudice to the provisions of this Act, the right of habitation in the cohabitation home;

(b) shall be considered as a tenant for all intents and purposes of the law with regard to any lease of the cohabitation home constituted by contract by either of the cohabitants, after the drawing up of the public deed of cohabitation in accordance with this Act;



What are the basic rights and duties of cohabitants ?

(c) shall be regarded as having the same rights granted to a person who is married or in a civil union in terms of rights related to labour and family, including various rights related to leave, whether rights found in primary and subsidiary laws or under codes and working practices, excluding however the right of leave to accompany one's partner to courses sponsored by the government abroad;

(e) without prejudice to the provisions of the Civil Code shall have, in the event that one of the cohabitants dies during the cohabitation, the right of habitation for twelve (12) months over the cohabitation home, where the said cohabitation home is held in full ownership or emphyteusis by the deceased cohabitant, either separately or jointly with the surviving cohabitant:



What are the basic rights and duties of cohabitants ?

Provided that, this right of habitation shall cease, if the survivor contracts a marriage, civil union or enters into cohabitation with another person:

Provided also that, the right conferred in this paragraph shall subsist even where such right has the effect of reducing during the said period, the reserved portion due to any other person;

f) shall have the right to be entitled to non-contributory social assistance when the cohabitant is a person, who in the opinion of the Director of Social Services is living with the head of the family, as if they were spouses in marriage in accordance with article 30 of the Social Security Act;



What are the basic rights and duties of cohabitants ?

g)shall have the right to a widow's pension under articles 31 to 43 (both inclusive) of the Social Security Act.

(h)shall have the right upon the death of the other cohabitant, to apply for a retirement pension if he had been, or was entitled to be maintained by the deceased cohabitant under article 46 of the Social Security Act;

(i)shall have the right to payment of an age pension when both cohabitants qualify under article 66 of the Social Security Act;



What are the basic rights and duties of cohabitants ?

(j) shall have the right to receive social benefits as a foster carer in accordance with article 76A of the Social Security Act;

(k) shall have the right to sickness assistance when the cohabitant is living with the head of the family during a period when such sickness assistance is being paid, or could be paid.

(l) shall have the right to unemployment benefit and to special unemployment benefit if the cohabitant is maintaining the other cohabitant in accordance with article 30 of the Social Security Act;

(i)

What are the basic rights and duties of cohabitants ?

(m) shall have the right to maternity benefit and maternity leave benefit in accordance with articles 71 and 72 of the Social Security Act;

(n) shall have the right to the supplementary allowance under article 73 of the Social Security Act;

(o) shall have the right to children's allowance under articles 76, 80, 81 and 82 of the Social Security Act;



What are the basic rights and duties of cohabitants ?

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(p) shall have the right to allowance in respect of children in care under articles 76A, 80, 81 and 82 of the Social Security Act;

(q) shall have the right to an allowance for disabled children under articles 77, 80, 81 and 82 of the Social Security Act;

(r) shall have the right to have their dependent children live with the cohabitees in the cohabitation home, as the case may be, unless otherwise provided by an order of the competent Court



Reciprocal Rights and Duties of Cohabitants

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14.(1) The cohabitants shall have equal rights and shall assume equal responsibilities during their cohabitation, and shall also have the duty to support each other morally and materially.

(2) The cohabitants are bound, each in proportion to their means and their ability to work whether inside or outside the cohabitation home, as the interests of the family require, to maintain each other and to contribute towards the needs of the family:

Provided that this duty of the cohabitants shall cease upon the dissolution of cohabitation.



Duty of cohabitants towards children

1(1) Cohabitation imposes on the cohabitants the obligation to look after, maintain, instruct and educate the dependent children taking into account the abilities, natural inclinations and aspirations of the children.

(2) The obligation of the parents to provide maintenance according to sub-article (1), also includes the obligation to continue to provide adequate maintenance to the dependent children according to their means, and where it is not reasonably possible for the children, or any of them to maintain themselves adequately, due to the fact that:

(a) they are students who are participating in full-time education, training or learning and are under the age of twenty-three (23); or



Duty of cohabitants towards children

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



The Cohabitation Home

16. (1) The cohabitation home shall be established where the cohabitants may by their common accord determine in accordance with their needs and the overriding interest of the family itself.

(2) Where the cohabitation home is, wholly or in part, owned or otherwise held under any title separately by one of the cohabitants, such cohabitant may only assign by title inter vivos his right over the cohabitation home:

- (a) with the consent of the other cohabitant; or
- (b) where such consent is unreasonably withheld, with the authority of the competent Court; or
- (c) in a judicial sale by auction at the instance of any creditor of the said cohabitant.

(3) The party who has not given his consent to a transfer, may file an action for the annulment of the said transfer which has not been effected in accordance with sub-article (2), within one (1) year from the registration of the transfer.

Dissolution of Cohabitation (Article 17)

The dissolution of the cohabitation may not take place except:

- A. on the demand of one cohabitant against the other,
- B. or by mutual consent of the cohabitees.

Dissolution – decree of court judgement

Dissolution of Cohabitation

A. Article 18 Unilateral request for dissolution.

18 (1) Where an application for the dissolution of the cohabitation is made by only one of the cohabitants, it shall not be necessary for the cohabitant making the demand to impute to the other party any fault leading to the making of such request.

(2) The cohabitant making the request for the dissolution of cohabitation may, together with the same request, and without prejudice to the provisions of this article and of article 14, make all those requests that are permissible in a cause for separation in accordance with Sub- Title III of Title I of Book First of the Civil Code.

The Court may also give orders pendete lite, in the same fashion as in personal separation proceedings.

Dissolution of Cohabitation

By Mutual Consent Article 21

Authority of the Court by means of a decree, and effected by mutual consent of the cohabitants by means of a public deed. The Court has the authority prior to pronouncing itself in the decree, admonish the parties as to the consequences of dissolution, and shall try to reconcile them, and may revoke, modify or add those conditions that it may deem fit in the circumstances.

22.(1) The Court, on authorising the dissolution of cohabitation, shall in the said decree order in whose custody the children are to be placed.

(2) It shall be lawful for the Court to revoke or vary such orders at any time, in the best interest of the children

General Provisions Article 25 et seq

25.(1) When two cohabitants contract a marriage or civil union between them, the public deed of cohabitation shall be terminated ipso facto from the day on which the same marriage or civil union is contracted.

(2) The Director of Public Registry shall record an annotation of this on the Cohabitation Certificate.



Rights of action for *de facto* cohabitations

De Jure and De Facto

De Jure (Latin, meaning “by law”)

Refers to something that exists according to law and is formally recognised.

Example : Marriage in Malta is a de jure status because it is regulated, defined and protected by the Civil Code.

De Facto (Latin, meaning : “in fact”)

Refers to something that exists in practice or reality, but may not be legally recognised.

Example : An unmarried couple living together in a de facto relationship – it exists socially, but until registered under the Cohabitation Act, it lacks full legal effect.

Rights of action for *de facto* cohabitations

27. (1) A person who immediately prior to the termination of the relationship as a couple, or the other party is deceased was continually and habitually living with another person as a couple, and who has been living with the same person for a period of not less than two (2) years, and whose relationship is not regulated under any law, may, within twelve (12) months, file an application before the Court, requesting the following rights, as the case may be:

(a) the right of habitation in the common home, for a period that shall be determined by the Court, limitedly to be given time for the purposes of finding an alternative residence; or

Rights of action for *de facto* cohabitations

b) where the other person is deceased, the right of habitation in the common home, for a period that shall be determined by the Court, when the said common home is held in full ownership or emphyteusis by the deceased person, either separately or jointly with the surviving person, limitedly to be given time for the purposes of finding an alternative residence:

Provided that the right conferred in this paragraph shall subsist even where such right has the effect of reducing, during the said period, the reserved portion due to any other person;



Rights of action for *de facto* cohabitations

c) the right to be compensated for any patrimonial loss which that person may have suffered, where the other person has enriched himself to their detriment, in accordance with articles 1028A and 1028B of the Civil Code. (actio in rem verso 1028B Civil Code)

(2) During the pendency of the action, the plaintiff may demand that the Court shall determine who shall reside in the common home during the pendency of such action, whether the plaintiff has left the common home or not.

(3) The rights mentioned in paragraphs (1)(a) and (b) shall cease if the plaintiff contracts a marriage, civil union, or enters cohabitation with another person.



Rights of action for *de facto* cohabitations

(4) For the purposes of this article "common home" means that home within which the two (2) persons are living together, belonging to either one of them or to both of them, in whichever portion between them, and whether or not they possess it by title of lease or any other title, whether jointly or separately.

(5) The Court shall, in its judgment, order the Registrar of Courts to notify its judgment to the Director of the Public Registry within the period allowed for this purpose by the Court, so that the said judgment shall be registered in the Public Registry.



Cohabitations constituted by virtue of a contract

Article 31. This Act shall have no effect on those cohabitations constituted by virtue of a contract which were registered prior to the entry into force of the said Act. Such cohabitations shall remain to be regulated by the dispositions which were in effect at the time when they were constituted and registered.





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Matrimonial Regimes

Matrimonial regimes regulate the property relations between the spouses and are set out in the Civil Code (Chapter 16 of the Laws of Malta). A couple may choose a regime before or during marriage, and the chosen regime governs ownership, management, and division of assets:

1. Community of acquests (the default regime)
2. Separation of Assets
3. Community of Residue under Separate Administration (CORSA)

Community of Acquests (*kommunjoni tal-akkwisti*)

1. COA is the default system of management (*kommunjoni tal-akkwisti*) applies automatically if no other regime is chosen
2. Property acquired during the marriage (from work, savings, investments, acquisitions) becomes joint property of both spouses.
3. Exceptions : property acquired before marriage, gifts (donations), or inheritance remain personal.
4. Upon separation/divorce, whatever forms part of the COA is divided equally.



Community of Acquests

(a) all that is acquired by each of the spouses by the exercise of his or her work or industry;

(b) the fruits of the property of each of the spouses including the fruits of property settled as dowry or subject to entail, whether any one of the spouses possessed the property since before the marriage, or whether the property has come to either of them under any succession, donation, or other title, provided such property shall not have been given or bequeathed on conditions that the fruits thereof shall not form part of the acquests;



Community of Acquests

(c) the fruits of such property of the children as is subject to the legal usufruct of any one of their parents;

(d) any property acquired with moneys or other things derived from the acquests, even though such property is so acquired in the name of only one of the spouses;

(e) any property acquired with moneys or other things which either of the spouses possesses since before the marriage, or which, after the celebration of the marriage, have come to him or her under any donation, succession, or other title, even though such property may have been so acquired in the name of such spouse, saving the right of such spouse to deduct the sum disbursed for the acquisition of such property.

Community of Acquests

(f) winnings made by either or both spouses, and such part of a treasure trove found by either of the spouses, as is by law assigned to the finder, whether such spouse has found the treasure trove in his or her own tenement, or in the tenement of the other spouse, or of a third party

- (1) All the property which the spouses or one of them possess or possesses shall, in the absence of proof to the contrary, be deemed to be part of the acquests.
- (2) Any property, however, which may have come to either of the spouses under any title anterior to the marriage shall not be included in the acquests, notwithstanding that such spouse may have been vested with the possession of the property only after the marriage

What is paraphernal property?

The management of paraphernal property shall appertain exclusively to the spouse to whom such property belongs.

For the support of the family, the spouses shall first use income deriving from common property before income belonging to one of them exclusively, and they shall first use capital which is their common property or belongs to the community of acquests before the capital belonging exclusively to one of the spouse.

Community of Acquests – Administration

Ordinary Administration (Day to Day Management)

Article 1322

Parties act jointly in the interest of the community and the benefit of the family .

2. Either spouse may perform acts of ordinary administration such as

- * paying household expenses
- * managing bank accounts
- * collecting income for the benefit of the community
- * covering maintenance and children's needs

Community of Acquests – Administration

Extraordinary Administration (acts of greater importance that might effect the community) consent of both spouses is required – Article 1322 (2) Civil Code

Such as, acts that risk diminishing or encumbering the estate, or loans of immovable property, or disposal of business assets.

If one spouse acts without consent, the act may be annulable at the request of the other spouse.

Community of Acquests – Administration

It follows that any other act which is not described in this list, is an act of ordinary administration, which are better described as the day to day running of affairs.

Extraordinary – e.g. acquisition or alienation of real rights over immovable property, borrowing or lending money (excluding bank deposits), transfer of a business concern.

Community of Acquests – Administration

Article 1324 Normal acts of management of a trade, business or profession being exercised by one of the spouses, shall vest only in the spouse actually exercising such trade, business or profession even where those acts, had they not been made in relation to that trade, business or profession, would have constituted extraordinary administration.

At first this article seems to go against the reasoning of the COA, especially when business and trade happens on a daily basis. So in order to determine whether the acts of trade etc, fall under this article, one has to examine the nature of each individual person's business, in order to determine whether such is a normal act of management.



Community of Acquests – Administration

In J & E Ltd. Vs Jesomnd Sant (2007) – a case dealing with an acquisition of an immovable, thus falling under extra ordinary adminsitration.

The court noted that :

*“dan jibqa’ hekk sakemm dak l-att ma jkunx ukoll wieħed li jitqies ri-entranti fl-**“atti normali ta’ ġestjoni ta’ kummerċ, negozju jew professjoni”** għal liema jirreferi l-Artikolu 1324 tal-Kodiċi Ċivili li, dan, “ma japplikax għal kull att tal-kummerċ kif definit mill-Kodiċi tal-Kummerċ iżda kien japplika biss fil-każ ta’ persuna li tkun qed teżercita kummerċ, negozju jew professjoni bhala attivita` ekonomika u li fiha l-kuntrattazzjoni taht eżami setgħet tinkwadra ruħha bħala att normali tal-ġestjoni taghha”*

Community of Acquests – Administration

In another case, the court stated that Article 1324 should be interpreted widely, and that certain acts need not be performed habitually, but an act which would be expected in order to perform the course of the business, trade or profession in accordance to the requirements of such.

If one of the spouses does not give his/her consent for an an act of extraordinary administration, the spouses requested may apply to the competent court for authorisation.

If one spouse performs an act without consent, (Article 1326) in certain cases the act can be annulled, and with some other acts there can be no nullity.



Community of Acquests – Administration

A spouse can be excluded from the administration of the community of acquests if

- A) Is not competent to administer
- B) Has mismanaged the community

In such cases the administration shall vest exclusively in one spouse. But that same spouse who are excluded may request the court to be reinstated in the administration.

E.g. If one spouse shows a lack of interest in a family business on which the family depends.

Separation of Estates

By a public deed.

Each spouse retains ownership and control of their property , both present and future.

Consent of the other party is not required.

If the spouses, separate, divorce or die each spouse shall be deemed to own the property in his or her name.

Debts incurred by one spouse shall also be the responsibility of such and creditors may not turn unto the other spouse to make good for such debt.

CORSA

(community of residue under separate administration)

A hybrid system, incorporating but the COA and the Separation of Estates .

Public deed is required.

Each spouse administers and manages his/her own properties, separately and independently. No consent is required for acquisition or disposal.

Upon termination of the marriage though, the residue is divided equally between the spouses.



CORSA

(community of residue under separate administration)

If any property is acquired jointly, then it shall be also administered jointly.

CORSA may be terminated

- a) Mutual consent by a public deed with court authority
- b) Upon dissolution of a marriage (separation included)
- c) When one of the spouses is excluded from the administration of the community
- d) Upon death

CORSA

(community of residue under separate administration)

Example of how it works in practice :

Husband – owns €10,000

Wife – acquired an immovable property worth €35,000

The residue is amassed together and divided equally between both spouses

CORSA

(community of residue under separate administration)

Even though both spouses can act independently, each still has a direct interest on what the other spouses is doing. Why ?

Another interesting fact about CORSA is that no spouse can transfer any paraphernal property gratuitously without the consent of the other spouse.

Questions ?





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