

Diploma in Law

Lecture 11: The Civil Court (Family Section)

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**Diploma in Law
(Malta)**

Today's lecture:

- Establishment of the Family Section
- Competence
- Procedure before the Family Section
- Mediation
- Children's Advocates
- Personal Separation
- Divorce



Establishment of the Civil Court (Family Section)

Subsidiary Legislation 12.20



The Superior Courts

- The Civil Court
- The Court of Appeal
- The Constitutional Court

The Chief Justice and judges sit in the superior courts.

One judge sits in each court (except for the CoA in appeals from the Civil Court)

The jurisdiction of the superior courts is general for the entirety of the Maltese territory.



The Civil Court

- **First Hall / First Hall Constitutional Jurisdiction**

All cases of civil / commercial nature go before the First Hall, barring those within the CoM's jurisdiction. It is also the first stop for cases seeking redress for human rights violations.

- **Voluntary Jurisdiction (previously known as Second Hall)**

This section addresses pleas regarding tutorship, interdiction, incapacitation, adoptions, opening of successions and the appointment of executors.

- **Family Section**

All cases concerning family matters go to the Family section, including *inter alia*: divorce / separation, care and custody, child abduction

- **Commercial Section**

Cases relating to the Companies Act are assigned to the Commercial Section.

- **Asset Recovery Section**

Determines cases relating to the recovery of proceeds of crime by the State or the confiscation of assets not based on convictions.

Competence of the Family Section



The Civil Court (Family Section)

The Family Section is tasked with the following sole and exclusive competence for:-

- Titles I, II, and IV of Book I of the Civil Code

Rights and duties arising from Marriage

Filiation

Parental Authority

- Maintenance Orders (Reciprocal Enforcement) Act
- Marriage Act
- Child Abduction and Child Custody Act

(by means of S.L. 12.20)

By extension - this also includes the Civil Unions Act and the Cohabitation Act

In Gozo, this competence is given to the Court of Magistrates (Gozo), in its Superior Jurisdiction (Family Section).

Title I - Rights and Duties Arising from Marriage

- Spouses shall have equal rights and responsibilities during marriage.
- They owe each other fidelity, and moral and material support.
- Upon marriage, spouses must choose their surname & their family name.
- Both are bound (in proportion to their means and abilities) to maintain each other and contribute to the needs of the family.
- The matrimonial home acquires special burdens due to its nature. Where it belongs to one spouse in whole or in part, that title can only be alienated with the other spouse's consent / court authority / judicial sale by auction.
- Both spouses are bound to look after, maintain, instruct, and educate their children.

Title I - Rights and Duties Arising from Marriage

- Both spouses are bound to provide maintenance to their children up until the age of 18 or 23 where the children are in full-time education.
- Maintenance is defined as including food, clothing, health, habitation, and with regard to children, also education.
- In examining maintenance claims, the court will consider the means of the person liable, and the claimant's abilities. It is calculated by examining the means, needs, circumstances (e.g. illnesses or disabilities), and accommodation requirements.
- The duty to maintain a spouse ends if that spouse abandons the matrimonial home with no reasonable cause.
- In default of the parents, maintenance shall devolve on any other ascendants (i.e. grandparents) and siblings (aunts / uncles).

Title I - Rights and Duties Arising from Marriage

- Children are also bound to maintain their parents / ascendants who are 'indigent' - lack basic means.
- In competing claims of maintenance, the following order must be observed:
 - children / descendants in the same order of succession
 - spouses
 - parents
 - other ascendants in the same order of succession
- Persons ordered to supply maintenance to their children can only stop (before the established age) if they file an application proving they no longer have the means to supply it. Failure to pay maintenance is a **criminal offence**.
- Maintenance obligations also cease between spouses if the other spouse contracts another marriage.

Title I - Rights and Duties Arising from Marriage

- **Separation**

Can be pronounced by a judgment or authorised by a decree, which is communicated to the Director of the Public Registry to annotate the Act of Marriage.

Can be obtained either on the demand of one spouse against the other, or by mutual consent of the spouses.

The grounds of adultery, excesses, cruelty, threats, grievous injury, or desertion (2yrs +) are valid grounds to demand separation.

The most common ground is the inability of the spouses to continue to live together, as the marriage has irretrievably broken down.

The action for separation is extinguished by the reconciliation of the spouses, or the death of either one of them.

Title I - Rights and Duties Arising from Marriage

- **Separation**

The spouse found to have given cause to the separation shall forfeit

- rights of succession
- right of habitation following the other spouse's demise
- the things acquired from the other spouse
- any share of the other spouse's assets
- the right to maintenance

The Court has the absolute discretion to apply the above to any one or both of the spouses.

Title I - Rights and Duties Arising from Marriage

- **Separation**

Separation only affects third parties from the day on which the judgment / deed are registered in the Public Registry.

Following said judgment / deed, the parties may choose to reunite, thus ending the effects of their separation.

Title I - Rights and Duties Arising from Marriage

- **Divorce**

May be requested by any one of the spouses or jointly.

Divorce does not require prior separation.

Divorce is granted by judgment or decree - which is then notified to the Director of Public Registry for registration.

Divorce in Malta is no fault - no ground needs to be attributed to the other.

If the parties are already separated, divorce **does not** amend or modify the conditions of the separation, and only the demand of dissolution may be made.

Divorce gives the right to remarry.

Divorce does not affect the rights and obligations of the parties as parents.

Title II - Filiation

Children born in wedlock

- Children born in wedlock, or at least 180 days before marriage, or no later than 300 days from dissolution of marriage, are presumed to be the children of the parents - *juris tantum presumption* that can be rebutted.
- *Mater semper certa est* - it is only the other spouse who may repudiate a child.
- The court may, in such actions, order the spouses, alleged natural parent, and child to undergo a genetic test to determine parentage.
- Such action may be dismissed by the court if it considers its effects to be adverse on the child.
- If the Court determines that the spouse is not the natural parent, the judgment shall have effect to change the child's surname (and their descendants).

Title II - Filiation

Children born out of wedlock

- Children born out of wedlock may be acknowledged by both parents jointly or separately.
- Children so acknowledged are deemed to be under the parental authority of said parents. If the interests of the child so require, the Court may exclude one or both parents from the exercise of said authority.
- Children born out of wedlock may assume the surname of any of the parents, or of both, in the order of their choosing.
- All children born out of wedlock from the same parents must be given the same surname.
- Parents have the same duties and obligations towards their children as those born in wedlock.
- The acknowledgment of a child so born may be impeached by any party, including the child.

Title IV - Parental Authority

- A child is subject to the authority of their parents.
- Authority is to be exercised jointly, and in cases of disagreement, the matter may be referred to the Court.
- Children must obey their parents and cannot leave the parental / matrimonial home without the Court's authorisation.
- Parents are the joint representatives of their children in all civil matters.
- Parents are the joint administrators of their children's property.
- Parents may only accept inheritances in their children's name with the benefit of inventory.
- Parents are bound to give an account of their administration once the child is 18 / when the parental authority ceases.
- In the event of death of one of the parents, parental authority vests in the surviving parent alone.



Title IV - Parental Authority

- Parental Authority ceases:
 - upon death
 - when the child attains the age of 18
 - ~~when the child marries~~ - **no longer applicable, marriage act amended**
 - if the child has left the parental home
 - if the surviving parent remarries without having made an inventory of the child's property and obtained the court's go ahead to continue exercising said authority
 - **partially and only with regard to matters relating to the trade** if the minor (16yrs +) obtains the Court's permission to perform acts of trade.



Title IV - Parental Authority

- Parental Authority can be removed:
 - in cases of ill-treatment or neglect
 - where the parent's conduct endangers the child's education
 - if the parent is interdicted / cannot carry out certain acts
 - if the parent mismanages the child's property
 - if the parent fails to maintain / look after the child
- The Court can remove either one or both of the parents' authority over a child if the interests of the child so require.



CAP 242 - Maintenance Orders (Reciprocal Enforcement) Act

The Act provides for the enforcement of international conventions relating to maintenance, and the international recovery of said maintenance.

The Act gives the State the right to recognise maintenance orders from other countries (reciprocating countries), and therefore gives claimants the right to pursue the debtor in Malta.



CAP 410 - Child Abduction and Custody Act

The Act provides for the ratification of international conventions relating to the **civil** aspects of international child abduction (the Hague Convention) and the recognition and enforcement of custody decisions (the European Convention).

Decisions made in contracting states may be recognised in Malta as if made by a Maltese Court and shall equally be able to be enforced.



CAP 255 - Marriage Act

- Regulates the formalities of civil marriage in Malta.
- Marriage may only be contracted between persons aged 18 or over (**2025 amendment**) with the capacity to marry, and who are not ascendant / descendant in the direct line, siblings, persons related by affinity in the direct line, or adopter / adoptee.
- Previously married / cohabitees / civil union partners may not remarry.
- Formalities to precede marriage: the publication of banns 3 months prior to the wedding.
- Registration does not validate a marriage that is null.
- The registration of the Act of Marriage is essential to give it all effects at law.
- The lack of any formality shall not lead to annulment unless the demand is made within 2 years from the wedding.
- Marriage can be contracted by proxy if authorised by the Public Registry.

CAP 255 - Marriage Act

- A civil marriage must be contracted before the Registrar / officer of the Marriage Registry and before witnesses.
- The officiant asks the spouses whether they take each other as spouse without any condition or qualification, and they shall be so declared.
- The act of marriage is signed and delivered immediately for registration.
- Marriage must be contracted in the marriage registry / on board a MT registered ship / an open public space.
- Marriages contracted abroad are valid and recognised if the formalities of that country are observed and the capacity of the parties is confirmed, and the parties are over the age of 18.

CAP 255 - Marriage Act

Annulment of Marriage

Nullity may be sought if:

- consent is vitiated (violence, fear, error of identity, fraud, defect of discretion, psychological anomaly)
- impotency prior to marriage
- consent is conditional
- either of the parties did not, at the time of contracting marriage, have the necessary powers of intellect or volition to consent

CAP 530 - The Civil Unions Act

- A civil union is a partnership between two persons which, once registered, **has the exact same effects and consequences at law of civil marriage.**
- Civil unions contracted abroad are also recognised.
- Civil union cannot be entered into if the parties are already bound by marriage or another union of equivalent legal status.
- Civil unions contracted before the Marriage Act of 2017 may be converted into marriage.



CAP 614 - The Cohabitation Act

- A cohabitation is established by means of a public deed enrolled in the Public Registry.
- Capacity of parties = same as marriage & civil union.
- Cohabitants may choose to establish the community of assets between them (inverse of marriage - it is not presumed).
- Cohabitants have rights as exhaustively listed in the Act.
- Cohabitants have obligations towards their children as if they were born in wedlock.
- A cohabitation may be dissolved either by one cohabitant against the other, or by mutual consent.
- When cohabitants marry / enter into a civil union, the cohabitation is ipso facto terminated.



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Procedure in the Family Section

Subsidiary Legislation 12.20



The Civil Court (Family Section)

The Procedure of the Family Section is regulated by:

1. the COCP; **but also** by
2. **Subsidiary Legislation 12.20 - The Civil Court (Family Section), The First Hall of the Civil Court and The Court of Magistrates (Gozo) (Superior Jurisdiction) (Family Section) Regulations.**

The **lex specialis** principle is applied, i.e. the Subsidiary legislation specifically regulates procedure related to the Family Section so it supersedes the COCP.

Where it is silent, the COCP applies.



Mediation

Subsidiary Legislation 12.20



Appointment of Mediators

Mediators form part of a panel of experts on family matters appointed by Government, who are divided in two lists:

- a list of persons from whom the parties may **together** choose a mediator of their own choosing;
- a list of persons who are appointed by the court to act as mediators on a roster basis.

Mediators' fees are paid by the parties when they choose the mediator, or by the Registrar when a mediator is chosen in line with the roster.

Mediators may request to abstain, or may be challenged to abstain from a case on the same grounds on which a judge may be recused.



Mediation

Mediation is the first step in the following proceedings before the Family Section:-

- Personal separation
- Divorce
- Civil Union
- Cohabitation
- Disputes between parties, married or not, on issues related to their children
- Maintenance between spouses
- Variations of judgments or deeds of separation or divorce
- Variations of judgments or deeds on issues related to the parties' children.

Before authorising any proceeding, the Court shall summon the parties to appear before a mediator (chosen by the parties or appointed by it).



Lir-Registratur tal-Qrati Ċivili u Tribunali
Qorti Ċivili (Sezzjoni tal-Familja)
Triq id-Dejqa
Il-Belt Valletta

14 ta' Ġunju 2024

Għażiż Registratur,

Nikteb għan-nom u fl-interess ta' _____, detentur tal-karta tal-identità bin-numru _____ ta' _____

Illi huwa miżżewweg lil _____, detentriċi tal-karta tal-identità bin-numru _____ ta' _____

Illi minn dan iż-żwieġ huma kellhom tifel bl-isem ta' _____ u ċioe' hu ta' età minorenni.

Illi tali żwieġ tkisser irrimedjabilment, u m'għadx hemm lok li jiġi rimedjat, u għaldaqstant jeżistu l-estremi kollha li trid il-ligi għas-separazzjoni personali.

Illi ma hemmx ftehim dwar l-identità tal-persuna li għandha tiġi nominata bħala medjatur.

Għaldaqstant, ai termini tal-Ligi Sussidjarja 12.20, il-mittenti _____ gentilment jitlob lill-Onorabbli Qorti Ċivili (Sezzjoni Familja) tappunta medjatur għal dan l-iskop skont il-ligi.

Nirringrazzjak tal-hin u koperazzjoni tiegħek.

Inselli għalik,

Av. Désirée Attard

← addressed to the Registrar

← contains the details of both parties & others involved (e.g. children)

← details the issue / claim (e.g. breakdown of marriage)

← informs Registrar that there is / there isn't agreement on the appointment of a mediator and requests said appointment for mediation to be opened.

Mediation

The mediator's first role is to attempt reconciliation. Should this fail, the mediator is to guide the parties towards reaching an agreement on the dispute.

Where a person summoned fails to appear for mediation, the mediator shall inform the Court, and this shall be taken in due account in its decision.

The mediator may hear the parties separately or together, in the presence of their lawyers. They may also hear the children & children's advocate if appointed.



Mediation

Anything said or proposed during mediation may not be used as evidence before the Court.

During mediation, the parties may request the appointment of a judicial assistant to receive evidence on oath.

At any point during mediation, any party may request the Court to make provisional orders as necessary.

Where a person summoned fails to appear for mediation, the mediator shall inform the Court, and this shall be taken in due account in its decision.



Mediation

Domestic Violence in Mediation

Domestic violence immediately exempts parties from the obligation of mediation.

If DV is highlighted in the letter requesting authorisation to start proceedings, the Court summons the parties before it to determine the best interest of the parties.

Where during mediation the mediator becomes aware of / suspects domestic violence, they shall immediately inform the judge, who may then hear the parties and decide to terminate mediation and authorise proceedings to commence.

Mediation

If the mediator manages to reconcile the parties, the mediator makes a note of it and informs the judge to close proceedings.

If the mediator fails to reconcile the parties but reach an agreement, the mediator informs the judge and sends the agreement for the court's authorisation. The judge gives their authorisation by decree, but may choose to hear the parties / children / lawyers before doing so.

If the parties do not reach an agreement, the mediator informs the judge, who then authorises the parties to commence proceedings within two months from when mediation is closed.

Children's Advocates

Subsidiary Legislation 12.20



Appointment of Children's Advocates

Children's advocates form part of a panel of advocates who have a warrant to practice in court and have experience in family law.

Children's advocates are paid for by the Registrar.

The role of a children's advocate is to:

- provide the minor with legal assistance, representation, and advice;
- act in the minor's best interest;
- submit the minor's views in Court;
- explain to the minor any possible consequences should the Court conform to their wishes;
- provide the minor with any relevant information.

The above of course depends on the minor's capacity to understand the proceedings and their maturity.



Personal Separation

Subsidiary Legislation 12.20



Separation Proceedings

There are two ways of obtaining a personal separation at law: either with both spouses' consent (by decree), or adversarially, with one spouse against the other (by judgment).

In both cases, the final decree/judgment of separation will be ruling on:-

- the assets, their separation, and distribution
- the matrimonial home
- fault (if any)
- maintenance (if due)
- if there are children: their care, custody, maintenance, and access



Separation Proceedings

Consensual separation - the procedure

- Mediation
- The contract of separation is drawn up and agreed upon
- The mediator sends the contract to the judge for their authorisation, together with their notes on the case, if necessary
- The judge gives their authorisation by means of a decree, but may request that the parties / children are heard
- The parties appear before a notary and the contract is published
- The contract is registered in the Public Registry and the necessary annotations to the marriage certificate and their acts of civil status are made.

Separation Proceedings

Consensual separation - alternative procedure

- The parties independently agree on a separation contract and file it together in court by means of a note signed by their notary & lawyers
- The Court refers the matter to a mediator
- The mediator hears the parties / children and gives the court its advice, requesting authorisation
- The Court shall then issue its decree on the matter

Separation Proceedings

Adversarial separation

- Mediation
- If the mediation succeeds - refer to consensual separation proceedings
- If the mediation fails, either spouse can file a letter addressed to the Registrar within two months from closing of mediation requesting authorisation to proceed with proceedings for personal separation
- Once approved, the spouse may begin proceedings by means of a sworn application
- In parallel, and at any stage, any spouse may file an application for a provisional order on maintenance / children / who is to reside in the matrimonial home *pendente lite*. Where domestic violence is involved, this application is appointed within 4 days and the Court may also issue a protection or treatment order.
- The court's decree shall be equal to an executive title.

Separation Proceedings

Adversarial separation

The Trial

- Written proceedings stage: the sworn application, reply, and any counter-claim as applicable are filed
- Pre-trial: the Court can appoint a children's advocate where it deems it necessary (if not already appointed during mediation)
- Pre-trial: the Court fixes time-limits within which the parties shall produce all documentary evidence and witnesses that cannot be produced by affidavit
- Pre-trial: the Court may appoint any experts it deems necessary to assist it
- Pre-trial: the Court may on demand give any provisional orders it deems fit
- Trial: The advocates for the spouses and children make their submissions to the Court
- **Judgment is then given and the separation is notified to the Director Public Registry**



Separation Proceedings

- The immediate effect of separation is the termination of the obligation of cohabitation between the parties.
- Separation also leads to the cessation of the community of acquests - this can be requested *pendente lite*. This is notified to the Director of the Public Registry for registration.
- The Court also decides on the matrimonial home, to whom it is to be assigned, and who is entitled to reside in it.
- The Court also decides on care and custody and access of the children, which in very grave scenarios, may be excluded to one or both parents.

Divorce



Divorce Proceedings

Elements to bring an action for divorce:

Joint request for divorce: spouses must have lived apart for at least 6 out of the past 12 months.

Adversarial request for divorce: spouses must have lived apart for at least 12 out of the past 24 months.

OR

The parties are already legally separated

AND

There is no reasonable prospect of reconciliation;

AND

Any maintenance due to spouses / children is all being received already.

Divorce Proceedings

Consensual Divorce where there is no previous separation - procedure:

- Mediation procedure as per personal separation, where the agreement is presented to the judge for authorisation
- The judge gives their authorisation by means of a decree, but may request that the parties / children are heard
- The parties appear before a notary and the contract is published
- The contract is registered in the Public Registry and the necessary annotations to the marriage certificate and their acts of civil status are made.

Divorce Proceedings

Consensual Divorce where there is previous separation - procedure:

- A joint sworn application is filed before the court detailing the details of the marriage and separation, and that there is no reasonable prospect of reconciliation.
- The parties declare on oath the above facts by means of an affidavit.
- The parties request the dissolution of the marriage and its notification thereof to the Public Registry.
- The Court gives its judgment in camera, but may need to hear the parties before.



Divorce Proceedings

Adversarial Divorce where there is no previous separation - procedure:

- Identical to adversarial personal separation proceedings, including mediation.
- At any stage provisional orders may be sought to determine *pendente lite* issues.
- Requests to dissolve the community of assets *pendente lite* may also be made. Inversely, the divorce may be pronounced without liquidating common assets (if the parties agree).
- Fault is not required, but if identified and proved, this may impact the judgment.

Divorce Proceedings

Adversarial Divorce where there is a previous separation - procedure:

- Identical to adversarial personal separation proceedings **but the only request may be to dissolve the marriage.**
- The other party may only contest this demand by proving that the applicant has not paid maintenance as due or that if divorce is pronounced, it would be more difficult for that party to obtain the payment of maintenance.

Divorce Proceedings

Effects of divorce:

- Parties are free to remarry
- Divorce has no effect on the parties' obligations towards their children
- Obligation of cohabitation ceases
- Succession rights are forfeited
- Maintenance is regulated (if not already done)
- Assets are divided (if not already done)

If a party remarries, the obligation of the first spouse to provide maintenance is extinguished.



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