The Functions of The Court of Voluntary Jurisdiction

Lecture Title: Succession

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Date: 5th February 2026

Undergraduate Certificate in Notarial Law
Fundamentals for Office Assistants

Introduction to Succession

Succession and The capacity to make a will are regulated by sections 588-591 & 596-598 of the Civil Code.

Article 585 of the Civil Code gives us a definition of ‘an inheritance’:

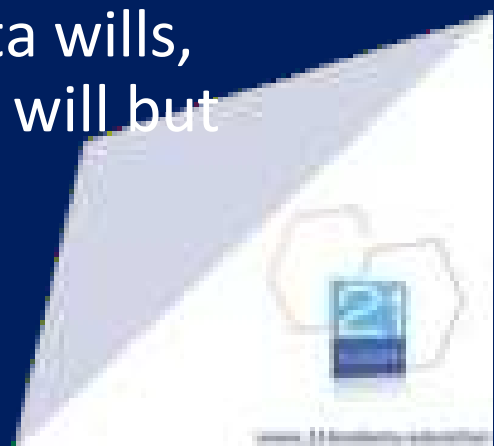
‘An inheritance is the estate of a person deceased, and it devolves either by the disposition of man or, in the absence of any such disposition, by operation of law´.

Therefore, the law is saying that one’s estate devolves either by a will (disposition of man) or else by operation of the law, namely according to the rules of intestacy in force at the time of the person’s death.

Article 588 provides “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 ceased to live, of the whole or of part of his property”.

From this definition, a number of comments can be elicited:

Firstly, one must point out the fact that a will is always revocable. A person can always revoke a will freely even if in the said will, he himself had bound himself not to revoke the will. At times, most notably in unica charta wills, there may be certain repercussions that one suffers if he changes a will but nevertheless the freedom to change or revoke a will remains.



Secondly, the law itself gives an indication that one is not always entirely free to dispose of his assets as he deems fit. There are certain instances where one is bound by certain restrictions (as we shall be seeing when discussing the reserved portion).

Thirdly, it makes it clear that the testator may dispose of either the whole of his property or part thereof. Thus, it is perfectly legitimate for a testator to dispose of part of his property and let the rest devolve in terms of his heirs-at-law.

Universal or singular title:

This is the fundamental distinction between the figure of the heir (who is left by ‘universal title’) and the figure of the legatee (who is left by ‘singular title’).

Article 589 (1) provides that a will may contain dispositions by universal as well as by singular title.

Article 589(2) further provides that it may also contain dispositions by singular title without any disposition by universal title.

Articles 590 and 591:

- A disposition by universal title is that by which the testator bequeaths to one or more persons the whole of his property or a portion thereof. The word ‘heir’ applies to the person in whose favour the testator has disposed by universal title.
- Any other disposition is a disposition by singular title. The word ‘legatee’ applies to the person in whose favour the testator has disposed by singular title.

The idea is that a legatee is often left an object (or more than one) by a singular title. The legatee’s involvement in the inheritance is only in so far as the objects in question are concerned. There is no stepping into the shoes of the decujus and no continuation of the deceased's property.

The heir/s on the other hand continue the deceased’s personality (‘una persona cum defuncto’) with all the repercussions that this entails.

Capacity to receive under a will:

Incapacity is the exception and capacity is the rule. The burden of proof is to be borne by the party alleging incapacity. Incapacity brings about the nullity of the testamentary provision in whole or in part, depending on the circumstances.

The most important article is article 596 (2):

“all children and descendants without any distinction are capable of receiving by will from the estate of their parents and other ascendants to the extent established by law.”

With the introduction of this article, there was the removal of certain incapacities, which referred to:

-illegitimate children

-adopted children

-children of second marriages

-surviving spouses

-spouses of second marriages.

To confirm these changes, article 602 clarifies that:

“all children of the testator whether born in wedlock, out of wedlock or adopted may receive by will from the testator”

Despite these amendments, there are still some incapacities to receive:

1) Those not yet conceived

Article 600 (1) provides that those who at the time of the testator's death or at the time of the fulfilment of a suspensive condition on which the disposition depended, were not yet conceived, are incapable of receiving by will.

It is important to note that the law speaks of those who were not yet conceived and NOT those who were yet born. Thus, if a father conceives a child, and whilst his wife is pregnant, he dies, then that child is still capable of receiving from his father.

It is extremely important that the testator who wishes to leave all his children as heirs must in his will include a provision to this extent:

"*the testator nominates as his heirs, all his children in equal shares between them*"

and NOT

"*the testator nominates as his heirs, his children Mary and Joseph*"

The reason is to cater for any future children that might be born to the testator. If the testator had to leave the latter disposition, and subsequently has another child then such child will not be an heir, but will only be entitled to the reserved portion.

2) Tutors or curators

Article 609 (1) states that tutors and curators may not receive by will made by the person under their tutorship or curatorship.

However article 609 (3) provides an exception to this saying that this rule shall not apply if the tutor or curator is an ascendant, descendant, brother, uncle, nephew, cousin or spouse of the person making the will.

The idea is to protect the person under tutorship or curatorship from possibly being unduly influenced by the tutor or curator, also bearing in mind that the tutor or curator will generally be receiving some compensatory remuneration for the office they are occupying. If, however, the tutor or curator is a close relative as established by law, then it is perfectly reasonable for a testator to want to bequeath something to such person.

3. Notary publishing the will.

Article 610 provides that the notary by whom a public will has been received, or the person by whom a secret will has been written out, cannot benefit in any way by such will.

The only exception to this, is found in article 12 of Chapt 55, which says that a notary can benefit from a will if such a provision is contained in a secret will not written by the said notary and it is delivered to him sealed by the testator.

Disherison:

Article 622 provides grounds whereby a testator can disinherit a descendant of even the reserved portion. This is to be done by a specific declaration in the will.

a) If the descendant has without any reason refused maintenance to the testator

b) If, where the testator has become insane, the descendant has abandoned him without in any manner providing for his care

c) If, where the descendant could release the testator from prison, he has without reasonable ground refused to do so

d) If the descendant has struck the testator, or has otherwise been guilty of cruelty towards him

e) If the descendant has been guilty of grievous injury against the testator

f) If the descendant is a prostitute without the support of the testator

In all such cases of disherison, a simple declaration in the testator's will shall not be sufficient unless it is eventually backed up by hard evidence that the reason of disherison truly exists. Otherwise, this notion could be abused of by any parent who wanted to deny a descendant of his right to the reserved portion.

Reserved Portion:

What is the reserved portion?

The reserved portion, previously called ‘legitim’, is the right in the estate of the deceased reserved by law in favour of the descendants and the surviving spouse of the deceased.

In other words, the reserved portion is the share out of a person’s estate that he is not free to dispose of as he wishes. The rest of the person’s estate is known as ‘disposable portion’.

Who is entitled to it?

It is thus clear from the outset that only two categories of persons are entitled to the reserved portion; the descendants and the surviving spouse. This is different from the position under the old law.

Article 615 (OL) used to provide that the legitim was saved to the descendants and in their absence to the ascendants of the deceased. Further down, the old law used to then distinguish between legitimate children and otherwise when it spoke of their share to the legitim

What is the amount of the reserved portion and how does it devolve upon the descendants under the new law?

The new Article 616 (1) provides that the “the reserved portion due to all children whether conceived or born in wedlock or conceived and born out of wedlock or adopted shall be one-third of the value of the estate if such children are not more than four in number or one-half of such value if they are five or more.”

It goes on to say that the reserved portion is to be divided equally among the children who participate in it, and where there is only one child, he shall get the entire amount of the one-third.

What are the rights of the surviving spouse under the new law?

Under Article 631 , the surviving spouse is entitled as a minimum to ¼ of the value of the estate in full ownership where a deceased spouse is survived by children or other descendants.

Under Article 632 , the surviving spouse is entitled to 1/3 of the value of the estate in full ownership when a deceased spouse has no children or descendants.

Furthermore, under Article 633 (1) (NL) the surviving spouse is entitled to the right of habitation over the tenement occupied as the principal residence by the said surviving spouse at the time of the death of the predeceased spouse, where the same tenement is held in full ownership or emphyteusis by the deceased spouse either alone or jointly with the surviving spouse.

What were the rights of the surviving spouse under the old law?

The surviving spouse under the old law wasn't adequately protected. Unlike the situation today where as a minimum she is entitled to 1/4 share of the full estate in ownership, in the old law when the deceased spouse left descendants (of whatever form), the surviving spouse was only entitled to the usufruct of ½ part of the estate to the deceased. This was found in Article 631 (1) OL.

The surviving spouse couldn't hypothecate or alienate, wholly or in part, this portion except when authorised by the court to do so in order for the surviving spouse to provide for his or her maintenance.

Article 633 OL then provided that the surviving spouse would only be entitled to ¼ share of the estate in full ownership on failure of there being any children or descendants. So, whereas now, this right is automatic, in the old law this right would only come into existence upon there not being any descendants.

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Acceptance and Renunciation of an Inheritance

Opening of Succession:

Article 831 provides that “a succession opens at the time of death, or on the day on which a judgment declaring a person to be presumed dead on account of his long absence, becomes res judicata”.

Thus, it must be made clear that the opening of succession is different from the acceptance of inheritance which is explained in further detail below.

When it results that a person died intestate, for his succession to devolve onto his next of kin, an application (rikors) has to be made for the opening of his succession.

After his heirs at law are established, they can accept the inheritance and go to the Notary for the publication of the Deed of Declaration Causa Mortis.

Example of application for the opening of succession

FIL-QORTI ĊIVILI (SEZZJONI ĠURISDIZZJONI VOLONTARJA)

Rikors ta’ _____

Jesponi bir-rispett:

Illi, fl-20 ta’ Marzu, 2002, miet _____, ġuvni u minghajr tfal, bin _____, skond ma jirriżulta miċ-ċertifikat tal-mewt hawn esibit (Dok. ‘A’).

Illi, skond ma jirriżulta mir-riċerki testamentarji li saru fir-Registru Pubbliku u fir-Registru ta’ din l-Onorabbli Qorti, jirriżulta li l-istess _____miet intestat (Dok. ‘B’ u ‘Ċ’ esibiti).

Illi, l-eredi skond il-Liġi ta’ l-imsemmi decuius huma ommu _____u ħutu _____, peress illi missieru miet qablu u m’hemmx tfal ta’ ħutu mejta, kif jirriżulta mill-anness arblu ġenjaloġiku debitament maħluf, hawn esibit (Dok. ‘D’).

Għaldaqstant, ir-rikorrent umilment jitlob lil din l-Onorabbli Qorti sabiex jogħġobha tiddikjara miftuħa s-suċċessjoni tad-decuius _____favur ommu _____u ħutu _____u _____, f’ishma ndaqs bejniethom.

Art 537 COCP:

537.(1) Upon the filing of the application, the court shall issue banns which shall be published in the Gazette and in at least one daily newspaper and be posted up at the entrance of the building in which the court sits, calling upon all parties interested to enter their opposition by a note, within a time of not less than eight days nor exceeding one month, to be fixed by the judge.

Art 538. At the expiration of the said time, the court, in the absence of opposition, shall examine the claim of the applicant; and if the claim appears to be justified, the court shall allow the demand and shall declare the succession opened in his favour and may, at the request of the applicant, also establish in its decree, the identity of any other person called to the inheritance and his relative share therein.

Art 539. Pending the application and until the expiration of the said time, it shall be lawful for the court to make any special order with a view to preserving such hereditary rights or property as might suffer prejudice or deterioration.

Possession of Property:

Article 836 - The possession of the property of the deceased is transferred **by way of continuation**, to the heir whether testamentary or an heir-at-law, subject to his obligation of discharging all the liabilities of the inheritance.

This article is of extreme importance and one of the fundamental principles of succession law. The idea is that the heir continues the personality of the deceased („una persona cum defuncto‟).

Thus, if a claim is to be made by for example, the creditors, the legatees or the leġittimarji, then such claim is to be made against the heir.

Art 838 - If someone else takes possession of some property of the inheritance, then the heirs in whom possession vests as aforesaid, may exercise all the actions competent to a legitimate possessor.

It sometimes happens that the persons who were living with the deceased take possession of the latter’s belongings. This is obviously not allowable and the real heirs have every right to reclaim the objects belonging to them.

Prescriptive Period for demanding inheritance, legacy or reserved portion

Art. 845 (1) -The action for demanding an inheritance, a legacy or the reserved portion, whether in testate or intestate successions, shall lapse on the expiration of **ten years** from the day of the opening of the succession.

Art. 845 (2) – “If person entitled was interdicted or minor, this time-period shall only lapse within a year from date when they attained majority or were no longer interdicted”

Acceptance of an Inheritance:

Article 846: No person is bound to accept an inheritance devolved upon him.

Article 847: An inheritance may be accepted unconditionally or under benefit of Inventory.

Article 848: A tutor, curator or parent exercising parental authority may only accept an inheritance for the person he represents under the benefit of inventory.

The idea here is to avoid a situation where a person ends up being burdened by an acceptance which was accepted for him by someone else.

Art 850(1): Acceptance may be either express or implied.

850(2): If express, then the status of heir is expressed either in a public deed or in a private writing.

850(3): It can be implied if the heir performs any act which necessarily implies his intention to accept the inheritance, and to which he would not have been entitled except in the capacity as heir. (ex: a person who helps himself to jewellery items belonging to his late father – in so doing, he's accepting the inheritance impliedly).

Art. 852 (1): Arrangements made for the funeral, acts of mere preservation, or of provisional administration, do not imply acceptance of an inheritance.

“Acts of provisional administration” could for instance include the heir paying some of the deceased’s pending bills, collecting some money due to the deceased and depositing it together with the rest of the deceased’s assets, or continuing with the carrying on of the deceased’s business.

Likewise, it’s an accepted principle that even if one pays the causa mortis duty, this is NOT an act of tacit acceptance

Renunciation of an inheritance

Art. 860: Renunciation of an inheritance cannot be presumed.

It may only be made by a declaration filed in the registry of the Civil Court (Voluntary Jurisdiction Section) OR by a declaration made by an act of notary public.

A recent amendment which has taken place in 2012 (Act 15 of 2012) is Article 860(3) which provides that the declaration of renunciation referred shall not be operative with regard to third parties except from the time when it is registered in the Public Registry. Thus, as a rule, renunciation, unlike acceptance, cannot be tacit.

Example of Application for renunciation

FIL-QORTI CIVILI TA' MALTA SEZZJONI GURISDIZZJONI VOLONTARJA

Nota ta' Rinunzja ta' Eredita'
ta' Carmen Briffa [ID 639745M],

Li biha tiddikjara li qed tirrinunzja ghall-wirt ta' ***Joseph Attard*** kien armel minn Mary nee Galea, bin Luigi Attard u Carmela nee Schembri, imwieled Gzira – kellu karta ta' l-identita' numru 220443M – li miet nhar it-28 ta' Ottubru, 2011; liema wirt iddevolva fuqha in forza tal-ahhar testment tad-*decuius* fl-atti tan-Nutar Dr. Vanessa Bonnici ippubblikat nhar l-20 ta' Ottubru, 2005; u dan minghajr ebda riserva.

_____

Carmen Briffa *[ID 639745M]*

Esibiti:

'A' ***Certifikat tal-Mewt 2689/2011***
'B' ***Ricerka Testmenti Pubblici***
'C' ***Ricerka Testmenti Sigrieti***
'D' ***Kopja ta' l-ahhar testment***

Art. 861: The heir who renounces a testate succession shall forfeit all rights to the intestate succession. However, he may in the act of renunciation, make a reservation in respect of the reserved portion of the property to which may be entitled.

In the act of renunciation, one may still reserve his rights to the reserved portion. Thus, a son who fears that his father may have a lot of debts and wishes to renounce to his inheritance, may still be entitled to share in the reserved portion. It’s important to point out that this reservation must be expressly made in the act of renunciation.

Art. 862: The heir who renounces shall be considered as if he had never been an heir.

However, the renunciation shall not deprive him of the right to demand any legacy bequeathed to him.

If this happens, the heir who renounces must then demand the payment of the legacy from the heir/s that step in instead of him.

V.IMP: Art 864:

864 (1): No person may take as the representative of an heir who has renounced.

864 (2): If, however, the person renouncing is the sole heir in his degree, or if all the co-heirs renounce, the children shall take in their own right, and shall succeed per capita.

Ex: Mr. T leaves his two children (A and B) as heirs. A has three children himself (C, D and E) whereas B has one child (F). If A renounces to Mr.T's inheritance, then his children may not represent him and B would be the sole heir.

If, however, both A and B renounce to T‟s inheritance, then the four grandchildren themselves (C,D, E and F) will succeed in their own right, per capita, which means that Mr.T's estate is divided equally between the four of them.

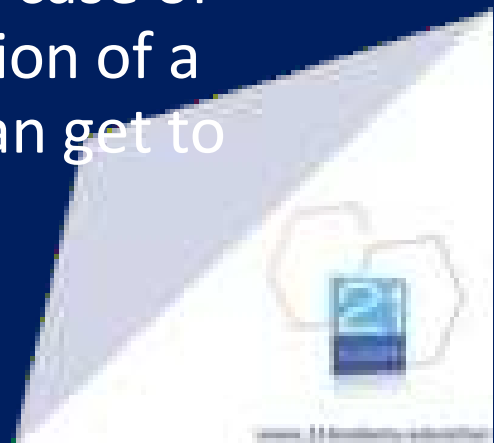
The point being made here is that the grandchildren are not succeeding as representatives of their respective fathers (who had renounced) but rather, in their own right, as grandchildren.

Types of wills

Wills are sub-divided into:

- Public Wills
- Secret Wills

The distinction between the two types of wills lies in the form and manner in which the wills are drawn, and more importantly is the fact that any person can check whether a person has made a public will, however in the case of secret wills, one can only carry out such search upon the presentation of a person's death certificate, meaning that there is no way that one can get to know whether a person has made a secret will during his lifetime.



If the testamentary searches result that the deceased had made a secret will during his lifetime, the notary is to present an application (rikors) in the Court of Voluntary Jurisdiction for the opening of the secret will.

Example of application for the opening of secret will:

FIL-QORTI ĊIVILI (SEZZJONI ĠURISDIZZJONI VOLONTARJA)

Rikors ta' **Alfred Mallia (ID.52468M)**

Jesponi bir-rispett:

Illi, fl-20 ta' Marzu, 2004, mietet oħtu, Adelina Mallia, xebba u ming]ajr tfal, bint Lorenzo u Marianna nee Vella, skond ma jirrizulta mill-anness Dok. 'A' hawn esibit.

Illi, mir-riċerka li saret, irriżulta illi fit-30 ta' Jannar, 1990, ġie depositat fir-Reġistru ta' din l-Onorabbli Qorti min-Nutar Dottor George Borg, testment sigriet ta' l-imsemmija Adelina Mallia. (Dok. 'B' esibit).

Għaldaqstant, ir-rikorrent, stante l-interess tiegħu, umilment jitlob lil din l-Onorabbli Qorti jogħġobha tiffissa data, ħin u lok għall-apertura u publikazzjoni ta' tali testment min-Nutar Dottor George Borg.

Deed of Declaration Causa Mortis

When a person benefits from the succession of a deceased, there are instances where duty is due. Up until November 1992, we did not have the concept of Declaration Causa Mortis. Before, we had ‘denunzja’ which entailed in giving a list of assets that the deceased owned to the State, and according to the value of those assets, a certain amount of duty was paid. However, this was not done by means of a public deed.

The liability to duty causa mortis arises upon a transmission of immovable property. And therefore, if the deceased did not own any immovable property, the declaration causa mortis can be dispensed with.

Duty arises irrespective of whether the beneficiary is an heir or a legatee. The issue is whether the beneficiary has inherited immovable property.

The liability is attached to each beneficiary separately and not the estate as a whole. Therefore, each beneficiary/heir/legatee may go to his/her own notary and declare the assets that he/she has inherited from the deceased.

The causa mortis deed is a declaratory deed for tax purposes. It is not a deed of transfer but rather a declaration of the assets, one has inherited.

What does a declaration of Causa Mortis include?

- Details of the beneficiaries – heirs/legatees
- Details of the deceased
- Date and place of death
- Whether the deceased died intestate or testate – including details of the last will and testament and the dispositions it contains
- Description of the immovable properties and their respective values
- Duty on documents due by the beneficiaries.

The value attributed to each property is to be the average free market value at the date of death of the deceased. If the beneficiaries declare a lower value, resulting in the payment of a lower amount of duty paid, the CFR may send its own architect to confirm or otherwise the value of the property. If it deems that the property has a higher value, a letter is sent to the beneficiaries informing them that a higher duty is due.

The CFR has a period of one year to send its own architect to value the property.

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