

Notarial Duties and Functions

Lecture Title: Examination of Title

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Fundamentals for Office Assistants**

What is a title?

The legal title that an individual holds over a property is fundamentally determined by the specific manner in which the property was acquired. Ownership, as recognized under property law, is not an inherent or automatic right but a consequence of a transaction or event that confers legal authority over the property to the individual. This acquisition can occur through various means, each of which results in the establishment of distinct legal titles.

For instance, when a person purchases a property, their acquisition of title is a direct result of the transaction involving a **deed of sale**. The deed of sale serves as the formal document that evidences the transfer of ownership from the seller to the buyer, thereby granting the buyer a legal title of ownership over the property. The transfer is typically accompanied by various legal formalities, including the payment of consideration, which solidifies the buyer's proprietary rights.



Similarly, an individual may acquire property through a **donation**, as in the case where a person receives a property from their parents through a deed of donation. In this scenario, the title over the property is derived not from a commercial exchange, but rather from a voluntary transfer of ownership, often as a gift or bequest. The deed of donation functions as the official instrument that establishes the legal title of ownership in favor of the recipient, who becomes the rightful owner by virtue of the donation.

In contrast, there is also the means of **succession**, which involves the acquisition of property through inheritance. In such cases, the title to the property devolves upon the heir through the process of succession, typically upon the death of a relative. This transfer of ownership occurs in accordance with the provisions of a will or, in the absence thereof, under the laws of intestate succession. The heir inherits the property and assumes ownership by title of inheritance, which legally acknowledges their right to the property due to familial or legal ties.



Thus, the title one holds over a property is intricately tied to the method of acquisition, whether it be through purchase, donation, or inheritance, each of which establishes distinct legal grounds for the ownership and enjoyment of the property in question.



Examination of Title

Examination of Title is dealt with in:

- Article 84C of Chapter 55 of the Laws of Malta
- Legal Notice 355 of 2012 – Examination of Title Regulations of 2012



84C.(1) A notary is empowered to compile documents conducive to establishing both the title to an immovable property and the causes of preference among creditors affecting such title. He has the right to interpret the compiled documents and give advice thereon. In this Act, this process of compilation, interpretation and advice is referred to as "the examination of title" or cognate expressions.



Without prejudice to his responsibility in terms of this article, the notary shall have the right to delegate any or all of these powers to persons he deems trustworthy – usually notarial assistants.



A notary may examine title whenever he is instructed to do so by a written contract of engagement whose requisites shall be laid down by regulations.

A notary who publishes a notarial act of transfer of ownership of immovable property or other real rights over such property shall be deemed to have been instructed by the transferee to examine its title.



Provided that the transferee may, by an express declaration recorded in the notarial act, exempt the notary from the obligation imposed on him in terms of this sub-article or limit the extent of such obligation in any way the transferee deems fit.



Art. 84C(7)

(7) Notwithstanding the provisions of this Act or any law:

(a) a notary's responsibility for the examination of title shall be regulated by, and be strictly interpreted according to, this article and the regulations made thereunder;

b) where a notary examines title he shall exercise the diligence required by the regulations referred to in paragraph (a);

(c) where he examines title in terms of the regulations, he shall be deemed to have acted with due diligence.



Only the following persons may bring an action against a notary in connection with the examination of title which he has carried out:

- (i) the person with whom he has entered into a contract of engagement in terms of sub-article(4),
- (ii) the transferee referred to in sub-article (5), or
- (iii) the persons indicated in regulations which maybe made in terms of sub-article (6)



Where a notary is deemed to have been engaged to examine title by the transferee or has been engaged to examine title by any person, the said Notary may not, without the prior consent of the transferee or person who engaged him, be questioned on any matter in reference to the said examination of title, or on a property title report, or on any communication related thereto, nor may the notary be constrained to produce any document which is not available publicly, or to disclose in any manner a matter or information which may have come to the knowledge of the notary in professional confidence or in his professional capacity



(8) (a) Where a notary receives instructions in terms of sub-article (4) or where he is bound to examine title in terms of this article, he shall inform the transferee in any manner, including through verbal communication, of those facts and findings resulting from the searches and those reservations which he is specifically required to mention in terms of the regulations made under this article.

(b) Unless the transferee has already made a declaration in terms of the first proviso to sub-article (5) exempting the notary from examining the title, or where the notary records in the act in terms of the second proviso thereto that he is exempt from examining title, or the notary records in the act in terms of the third proviso thereto that he is authorized to refuse to examine title, the notary shall be deemed to have been instructed by the transferee to examine title.



Art 84C (9) The notary shall be the owner of the documents he compiles for the examination of title and shall preserve them for a period of five years. Such period shall run from the date agreed upon in the contract of engagement or if no such date was agreed upon from the date of the contract of engagement or in default from the date of the deed where the examination was made in terms of sub-article (4), and from the date of publication of the act where the examination was made in terms of sub-articles (5) or (6) and, in the case of a private writing referred in sub-article (6), from the date it is authenticated by the Notary.



An action brought against a notary by a person mentioned in sub-article (7)(d) alleging any act or omission of the notary regarding the examination of title shall be barred by the peremptory term of **five years** which starts running from the dates mentioned in sub-article (9).



(11) Nothing in this article shall preclude the notary from being engaged only to compile any of the documents referred to in sub-article (1), or to interpret or give advice on such documents which he or a third party has compiled, but this shall not be deemed to be the examination of title as defined in this article. Such a service shall be regulated by an ad hoc contract of engagement made in terms of regulations made under this article.



(12) The Minister responsible for notarial affairs shall from time to time make regulations, after consulting the Notarial Council, prescribing any matter referred to in this article including, but not limited to:

- (a) the manner in which and the extent to which a notary examines title;
- (b) the exemptions from the obligation to examine title, and the instances where and conditions under which a notary may refuse to examine title;
- (c) the applicability or otherwise of this article both to notarial acts containing transactions other than the transfer of ownership of immovable property or other real rights over such property, and to transactions referring to such property made by a private writing authenticated by a notary;
- (d) services analogous to but short of the examination of title in terms of this article;
- (e) the degree of diligence required of the notary;
- (f) the formalities of a contract of engagement; and
- (g) the facts and findings resulting from the examination of title and the reservations which the notary is required to mention to a transferee.



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Legal Notice 355 of 2012 – Examination of Title Regulations 2012



Article 4. A notary shall ipso jure be exempt from examining the title to an immovable which is the subject-matter of any of the following acts he publishes:

- (a) a donation made between persons related to each other by consanguinity or affinity in the direct line to any degree and, or to their respective spouses, and in the collateral line up to the third degree inclusively and, or to their relative spouses;
- (b) the constitution of the right of usufruct, use or habitation between any of the persons mentioned in paragraph(a);
- (c) a transfer ordered by a competent Court or tribunal;
- (d) an acquisition under any title from the Government of Malta, whatever the root of title;



(e)an acquisition under any title from the Housing Authority or other body established by law, whatever the root of title;
(f)an acquisition under any title, whatever the root of title, by the Government of Malta, by any corporate body established by law or, as may be authorized in each case by the Minister responsible for notarial affairs in terms of article 22(3)of the Act, by any partnership or any other body in which the Government of Malta or any such corporate body as aforesaid has a controlling interest or over which they have effective control;

- (g) an acquisition of the perpetual directum dominium;
- (h) a partition;
- (i) an assignment between spouses consequent to the termination of the community of acquests even where the assignment includes immovables which did not form part of the community of acquests

Article 6. The documents to be compiled for the examination of title shall consist of the following:

- (a) official searches;
- (b) official testamentary searches;
- (c) copy of the acts inter vivos and wills, extracts therefrom and declarations in terms of regulation 16; and
- (d) any other copy of a document or a plan to which these regulations refer as forming part of the searches.

(2) The documents compiled in terms of this regulation shall collectively be referred to as the searches



A notary shall ensure that the official Public Registry search be updated officially up to not more than twenty-one days prior to the date of publication of the notarial act, unless he chooses to update it through an online search, in which case he shall update the search up to not more than seven days prior to the date of publication of the notarial act



(4) (a) A notary shall not be responsible beyond what transpires from the Public Registry official search.

(b) Without prejudice to the generality of the provisions of paragraph (a), a notary shall not be responsible for any error or omission in the Public Registry official search itself, whether this results from an error or omission in the official list of numbers, or an error in the contents of a note referred to in the official list of numbers, or an error or omission in the online data the notary has downloaded.



Where there is a discrepancy between an official Public Registry search and a copy of a notarial act forming part of the searches, because the contents of a note is in conflict with the contents of the corresponding notarial act, the notary shall advise the transferee on the course of action he could take, including the possibility of referring such transferee to take further independent legal advice.



Land Registry Searches:

The Land Registry official search (Form E) shall be issued not more than two months prior to the date of publication of the notarial act.

A notary shall not be responsible beyond what transpires from the Land Registry official search.



Where there is a conflict between the Land Registry official search and a copy of a notarial act which forms part of the searches, the notary shall mention this, and he shall advise the transferee on the course of action he could take, including the possibility of referring such transferee to take further independent legal advice

Where there is a manifest discrepancy between a plan in the Land Registry official search and a plan submitted to a notary by the transferee, or one which is annexed to a copy of a notarial act which forms part of the searches, the notary shall advise the transferee to seek the services of an architect on the course of action the transferee could take.



Testamentary Searches:

Where the immovable devolved on the transferor by testate succession, the testamentary searches shall form part of the searches

Where the immovable has devolved by intestate succession on the transferor or on any of his predecessors in title, a Court decree declaring open the succession of the person from whom the immovable devolved shall form part of the searches, unless at least one of the transferors provides an affidavit of the family tree in which case the affidavit shall form part of the searches instead of the decree



A testamentary search consists of:

- the official extract of the Act of Death (Death Certificate)
- the official search relative to secret wills issued by the Civil Court (Voluntary Jurisdiction Section),
- the official search relative to public wills issued by the Public Registry including a copy of the relative notes of enrolment, and,
- saving the provisions of regulation 16, it includes an authenticated copy of the will governing the succession, if any

Where the succession is governed by a will executed abroad, it shall be the responsibility of the transferor to provide the notary with a copy of the documents relative to the last testamentary dispositions of the testator, and such documents shall form part of the searches.

Where the succession of any of the transferor's predecessors in title within the prescriptive period is governed by a will executed abroad, the notary shall rely on the declarations made in previous notarial acts relative to the immovable being transferred and, or any relevant document available in Malta and obtainable with due diligence by the notary



Where the immovable is subject to an Emphyteutical concession to which there is an exact reference in the Public Registry official search within the prescriptive period or to which there is an exact reference in the Land Registry official search, the notary shall check the terms and conditions of such concession, if the original actor register thereof is available.

Where an exact reference to the emphyteutical concession does not result from the Public Registry official search within the prescriptive period or from the Land Registry official search, the notary shall not be bound to carry out a Public Registry official search beyond the prescriptive period in order to trace the Emphyteutical concession and peruse its terms and conditions, but the notary shall inform the transferee that it is advisable to obtain a copy of the act of emphyteutical concession



Unless information is available from the searches, a notary shall not be bound to verify:

- (a) whether the immovable is covered by a valid development permit issued by the Planning Area Permits Board, the Planning Authority, the Malta Environment and Planning Authority or other competent authority or board;
- (b) whether the immovable is built according to the plans forming part of the development permit;
- (c) whether it is in conformity with building laws and regulations;
- (d) whether it is compliant with energy performance or similar regulations;
- (e) whether it is compliant with any environmental obligation, of whatever nature;
- (f) whether it is covered by trade and operation licences; and
- (g) whether it is structurally sound

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Where the official Public Registry or Land Registry searches refer to an inter vivos act regarding the immovable or to a will affecting the title to such immovable, an authenticated copy of such act and will, including all relevant documents annexed thereto, shall form part of the searches:

Provided that the notary may at his discretion obtain an authenticated extract of any act or will instead of a complete copy thereof



Prescriptive Periods:

Art 18. (1) A notary who carries out the examination of title in terms of these regulations shall be deemed to have acted with due diligence.

(2) Notwithstanding the provisions of any law to the contrary, a notary shall be deemed to have acted with due diligence in examining title if he adheres to the following:

(a) where the transferor acquired under a title capable of transferring ownership in terms of article 2140 of the Civil Code, the notary compiles the searches on the basis of the ten-year acquisitive prescription, and on the basis of the thirty-year acquisitive/extinctive prescription in all other cases, except those referred to in article 2144 of the Civil Code where he compiles the searches for the prescriptive period of forty years;



(b) where he compiles the searches on the basis of the ten-year acquisitive prescription, if he presumes good faith throughout the prescriptive period, unless it is manifestly clear to him from the searches that this is not the case;

(c) where he compiles the searches on the basis of the ten-year acquisitive prescription or on the basis of the thirty or forty-year acquisitive/extinctive prescription, if the notary presumes:

(i) continuous, uninterrupted, peaceable, open and unequivocal possession throughout the prescriptive period, unless it is manifestly clear to him from the searches that this is not the case;

(ii) there has been no cause of suspension or interruption of the prescriptive period, unless it is manifestly clear to him from the searches that there has been such cause.



For the purpose of this regulation "title capable of transferring ownership" means any onerous title, a donation, and a legacy even where the vesting of the legatee with the possession (immissjoni fil-pussess) of the immovable has not taken place:

Provided that where there has not been the vesting in possession of the legacy, the notary shall point this matter out and explain the meaning and consequence of article 845 of the Civil Code, and he may refer the transferee to take further independent legal advice.



Contract of Engagement:

Art. 19.(1) The contract of engagement shall be in writing and shall contain a description of the services a notary binds himself to provide, the standard of diligence he is to exercise, if it is different from that required by these regulations, any disclaimers and limitations, the professional fees payable and any other matter the parties to the agreement may agree upon. It shall also contain a declaration made by the person engaging the notary outlining the reason why he requires the examination of title



The contract of engagement shall be in two originals both to be signed by the notary and the person engaging the notary, and it shall bear the date of its execution. One of the originals shall be kept by the notary and the other by the person engaging him and, where more than one person jointly engage him, by one of them.

After he has examined the title, the Notary shall draw up a report in writing.

The notary's report shall include a list of documents he has compiled, his interpretation thereof and, depending on the reason why the notary examined the title, his advice to the transferee on the available courses of action, including the possibility of referring the transferee to take further independent legal advice.





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