

Principles of Civil Law

Lecture Title: Community of Property,
Possession and Succession

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Diploma in Law (Malta)



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Law of Property

Article 489 of Chapter 16 of the Laws of Malta: *The community of property exists where the ownership of one and the same thing, or of one and the same right, is vested pro indiviso in two or more persons.*

The fullest right of any person over a thing is the right of ownership , but there are also other rights such as **real or personal rights**.

Ownership – the full and complete right of dominion over property, the legal right to the possession of a thing. An independent and general right of a person to control a thing he possesses- therefore, enjoyment, disposition and recovery. Subject to no restrictions unless imposed by law. E.g. expropriation.

Law of Property

The right to use a thing and enjoy its fruits, the rights to exclude others from using the thing, disposing of the thing, and the right to destroy the thing.

Thing & Right – I can own a thing but somebody else can have a right over the same thing.

The object which is subject to the community or property, which can be a right or a thing. A thing is tangible whilst on the other hand a right is an entitlement which a person has over a thing. Hence, there can be a co-ownership either of the thing itself or of the same right.



Law of Property

Co-ownership – when a right or a thing is shared.

This can arise:

1. By agreement between the parties
2. By Succession
3. By operation of the law

Ownership

Article 320 of Chapter 16 of the Laws of Malta

“Ownership is the right of enjoying and disposing of things in the most absolute manner, provided no use thereof is made which is prohibited by law.”

Article 321 of Chapter 16 of the Laws of Malta

“No person can be compelled to give up his property or to permit any other person to make use of it, except for a public purpose, and upon payment of a fair compensation.”

Article 323 of Chapter 16 of the Laws of Malta states - that ownership of land carries with it ownership of what is above and under it.



Rights

Different modes of rights, such as usufruct, use and habitation.

Definition of Usufruct (the right of use): Article 328 of Chapter 16 of the Laws of Malta

“ Usufruct is the real right to enjoy things of which another has the ownership, subject to the obligation or preserving their substance with regard both to matter and to form”

Right of usufruct can be constituted either by law or by will of man (Article 330), can also be conditionally or for a specified period (Article 331).

Cont.

Termination of the Usufruct

1. By death of the usufructuary
2. By the expiration of the time for which it was constituted
3. By the merger or reunion of usufructuary and owner
4. By non-user of the right during thirty years
5. By the total loss of the subject of the usufruct

Right of Easement

Article 400 Chapter 16 of the Laws of Malta

Definition of 'easement' – “ *an easment is a right established for the advantage of a tenement over another tenement belonging to another person, for the purpose of making use of such other tenement or of restraining the owner from the free use thereof.*”

Easements are created either by law or by act of man. By law for public utility established by special laws or regulations. For private utility e.g. arising on the situation of the property.

Easements can be continuous or discontinuous, apparent or non apparent, affirmative or negative.

Cont.

- Continuous easements: without interference by man e.g. easement of watercourse
- Discountinuous easements: by interference of man, e.g. drawing of water
- Apparent easements: visible e.g. door, window
- Non-apparent easements: not visible e.g. prohibition to build a specified height
- Affirmative easements: consist in the right of making use
- Negative easements: consist in the right of restraining the owner of the servient tenement from the free use thereof.

Title V Of Community of Property (Civil Code)

Already made reference to the Article 489

Article 490 (1) “ *The shares of the co-owners shall, unless the contrary is proved, presumed to be equal*”

(2) “*Every co-owner shall participate in the advantages and burdens of the community in proportion to his share*”

Article 492 “*Each of the co-owners may compel the others to share with him the expense necessary for the preservation of the common property, saving the right of any of such other co-owners to release himself from his liability thereof by abandoning his right of co-ownership*”

Community of Property

Article 493 It shall not be lawful for any co-owner to effect any alteration in the common property without the consent of the other co-owners, even though he claims that such alteration is beneficial to all.

Article 494

(1) Where the co-owners fail to agree, the court shall give the necessary directions as to the management and better enjoyment of the common property, and may appoint an administrator, even among the co-owners themselves.

(2) The court shall give effect to the opinion of the majority. Regard being had to the total number of the co-owners, unless the co-owner/s in opposition show they will be prejudiced thereby.

Community of Property

As one can note the basic principle of the law of co-ownership is that unless it is prohibited by law the agreement between the co-owners prevails. Should the co-owners not be in agreement, the provisions of the law shall apply, taking into account the shares of each of the co-owners.

So each co-owner has a right to make use of the thing held in common, however Article 491 lists the rights of the co-owner and the use of the common property.

1.that the use be made according to the destination of the property as established be usage.

Community of Property cont.

2. That it cannot be made against the interest of the community, or such a manner as to prevent the other co-owners from making use of the common property according to their rights.

In *Paulina Stagno vs Carmelo Bugeja*, the court confirmed that through Article 491 the co-owners can make use of the thing held in common, as long as such use is not to the detriment of the other co-owners.

In *S. Caruana vs M. Genovese*, the court confirmed that Article 492 - that every co-owner may compel the other co-owners to contribute their share to the expenses necessary from time to time for the preservation of the property held in common, but they can opt to release themselves from the liability by abandoning his right of co-ownership

Community of Property cont.

Each co-owner has the full ownership of his share and of the profits or fruits thereof. He may freely alienate, assign, or hypothecate such share, and may also, subject to the provisions of article 912, substitute for himself another person in the enjoyment thereof, unless personal rights are concerned:

Provided that the effect of any alienation or hypothecation shall be restricted to that portion which may come to the co-owner on a partition.

Where the heirs in an inheritance continue to hold in common, property deriving from the succession for more than **three years** and no action has been instituted before a court or other tribunal for the partition of the property within three years from the opening of the succession and the portions of the heirs in the said inheritance are the same in respect of all the assets of the inheritance, each co-owner shall be deemed to be co-owner of each and every item of property so held in common

Community of Property cont.

Changes in property held: In *Emmanuela Farrugia et vs Nazzareno Fenech*, the court held that any of the co-owners do not have the right to make a change in the substance, which changes the nature of the object held without the consent of the others. The court in this case held that changing land in an industrial building constitutes a change in the substance.

Article 495: *“Each co-owner has the full ownership of **his share** and of the profits or fruits thereof.”*



Community of Property cont.

How can the community of property terminate?

1. By partition
2. By licitation
3. By sale of the undivided share of the common thing
4. By sale of the thing irrespective of the opposition of some of the co-owners

Community of Property cont.

What happens when co-owners are not in agreement?

Article 494 states that when a disagreement arises between the co-owners an application is to be filed in the First Hall Civil Court whereby a request is made for the court to give directions on the thing held in common and on how it should be enjoyed and administered.

Limitation:

1. If property is subject to a right of habitation, use or usufruct.
2. If in its nature the property is nor indivisible
3. When the persons holding the property deriving from succession in common agree otherwise.

Where co-owners fail to agree in respect of a sale of a thing held in common

495A. (1) *Except in cases of condominium or necessary community of property, where co-ownership has lasted for more than three years and none of the owners has instituted an action before a court or other tribunal for the partition of the property held in common, and the co-owners fail to agree with regard to the sale of any particular property, the court shall if it is satisfied that none of the opposing co-owners are seriously prejudiced thereby, authorise the sale in accordance with the wish of the majority of co-owners regard being had to the value of the shares held by each co-owner.*

The application shall be served on the co-owners who do not agree with the sale as well as on curators to be appointed by the court to represent such of the co-owners who are unknown or who cannot be traced. The registrar shall cause a copy of the application to be published in the Gazette and in one daily newspaper

Community of Property cont.

Court of Appeal, Zammit et vs Muscat, decided 5th October 2018

The decision of the First Court was overturned by the Court of Appeal.

The first court ordered the sale of one sixth of the property pertaining to the respondent whilst the Court of Appeal concluded that such sale will cause prejudice to the co-owner as she enjoyed the usufruct of the property.

Community of Property cont.

Partition of Common Property

No person can be compelled to remain in the community of property with others, and each of the co-owners may, at any time, notwithstanding any agreement to the contrary, demand a partition, provided such partition has not been prohibited or suspended by a will.

Nevertheless, an agreement to the effect that property shall continue to be held in common for a fixed period not exceeding five years is valid; and any agreement for a longer period, is null in so far as it exceeds five years.

Partition may be demanded even though one of the co-owners may have enjoyed separately a portion of the common property, unless there has been a partition or a possession sufficient to give rise to prescription.

A partition of immovable property is null unless it is made by a public deed



Partition

A co-owner possessing property immovable by its nature adjacent to any of the immovables in community about to be divided, may demand that such immovables be assigned to him upon a valuation, provided there be other immovables in community out of which an approximately equal portion may be assigned to each of the other co-partitioners.

Any inequality of the shares in kind, where it cannot be conveniently avoided, shall be set off by the payment of a sum of money equal to the difference between the larger and the smaller share.

The shares shall be drawn by lot. Where, however, the shares of the co-partitioners are not equal, the court shall determine whether the shares are to be drawn by lot, or whether the partition is to be carried out by assignment in whole or in part.

Community of Property cont.

Sale by Licitation

Where common property cannot be divided conveniently and without being injuriously affected, and compensation cannot be made with other common property of a different nature but of equal value, it shall be sold by licitation for the purpose of distributing the proceeds thereof.

Any of the co-owners, whatever his share of the property, may demand the sale by licitation, where competent.

Sale by Licitation can be:

1. Consensual or
2. Under the authority of the Court

Community of Property cont.

Sale by Licitation

Consensual:

Sale by licitation which takes place with the consent of all the co-owners, is not subject to any formality, and may be made by means of any person and in whatsoever manner the co-owners may agree upon; but in any such case there is no sale until the highest bid has been accepted and, if the licitation is in respect of immovable property, until a contract is made by means of a public deed.

The same rule shall apply where, although the sale by licitation has been ordered by a judgment, the parties agree to carry it out in a manner other than that established for judicial sales by auction

Community of Property cont.

Sale by licitation under the authority of the Court:

Where the sale by licitation takes place under the authority of the court, it shall be carried out according to the rules laid down for judicial sales by auction, in so far as such rules are applicable, unless the court deems it more beneficial for the parties interested that it should be carried out otherwise.

In all cases, strangers shall be invited to bid.

The adjudication made by the registrar shall be equivalent to the deed of sale, even if the sale relates to immovable property.

Ownership and Possession

Definition of possession: the control or occupancy of a thing, with or without ownership.

Definition of ownership: legal title and the right to possess, use or transfer property.

e.g. Leasing an apartment gives possession but ownership remains with the landlord. So tenants have rights to possession under lease agreements.

Physical control (corpus) physical control over an object or immovable property and intent (animus)- the intention to possess and control the property for oneself.

e.g. Owning a car versus borrowing a car, holding someone's property temporarily.

Joint possession – as the name implies, the control or occupancy by more than one person.

Article 526 of the Civil Code: “...acts of violence or clandestine acts cannot found the acquisition of possession”

“Nevertheless, possession may commence when the violence or clandestinity ceases”

Possessor in good faith or bad faith

Article 531: (1) “A person who, on probable grounds believes that the thing he possesses is his own, is a possessor in good faith.”

(2) “A person who knows or who ought from circumstances to presume that the thing possessed by him belongs to another, is a possessor in bad faith.”

Article 532: “Good faith is presumed, and the party alleging bad faith is bound to prove it”

Possession cont.

Molestation in possession: refers to the unlawful interference or disturbance with someone's possession of property. Essentially, molestation in possession occurs when someone interferes with or disrupts the possessor's enjoyment and control of the property without lawful justification or permission.

e.g. trespassing or damage to property.

Thus a possessor, even though not the owner, has the right to undisturbed possession and can seek protection under the law if their possession is molested.



Possession cont.

Article 535: (1) “ Where any person is by violence or clandestinely despoiled of the possession, of whatever kind, or of the detention of a movable or an immovable thing, he may within two months from the spoilation (spoil), bring an action against the author thereof demanding that he be reinstated in his possession or retention...

(2) Such reinstatement shall be ordered by the court even though the defendant be the owner of the thing of which the plaintiff had been despoiled.



The rights and obligations between the possessor and the owner:

Mainly the rights of the owner are:

1. The right to recover possession, provided any legal conditions (e.g. lease term)
2. The right to transfer and sell
3. The right to use and control, which might be restricted through possessor's rights.
E.g. lease
4. Right to protect the property e.g. legal action to prevent or stop any misuse or damage by the possessor.

The rights and obligations between the possessor and the owner

Rights of possessor:

1. Right to peaceful enjoyment. A lawful possessor has the right to enjoy the property without interference from the owner or third party, as long as they respect the terms of possession.
2. Protection against molesation: e.g. a tenant has a right to privacy in a rented space, and the landlord generally cannot enter without notice.
3. Right to maintain the property: difference between meliorations which can be removed and decorative expenses.

The rights and obligations between the possessor and the owner

Article 545 defines necessary, useful and decorative expenses.

1. Necessary are those without which the thing would have perished or deteriorated.
2. Useful are those which ameliorate the thing by making it more convenient, or capable of yielding more fruit, but the omission of which is not prejudicial to the thing.
3. Decorative are those which serve only to adorn the thing, without yielding more fruit, and which if omitted would not cause the thing to deteriorate. – although these can sometimes be held as useful expenses.

The rights and obligations between the possessor and the owner

Obligations of the owner:

1. Owner must respect the lawful possessor's right to use and enjoy the property.
2. Obligation to maintain property in good condition.
3. Duty to provide notice. E.g. prior notice if the owner wants to reclaim possession.

The rights and obligations between the possessor and the owner

Obligations of Possessor

1. Duty to maintain the property's condition. E.g. to maintain the property and making use of such for its intended purpose.
2. Duty to pay rent or other fees (if applicable)
3. Duty to vacate at the end of the agreement
4. Obligation to respect owner's property rights- e.g. not alter the property significantly without permission.

The rights and obligations between the possessor and the owner

The relationship between a possessor and an owner involves both rights and obligation to ensure the peaceful and lawful use of property. Legal agreements, such as leases, often clarify these terms, making it clear what each party can or cannot do. Courts can intervene if either party fails to meet their obligations or violates the other's rights.

Occupancy

Occupancy refers to the taking of possession of an object or property usually with the intent of ownership.

Article 561 " Occupancy consists in taking possession of a corporeal thing which is not, but can be, the property of any one, with the intention of becoming the owner or it."

" The occupant shall acquire the ownership thereof, unless the law provides otherwise."

The civil code makes reference to 'swarms of bees' , 'treasure troves' and 'lost property'



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Succession

- Succession is the process by which property and rights are transferred from a deceased person to their heirs or beneficiaries. Governed by the terms of the will and relevant jurisdictional laws.
- Commonly prioritizes spouses, children, parents and siblings in descending order.
- One can also contest a will which will be discussed later on.

Succession

Inheritance: An inheritance is the estate of a person deceased, and it devolves either by the disposition of man or, in the absence of any such disposition, by operation of law.

Therefore, there are two branches of succession:

1. Testate succession
2. Intestate succession

A person may only dispose his property after his death, by means of a will.



Of Testate Succession

- Civil Code Article 588 et seq Chapter 16 of the Laws of Malta
- Article 588 *A will is an instrument, revocable of its nature, by which a person, according to the rules laid down by law, disposes, for the time when he shall have deceased to live, of the whole or of a part of his property.*
- Article 589 (1) *A will may contain dispositions by universal as well as by singular title.*
(2) *It may also contain dispositions by singular title without any disposition by universal title*

Testate succession requires the existence of a will.

Of Intestate Succession

- Article 788 *Where there is no valid will, or where the testator has not disposed of the whole of his estate, or where the heirs-institute are unwilling or unable to accept the inheritance, or where the right of accretion among the co-heirs does not arise, intestate **succession takes place, wholly or in part, by the operation of law***
- **Article 789** *Intestate succession is granted in favour of the descendants, the ascendants, the collateral relatives and the spouse of the deceased, and the Government of Malta, in the order and according to the rules hereafter laid down*

Succession

- So succession refers to the transfer of property from the estate of a deceased (*deceujus*) person unto their legal successors (heirs).
- Thus a will made in accordance to law is known as testate succession
- By operation of the law known as intestate succession.
- Through a trust whereby heirs will be nomianted as beneficiaries

Heirs

Hierarchy of Succession

In intestate succession the law dictates how the estate is to be distributed among heirs.

1. Direct Line- spouses, children
2. Direct Line and Collateral – Parents and Siblings
3. Collateral Descendants – Nieces and Nephews
4. Further- Aunts, Uncles, Cousins

Wills

- **Article 654** *A will may be either public or secret*
- **Public Will**- usually drawn up by a notary public according to the wishes of the testator in the presence of two witnesses- such wills can be seachred in the public registry.
- **Secret Will**- It can be printed, type-written or written in ink either by the testator himself or by a third person. It shall be delivered to the notary, or in the presence of the Judge or Magistrate sitting in the court of Voluntry Jurisdiction. Shall be deemed to have been made on the day of delivery.
- **Privileged Will**- Wills for exceptional circumstances (e.g. wills made at sea)
- **Unica Charta** – A husband and wife may draft a will in one.

Capacity to Dispose and Receive under a will

Any person not subject to incapacity under the provisions of this Code, may dispose of, or receive property by will.

The following persons are incapable of making wills:

- (a) those who have not completed the sixteenth year of their age;
- (b) those, who, even if not interdicted, are not capable of understanding or who, because of some defect or injury, are incapable even through interpreters of expressing their will:

Provided that a will can only be made through an interpreter if it is a public will and the notary receiving the will is satisfied after giving an oath to the interpreter that such interpreter can interpret the wishes of the testator correctly;

Wills cont.

(c) those who are interdicted on the ground of insanity or of mental disorder;

(d) those who, not being interdicted, are persons with a mental disorder or other condition, which renders them incapable of managing their own affairs at the time of the will

e) those who are interdicted on the ground of prodigality unless they have been authorized to dispose of their property by the court which had ordered their interdiction.



Will Unica Charta

Article 592

(1): *A will made by the spouses in one and the same instrument, or, as is commonly known, unica charta, is valid.*

(2) *Where such will is revoked by one of the testators with regard to his or her estate, it shall continue to be valid with regard to the estate of the other.*

(3) *A will unica charta shall be drawn up in a manner that the provisions with regard to the estate of one of the testators are drawn up in a part separate from those containing the provisions of the other spouse.*

Will Unica Charta

(4) The non-observance of the provisions of sub-article (3) shall not cause the nullity of any provision of the will if it is otherwise intelligible; but the notary drawing up the will shall be liable to a fine of two hundred and thirty-two euro and ninety four cents (232.94) to be imposed by the Court of Revision of Notarial Acts.

Article 595- “It shall not be lawful for any two or more persons, other than the spouses, to make a will in one and the same instrument, whether for the benefit of any third party or for mutual benefit.”

Wills cont.

Public Will

A **public will** is received and published by a notary in the presence of two witnesses in the same manner as any other notarial instrument, in accordance with the provisions of the Notarial Profession and Notarial Archives Act, even in regard to the signature of the testator, according as to whether the testator knows how to, and can write, or not. The signature of the witnesses is in no case dispensed with whatever may be the value of the thing disposed of by the will.

Wills cont.

Secret Will

A secret will may be printed, type-written or written in ink either by the testator himself or by a third person.

Where the testator knows how to, and can write, the will shall, in all cases, be signed by him at the end thereof.

The paper on which a secret will is written, or the paper used as its envelope shall be closed and sealed.



Wills cont.

Secret Will

The notary who receives a secret will shall draw up the act of delivery, recording therein the declaration that this constitutes a secret will, on the paper itself on which the will is written, or on the paper used as its envelope.

The act of delivery shall be signed by the testator, the witnesses, and the notary.

Where the testator declares that he does not know how to, or cannot write, the notary shall enter such declaration at the foot of the act, and such entry shall be equivalent to the signature.

Wills cont.

Secret Will

A notary who has received a secret will, shall, within four working days, to be reckoned from the day of the delivery, present such will to the court of voluntary jurisdiction for preservation by the registrar.

It shall not be lawful for any person who does not know how to, or cannot write, to make any disposition by a secret will without the assistance of a judge or magistrate

Wills cont.

Privileged Will Article 673 et seq

1. In places with which communications have been interrupted by order of public authority. Wills may be received in writing, in the presence of two witnesses, by a judge, magistrate, or notary, or parish priest, or other ecclesiastic in holy order. On pain of nullity signed by the person receiving it.
2. Wills made at sea – ship registered in Malta, in writing, by the master of the person acting in his stead. Two witnesses age of eighteen or over. Null and void if such requirements are not followed. Upon return to the port of Malta, the master or person in possession shall within eight working days present to the court of voluntary jurisdiction.



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