The Law of Succession in Malta – A Reappraisal

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This article is only intended to serve as an outline, a brief explanation of the salient principles and the most significant changes introduced to the Law of Succession.[113] It is hoped that it will serve to tickle the reader into a more profound study and examination of the institutes and principles involved and the inter-play between them.

Background

Discussions at a political level had been going on since the early 1990's when the Permanent Law Reform Commission was set up with the task of recommending legal reforms or at any rate with stimulating discussion where reforms are called for or desirable.[114]

The Commission had been working on a report and draft bill to introduce long awaited reforms since the early 1990's. It prepared a report on the Law of Succession and a draft Bill way back in December 1994 and discussions, both at a political as well as at the appropriate legal levels had been going on since then. The political momentum then generated was cut short with the 1996 elections and change in administration which, at that time was faced with more important priorities.

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[113] Mostly concentrated in Act XVIII of 2004 which, amongst others and for the purposes of this paper, has amended the Civil Code - Book Second, Of Things, Part II Title III - Of Successions. Chapter 16 of the Laws of Malta. These have come into force by Legal Notice 37 (Articles 110,113 and 115 – as from 04 February 2005) and by Legal Notice 48 of 2005 (all other Articles – as from 01 March 2005).

[114] To date this Commission has published 2 reports, the first in December 1991 and the second in May 1992. Law Relating to Legal Aid (Report No. 1) and Law Relating to Foundations (Report No. 2). 1992, Malta University Services Ltd. No other reports have since been published and this notwithstanding the continued pro-active approach of the Commission.

When the dust had settled, concentration and energies could be directed at these reports, but then came the sudden 1998 elections which witnessed another change in administration with European Union membership being the top priority. These reports were left gathering dust since then until 2003 with the publication of the first Bill and its culmination in these much awaited reforms.[115] It is probable that another factor which contributed to these amendments was that after the 2002 elections, two of the leading lawyers who were clamoring for these much awaited reforms were appointed Minister of Justice and Permanent Secretary respectively within the same Ministry.[116]

Having given a short background to the events preceding these amendments I will now proceed to indicate the major amendments at play.

1. Forms of Wills

1.1. Disposing of Property in a Life Insurance otherwise than by Will

This amendment solves a long outstanding issue with respect to beneficiaries of contracts of life insurance policies. The Civil Code did not allow dispositions of property after death otherwise than by a will. This was problematic on insurances and the naming of a beneficiary in a life insurance as this was tantamount to a disposition otherwise than by a will and was therefore null due to lack of form.[117]

[115] Bill 15 of the 17. 10. 2003 – An Act further to amend the Civil Code, Cap.16 was read the First time at the Sitting of the House of Representatives at the Sitting of the 21 July, 2003. This culminated in Act No. XVIII of 2004 which was passed by the House of Representatives at its sitting No. 215 of 17 December, 2004.
[116] The Hon. Dr. Tonio Borg and The Hon. Dr. Carmelo Mifsud Bonnici, respectively.
[117] The applicability of this rule must also be seen within the context of our Courts' reluctance when called upon to interpret contents of a will within the confines of this article and articles 683, 692 and 693 concerning the inadmissibility of evidence to show that the words of the will are contrary to the intention of the testator and the prohibition of fiduciary dispositions. The general trend has consistently been that where a will is clear there is no room for interpretation as this would be tantamount to the disposal of property otherwise

Insurance companies used to advise that it was best to make a will in accordance with the form required by law confirming the named beneficiary in the policy of insurance rather than run the risk of nullity due to lack of form. The strict rule that no one can dispose of one's property except by will has today been tempered.[118]

1.2. Joint Will Unica Charta

Under Maltese law joint wills are only permissible between husband and wife.[119] They partake both of the will element and of the contract element in that besides being regarded as two wills in one instrument, they also partake of a bilateral contract.[120]

Two amendments to article 592, more of form than of substance, mainly concern Notaries on whom, certain drafting obligations were imposed.[121] They are intended to render life easier in procuring copies of joint wills particularly when only one of the spouses has died. Before, unless the other spouse consents for his will to be shown to third parties, any person who requires the will

than by will. In other words, the Court would be substituting its interpretation to that expressed by the testator in the will. See amongst others, Attard vs Borg, 21/03/1941 - Vol. XXXI.i.49 and Vella vs Borg et, 15/12/1994 - Vol. LXXVIII.ii.419.

[118] One must also consider that wills recognised under Maltese law extend beyond those made in Malta that is ordinary public wills, ordinary secret wills and privileged wills. Other forms of wills are recognized by virtue of the rule of private international law contained in article 682 which compliments the extension namely: "A will made outside Malta, shall have effect in Malta, provided it is made in the form prescribed by the law of the place in which the will is made."

[119] Article 592(1) "A will made by husband and wife in one and the same instrument, or, as is commonly known, unica charta, is valid". Article 595 "It shall not be lawful for any two or more persons, other than a husband and wife, to make a will in one and the same instrument, whether for the benefit of any third party or for mutual benefit..." This is an exceptional situation uncommon in most legal systems although exceptions do exist for joint or mutual wills under the German Civil Code and in Spain in certain Provinces such as Navarra and Aragon.

[120] See amongst others, M. Bianchi v J. A Galizia noe – Court Of Appeal, 19/04/1937 - Vol.XXIX.i.991

[121] 592(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. 592(4) The non-observance of the provisions of subarticle (3) of this article 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 one hundred liri to be imposed by the Court of Revision of Notarial Acts.

of a pre-deceased spouse had to file an application in the Second Hall of the Civil Court to ask for an extract, a difficult and time consuming exercise.

The more far-reaching amendments concern the contract element of joint wills and to their effects, that is where there exists reciprocity of bequests between the spouses. Before the amendments, reciprocity existed where spouses bequeath to each other all or the greater part of their property in full ownership or in usufruct. Its effect gave rise to forfeiture of all that the spouse would have received from the pre-deceased spouse in case of either express or tacit revocation, unless otherwise ordained.

Conditional upon there being reciprocity, and in the silence of the parties through their will, there would be forfeiture with wide ranging consequences. After the decease of one of the spouses a change in circumstances may necessitate changes by the surviving spouse of his/her joint will or a tacit change thereto. They would probably have forgotten all about their old will and this often created problems very similar to the verification of a resolutive condition in the law of obligations.[122]

Two changes were introduced; the removal of usufruct as a condition for reciprocity between bequests (and therefore usufruct is no longer part of the contractual element of reciprocity) and forfeiture now, only operates where the spouses specifically so provide. Today the rule has been whittled down to reciprocal bequest in ownership and it is actually inverted. Whereas before, the silence of the parties was tantamount to forfeiture, now they must specifically provide for such forfeiture.[123]

[122] 593(1) Where, by a will unica charta, the testators shall have bequeathed to each other the ownership of all their property or the greater part thereof with the express and specific condition that if one of the testators revokes such bequest he shall forfeit any right in his favour from such joint will, the survivor, who shall revoke the will with regard to such bequest, shall forfeit all rights which he or she may have had in virtue of such will on the estate of the predeceased spouse.
593(2) The forfeiture mentioned in sub-article (1) can also be ordained in the case where, by his or her act, the said bequest cannot be effectual with regard to his or her estate.
[123] Our Courts devised innovative rules of interpretation to whittle down the drastic hardship which a forfeiture created upon the innocent surviving spouse. See M. Caruana et. v G.

Notaries publishing a joint will have an obligation of warning the spouses of its effects and must write this warning in the will.[124] In addition, the spouse who would have incurred forfeiture would still retain the usufruct over the property so forfeited.[125]

To conclude, in a nutshell, the major amendments were the following:

(i) The retention of one instrument as a form but the will or the provisions of one spouse must be separate from that of the other spouse;

(ii) A change in the reciprocity clause and its contractual effects through the removal of reciprocal usufruct which also operated as a forfeiture;

(iii) Where before, there was automatic forfeiture unless the spouses provided otherwise, today forfeiture must be specifically expressed in the will;

(iv) Previously, the forfeiture operated in its totality while today the spouse who forfeits retains the usufruct over the property forfeited;[126]

Ainsworth et. – First Hall Civil Court, 18/02/2005 Subject to Appeal – Unpublished (concerning wills which have had their full effects and therefore not subject to a revocation); Dr L. Galea noe v J. A Galizia – Court of Appeal, 28/04/1935 - Vol. XXIX.i.149 & C. Aquilina et. v C. Bugeja et. – Court of Appeal, 24/01/1930 - Vol. XXVII.i.419 (concerning bequest of legacies and remuneratory legacies by the surviving spouse)

[124] 593(3) The notary drawing up a will unica charta is bound on pain of a fine of one hundred liri to be imposed by the Court of Revision of Notarial Acts to explain to the testators in a will unica charta the meaning and effect of this article and of article 594, and enter in the will a declaration to that effect".

[125] 594 "In the cases referred to in subarticles (1) and (2) of article 593 the ownership of the property bequeathed to the spouse incurring the forfeiture, shall, unless otherwise ordained by the other spouse, vest in the heirs instituted by such other spouse, or if no heirs are so instituted his heirs-at-law. The spouse who has forfeited the property as aforesaid shall, however, retain the usufruct over such property".

[126] It is debated whether spouses can provide also for specific forfeiture of the usufruct. In should not be impossible to impose partial forfeiture once full forfeiture can be imposed.

(v) Today, the Notary has a legal obligation to explain the implications of the joint will and a declaration to that effect must be written down in the will.

1.3. Legato de Residuo

This so called legacy of the residue has traditionally been interpreted to mean the nomination of a substitute heir. By virtue of this bequest, a testator can nominate a beneficiary, whether by universal and / or by singular title, for all or part or even a particular item of his property with the addition that whatever remains of this property or item after the death of the beneficiary will go to someone else.

Although, strictly speaking, it is not a form of will, I have included it under forms of wills due to the potential far-reaching effects which it may and will have in the future on the innocent third party in the sphere in which it has been introduced.[127]

Although reasonably common in wills, it has been established that this clause only comes into force unless the nominated heir or legatee in the first degree provides otherwise, either by act inter vivos or by act causa mortis. He is the heir or legatee in the fullness of ownership - the property is his and it will come into force only if he does not provide otherwise.

The introduction of this new rule solely between spouses has put the traditional meaning as explained above on top of its head.[128]

[127] This rule must also be read in conjunction with and in the context of the amendments introduced to joint wills between spouses together with the removal of the relative incapacity against surviving spouses who were unable, before the amendments, to receive more than a certain percentage of the estate of the predeceased spouses when they were in competition with the descendants.

[128] 758(3) "It shall also be lawful for a spouse to make in favour of the surviving spouse a bequest by universal or by singular title, substituting for him or her another beneficiary in the residue still existing at the time of the demise of the surviving spouse. In such case the surviving spouse shall only be restrained from disposing of any thing contained in the disposition, by will or by title of donation."

758(4) "For the purpose of this article "residue" means and includes only - (a) immovable property, whether immovable by its nature or by reason of the object to which it refers and

We are now faced with the new rule applicable exclusively to bequests to or between spouses and the traditional rule applicable for all bequests other than those to or between spouses.

When faced with such bequests, spouses and third parties must beware because they can neither dispose of whatever has been left to them by will nor by title of donation but they can dispose by onerous title.

Indeed, it will now not be uncommon for spouses to resort to simulation and declare that a transfer is onerous rather than gratuitous in order to avoid the tentacles of this article, namely potential nullity.[129]

1.4. Privileged Wills and Secret Wills

A privileged will is an exceptional and provisional form of will contemplated by Maltese law which may be resorted to solely in circumstances of interruption of communications by order of the public authority and when made on the high seas on board ships registered in Malta. Certain formalities and procedural rules are relaxed due to the exceptional circumstances in which these wills may be resorted to.[130]

The only amendment concerns the removal of a clause with respect to the capacity of witnesses on a privileged will made at sea which discriminated against the female sex. Henceforth, all persons of age are now competent witnesses.[131]

(b) all certain and determinate movable property which can be identified, excluding liquid cash and things identified only by their species."

[129] 758(5) "An action contesting any disposal made by the surviving spouse in contravention of subarticle (3) may be instituted during the lifetime of the surviving spouse, and shall be barred by the lapse of five years from the opening of succession of the surviving spouse." 758(6) "A disposal made by the surviving spouse in contravention of subarticle (3) shall in the case of immovables be null. In the case of movable property nullity shall ensue only if the beneficiary was in bad faith. In any other case action shall only lie for damages against the surviving spouse or his or her estate."

[130] See Articles 673 to 681 of the Civil Code.

[131] See Article 676(3) which removed the word "Male".

A secret will is that type of will which is deposited in the registry of the Court of voluntary jurisdiction and whose existence is, (unlike a public will which is registered in the public registry), not known to anyone except for the testator himself (or after the death of the testator). The only possibility of ascertaining the existence or otherwise of a secret will is that one can only order a search for secret wills against presentation of the death certificate of the deceased person.

There was one amendment of form which has clarified the rule that a secret will need not be written out but may be printed, type-written or written in ink.[132]

2. The Legitim / Reserved Portion

2.1. Nature of the Right

The reserved portion or the *legitim* as it was known, is that portion of the estate of a deceased person which the law reserves in favour of certain categories of individuals due to the close affinity which the latter have with the deceased.[133]

The law distinguished (and still does) between the disposable and the non-disposable portion of the estate of a deceased person.[134] However, there existed legal confusion on the nature of the non-disposable portion, most probably due to the cumulative effect of the old articles 614, 615 and 620 of the Civil Code and a number of Court judgments. This notwithstanding, it appears to have been settled that the beneficiary of the non-disposable portion of an estate, although due in full ownership was neither an heir nor a creditor of the estate but a *special* form of creditor.

[132] Article 656(1) "A secret will may be printed, type-written or written in ink either by the testator himself or by a third person."
[133] Article 615(1) defines "The reserved portion is the right on the estate of the deceased reserved by law in favour of the descendants and the surviving spouse of the deceased."
[134] See article 614.

Strictures of space do not allow me to delve deeper however it was thought and strongly argued by some lawyers that as the legitim, today the reserved portion, was due in full ownership and was the non-disposable portion of an estate, it was due on each and every item of the estate. In reality this gave rise to abuse and notwithstanding a number of judgments on the matter, it still gave rise to confusion.[135]

Today, the word legitim throughout the Civil Code has been replaced by the Reserved Portion. Article 615 is being replaced by confirming what had long been established that the reserved portion is a *right of credit* over the estate of the deceased person.[136] The amendments will hopefully solve this long outstanding legal issue as to the nature of the reserved portion and its implications when it comes to a partition or a sale by the heirs and the rights of those persons in whose favour the law has awarded a reserved portion.

Furthermore, Article 620 (5) introduced a new concept in testate succession, albeit not without future problems of interpretation.[137] Before the legislative intervention to the definition of the nature of the legitim, the practice was that due to what I consider to be an erroneous interpretation of the nature of the legitim, practitioners used to advise clients to renounce to everything left to them in a will and reserve all rights to the legitim. The idea was that as the legitim was a right pertaining on each and every item of the assets

[135] See C. Giuliano noe. et. v Dr. J. Buttigieg noe. - Court of Appeal, 07/10/1991, unpublished; Farrugia v Mintoff – Court of Appeal, 10/06/1949 – Vol.XXXIII.i.472; C. Meli v M. Pace Decesare et. – First Hall Civil Court, 24/05/2002, unpublished; J. Vella v A. Bezzina et. – Court of Appeal, 20/11/1998, unpublished and E. Mifsud et. v E. Mizzi et. – Court of Appeal, 14/12/1973, unpublished.

[136] Article 615(2) states: "The said right is a credit of the value of the reserved portion against the estate of the deceased. Interests at the rate established in article 1139 shall accrue to such credit from the date of the opening of succession if the reserved portion is claimed within 2 years or from the date of service of a judicial act if the claim is made after the expiration of the said period of 2 years."

[137] Article 620(5) states "The person claiming the reserved portion shall impute to his share any property bequeathed to him by will and cannot renounce any testamentary disposition in his favour and claim the reserved portion, unless such testamentary disposition is made in usufruct or consists in the right of use or habitation, or consists of a life annuity or an annuity for a limited time."

within the estate, it would work in such a way as to coerce the heirs into submission and put them at the mercy of the legitimaries for at least 10 years -being the applicable prescriptive period.[138]

Today this is no longer the case. The testator's choice and wish expressed in the will must be respected and a legal right of credit on his estate is converted into a right to the asset specified in the will.

Some problems of interpretation and application are already being encountered. For example, does this amount to a tacit acceptance of an inheritance? What happens when a father decides to partition his estate in virtue of his will and in so doing discriminates between his children to the extent of leaving one or some of them the reserved portion without his saying so in his will?[139] Does it imply that they must accept what is lawfully theirs without a fight, including the action for abatement?

The logical interpretation may be that the wishes of the testator will be respected so long as it is established that what has been left by will is enough to satisfy the dictates of the reserved portion. If it is equal to or more then the claimant would have to succumb to the wishes of the testator. If it is less, what is left by will should be considered as having been left on account of the value. We shall have to wait and see this type of will withstand the test of time.

2.2. The Beneficiaries of the Reserved Portion

The reserved portion is due solely to the descendants and to the surviving spouse. Article 619 with respect to the reserved portion in favour of ascendants has been repealed as have articles 640 to

[138] See Parliamentary Debates and Article 845(1) "The action for demanding an inheritance, or a legacy, or the reserved portion, whether in testate or in intestate successions, shall lapse on the expiration of ten years from the day of the opening of the succession."
[139] In terms of Article 953 "It shall be lawful for the father, the mother, or any other ascendant to divide and distribute his or her property among his or her children and descendants, including in such partition even the non-disposable portion."

646 which concerned the parameters of the reserved portion due to the illegitimate child - this distinction having also been removed.[140]

All rights of legitim reserved in favour of the ascendants of the deceased have now been removed as a result of the repeal of article 619. Previously, there existed a right to the legitim in their favour in the absence of a surviving spouse, and in the absence of legitimate and illegitimate children.

2.3. Extent and Quantity of the Reserved Portion

2.3.1. Descendants

In accordance with article 616, the amount is one-third of the value of the estate if there are 4 children or less and one-half if there are 5 or more children. The difference is that there is now no distinction between any descendants whether born in or out of wedlock or whether adopted or of different marriages.[141]

In virtue of article 646, today repealed, it is no longer necessary to state that the reserved portion of the surviving spouse and of the illegitimate child shall be a charge on the disposable portion. Today it has become superfluous and the only reserved portion pertains to the descendants and to the surviving spouse.

Article 618 (3) has been amended to clarify the point that a descendant who has been instituted heir shall get the disposable

[140] In fact this has necessitated the requirement to define the disposable and the non-disposable portion accordingly. Article 614(1) "Where the testator has no descendants or spouse, he may dispose by universal or singular title of the whole of his estate in favour of any person capable of receiving under a will". 614(2) "Where the testator has descendants or a spouse, the disposable portion of his estate shall be that which remains after deducting such share as is due to the said descendants or spouse under any of the provisions of articles 615 to 653".

[141] Article 616 states (1) "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." (2) "The reserved portion is divided in equal shares among the children who participate in it". (3) "Where there is only one child, he shall receive the whole of the aforesaid third part".

portion together with a share of the non-disposable portion which would otherwise have been due had the descendant not been instituted an heir.[142]

2.3.2. Surviving Spouse[143]

The surviving spouse is today entitled as a minimum to one fourth of the value of the estate of the predeceased spouse in full ownership where there in competition with children or other descendants of the pre-deceased spouse, and to one third of the value of the estate in full ownership if there are no children or other descendants.[144]

Furthermore, the surviving spouse has a right of habitation over the matrimonial home and is also entitled to the right of use over any of the furniture in the matrimonial home belonging to the deceased spouse and this without the obligation of providing security and of making up the inventory as would otherwise be the case where it concerns rights of usufruct, use and / or habitation.[145]

These rights go a long way in improving the plight of surviving spouses and tend to rectify a long outstanding notion that a blood relationship prevailed over that based on affinity.[146] Indeed, the law goes further to the extent that rights of the surviving spouse prevail over those of descendants and do not apply solely in such

[142] Article 618(3) states "A child or other descendant who has been instituted heir, who had he not been so instituted would have been entitled to share the reserved portion, shall also be entitled to share therein notwithstanding that he was so instituted".

[143] See also articles 603 and 604 relative to the removal of the relative incapacities against the surviving spouse including those of the surviving spouse of a second or subsequent marriage.

[144] See Articles 631 and 632. Before the amendments, where there were children, the surviving spouse was entitled to a usufruct over one-half part of the estate of the pre-deceased spouse and to one-fourth in full ownership if there were no children.

[145] See Articles 633, 635, 636 and 637.

[146] This trend extends to the rights granted under intestate succession in Part 4 of this paper. Before the amendments, the surviving spouse was only entitled to the reserved portion when in competition with legitimate descendants and to one-fourth of the estate in their absence. These rights were identical also to those existing under intestate succession under applicable articles, now repealed and / or replaced.

circumstances as personal separation, disinheritance and unworthiness.[147]

As a balancing factor, both the heirs and the surviving spouse have the added benefit or obligation that in any partition, the matrimonial home subject to the right of habitation be assigned to the surviving spouse. This is only fair as the heirs should not be lumped with the bare ownership of an immovable property. On the other hand it is also an incentive in favour of the surviving spouse to consolidate property.[148]

3. Active Capacity and Passive Incapacity

3.1. Capacity to make a Will

3.1.1. Age

Under Maltese law the rule remains that an individual acquires full capacity to assume obligations and to give valid consent upon attaining eighteen years of age. This is applied less rigidly in wills with limited capacity upon reaching the age of sixteen. This must be viewed as an exception which is limited to remuneratory dispositions and is nevertheless subject to overview by the courts regard being had to the means of the testator and to the services rendered which are being rewarded by such a disposition.[149]

3.1.2. Understanding and Volition

[147] Article 633(5) states that the right of habitation shall subsist even where such right has the effect of reducing, during the lifetime of the surviving spouses, the reserved portion due to any other person. Those do not apply in those circumstances contemplated by article 638.
[148] Article 634 states "Where the matrimonial home belongs in part to the surviving spouse, in any partition between the heirs of the deceased and the surviving spouse, the surviving spouse, or the said heirs, may demand that the property subject to the right of habitation be assigned to the surviving spouse upon a valuation which is to take account of such right of habitation over the property."
[149] Article 597(a) has increased this from 14 years but it remains circumscribed by the power of the court within the stated parameters. This is in line with the age requirement to emancipate minors to trade. It is now also being muted that age 16 be introduced for voting in local councils.

Article 597(b) has removed the incapacity of congenital deaf-mutes who do not know how to write from making a will. This has been replaced by lack of capacity on the basis of a general principle based on notions of consent, a move in line with modern advances in medicine where today most deaf-mutes know how to write and read. Incidentally, the law only refers to public wills and certain obligations of Notaries due to the presence of the Notary and an interpreter.[150]

3.2. Total Capacity to Receive by Will

This must be understood within a historical context of the powers of the Roman Catholic Church in Malta. Members of monastic orders or of religious corporations of regulars are legally incapacitated from receiving property except small life pensions. Testamentary dispositions in their favour are suspended and only become effective if they renounce or are released from their vows or else such dispositions are ineffectual if the beneficiary dies while still a member.[151]

These, together with the Mortmain Act,[152] were introduced more out of a political expedient to reduce the powers of the Church. In terms of Canon Law and / or the Statutes of these orders, property received by their members used to pass on to the Orders. As a result the Church became a large land owner with obvious corollary powers. The 1992 Church–State agreement[153] saw changes and this incapacity against the Church removed. Most of the Church property not required for its pastoral mission was

[150] Article 597(b) "those, who, even if not interdicted are not capable of understanding and volition, 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."
[151] Article 611(2) states "Nor can such persons receive under a will except small life pensions, saving any other prohibition laid down by the rules of the order or corporation to which they belong." See also article 611(3).
[152] Chapter 201 of the Laws of Malta.
[153] Act IV of 1992 – Chapter 358 of the Laws of Malta – Ecclesiastical Entities (Properties) Act, 1992.

passed on to the State against compensation and a Joint Office was established to administer property which now vested in the State.

The rule has been relaxed and appears to be a lapsus on the part of the legislator who repealed the rule under intestate succession but forgot to repeal the counterpart existing rules under testate succession![154] Another consequential amendment is a modification to article 596 where the reference to the Mortmain Act, 1967 was removed for reasons already stated and indicated above.

3.3. Partial Capacity to Receive by Will

Certain categories of individuals were incapable from receiving beyond a certain percentage from the estate of a particular individual when in competition with other individuals. In other words, they were fully capable of receiving property by will from any individual except one. These included illegitimate children, adopted children, children of second marriages, surviving spouses and second spouses from other marriages. In the greater part, the removal of these incapacities were triggered by the repeal of Articles 602, 603 and 604.

3.3.1. Children Born out of Wedlock and Removal of the Status of Illegitimacy

When in competition with legitimate descendants, Article 602 stated that illegitimate descendants, whether in their own name or through intermediaries, were incapable of receiving from their parents more than the reserved portion and this as a result of a rigid rule of public policy.[155] To quote a small example on how miserly

[154] In fact Articles 800 and 835 were repealed. The first stated "With regard to members of monastic orders or religious corporations of regulars, their capacity or incapacity to succeed ab intestato shall be governed by the same rules laid down in regard to testamentary successions." The second stated "Succession also opens on the taking of vows in a monastic order, or in a religious corporation of regulars." Ultimately these vows were tantamount to and equivalent to a civil death!

[155] Article 602 stated "Where the testator leaves legitimate children or descendants, or children or descendants legitimated by a subsequent marriage, or adopted children or their descendants, legitimate or legitimated as aforesaid, any illegitimate children, even though

the law was, when in competition with say 3 legitimate descendants, the maximum an illegitimate child was entitled to was 1/27 share of the estate of his parents! Indeed, it suited a father not to acknowledge his descendant since being a complete stranger, he could dispose of his estate without any limitations and restrictions.

The removal of this incapacity comes as a natural consequence, albeit subject to two exceptions, in the removal of the status of illegitimacy.[156] All references to illegitimate status throughout the Civil Code were replaced by children conceived and / or born in or out of wedlock as the case may be. This thinking applies both where it concerns the law of persons and also where it concerns the law relating to property particularly the law of succession. This turning point was necessitated also by a number of court judgements which declared certain provisions contrary to certain Human Rights provisions.[157]

The build up for the removal of this partial, relative incapacity of illegitimate children from receiving under a will from certain persons, are the new articles 596(2) and 602 under the title "Of the Capacity of Disposing and of Receiving by Will".[158] Subject to the

acknowledged, or legitimated by decree of court, cannot receive by will more than that to which they are entitled under paragraph (a) of subsection (1) of section 640."
In general, Article 640(1) stated that illegitimate children were entitled to one-third of the legitim to which they would have been entitled if they had been legitimate children and in default of any such children or descendants, the portion of the illegitimate children shall be one-half of the said legitim.

[156] Article 815 which diminishes the share of a child born out of wedlock when there is no will, as better explained in Part 4 of this paper and article 839 explained hereunder. For a more profound study of the various issues relating to this particular topic, I invite the reader to refer to another paper presented by Dr. Ruth Farrugia, a lecturer in the Faculty of Laws which is printed in this publication.

[157] Mario Buttigieg pro. et noe v Attorney General et., delivered by the First Hall Civil Court in its Constitutional Jurisdiction on 17 January 1997. This is a res judicata against the State and has taken on board the legal position adopted by judgments delivered by the European Court of Human Rights concerning the interpretation of Articles 8 and 14 and Article 1 to the First Protocol. Amongst others, these include Marckx v Belgium - Ser. A No 31 - 13 June 1979; Inze v Austria - Ser. A No 126 – 28 October 1987 and Johnston v Ireland – 18 December 1986. The European Convention on Human Rights is also part of Maltese Municipal Law under Chapter 319 of the Laws of Malta.

[158] Articles 596(2) and 602 respectively state "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." and "All the children of the testator whether

stated exception under intestate succession, today the legal position of children born out of wedlock is at a par with all other children. This because nobody should be made to suffer discrimination as a result of the actions of one's parents.

The other exception is article 839 which concerns a non peremptory mode of procedure where a child born out of wedlock can be subjected to discrimination if in competition with children born in wedlock and / or with the surviving spouse. One understands that the motivation behind this rule is to avoid disruption and internal bickering, particularly where such child was not integrated within the family of the deceased or indeed turned up out of the blue. Although common to both testate and intestate succession, this rule can be opposed by the child, is subject to Court intervention and is also facultative.[159] This notwithstanding, it remains superfluous because it fails to address the situation where the testator appoints a complete stranger as co-heir!

3.3.2. Surviving Spouse

In terms of the repealed article 603,[160] the surviving spouse was incapable of receiving more than one fourth in full ownership from the estate of the predeceased spouse when there were legitimate children. This caused hardship even more so in the light of limitations already existing with the reserved portion which consisted of only one-half in usufruct. This was mitigated by our

born in wedlock, out of wedlock or adopted or whether or not the presumption referred to in articles 102 to 112 applies to them may receive by will from the testator."

[159] Article 839 provides "Where under testate or intestate succession a person conceived and born out of wedlock succeeds with adoptive children of the deceased or other children of the deceased who are not so conceived and born or descendants of such children, or with the surviving wife (should be spouse?? my emphasis) of the deceased, the other heirs of the deceased shall be entitled to pay the share due to the person conceived and born out of wedlock, either in cash or in movable or immovable property of the estate, if the latter does not object; and in case of opposition by the latter, the Civil Court – Voluntary Jurisdiction shall, following an application to that effect by any of the other heirs of the deceased, decide whether to allow such payment or assignment, after taking into account personal considerations and those relating to property."

[160] This stated "Where the testator leaves children or descendants as stated in the last preceding section, the surviving spouse cannot receive, in ownership, more than one-fourth of the deceased's property."

courts which decided that the rest of the estate of the pre-deceased spouse, namely three-fourths, could be left also in usufruct.[161]

This incapacity has been repealed and no limitations to receive exist so long as it pertains to the disposable portion, in other words everything except the reserved portion, where due. The necessary consequence is that the surviving spouse can also be appointed sole heir. This must be seen also in the light of the progressive trend throughout the legislative reform in upgrading the status of the surviving spouse; in particular the increased doses in the reserved portion and rights under intestate succession.[162]

3.3.3. Second or Subsequent Spouse

The general positive trend to improve the legal status of a surviving spouse extends in this area in favour of remarriage. The previous legal position created unfairness, probably more through ignorance of the law rather than any other consideration. The legal position was that a spouse who had legitimate children from a previous marriage could not bequeath to his second or subsequent spouse, more than the least favoured of the children of any such former marriage.[163]

This incapacity has today also been repealed as has article 637.[164] Again, this used to be a real trap for the unwary widow or widower, who was caught between two stools. If there were children, either

[161] See amongst others - Caruana et v Micallef – Court of Appeal, 14/12/1891, Vol. XIII.72 and Serra v Serra – Court of Appeal – Vol. XXV.ii.447

[162] See Parts 1.2., 1.3. Forms of Wills; Parts 2.2, 2.3.2. - Reserved Portion; Part 4 - Intestate Succession.

[163] Article 604(1) "Where a spouse having children or descendants as stated in section 602, has contracted a second or subsequent marriage, such spouse cannot bequeath to his last wife or her last husband, more than that which the least favoured of the children of any former marriage will receive."

[164] "Where the surviving spouse has entered into a second or subsequent marriage, and at the time of such marriage, there are still children or descendants of the predeceased spouse, as stated in section 631, the surviving spouse shall forfeit the ownership of all things which he or she may have received under a gratuitous title from the predeceased spouse, including donations in contemplation of marriage, and shall only retain the usufruct thereof, unless the predeceased spouse has otherwise ordained. In such case the ownership shall vest in the said children or descendants of the predeceased spouse."

perpetual widowhood whilst living in sin, or else the joys of remarriage but accompanied by a forfeiture of all that was received from the predeceased spouse by gratuitous title and its being converted into usufruct, all unless otherwise ordained by the predeceased spouse!

This notwithstanding, our law is still somewhat suspicious of second or subsequent marriages. One still notices traces of social attitudes where old habits seem to die hard with shreds of principles against modern day trends. This can be seen through the retention of the rule under conditional dispositions which still allows a condition in restraint of remarriage between spouses.[165] This extends to the forfeiture of the right of habitation and the right of use of the furniture as part of the reserved portion of the surviving spouse in case of remarriage.[166] Today's social trends call for further reforms to our Civil Code in favour of full freedom without any shackles.

3.3.4. Children of a Second or Subsequent Marriage and Adopted Children

The arguments put forward with respect to the second or subsequent spouse extend to this area. Here, the legislative reforms appear to have been intended to remove all traces of discrimination between children of different marriages and adopted children. The prevailing legal position was that children of a second or subsequent marriage were incapable of receiving more than the least favoured of the children of a prior marriage.[167]

[165] Article 712(1) "A condition prohibiting a first or a subsequent marriage shall be considered as if it had not been attached." 712 (3) "A condition in restraint of remarriage, attached to a testamentary disposition by one of the spouses in favour of the other, shall be valid."

[166] Article 633(8) "The right of habitation conferred in this article shall cease on the remarriage of the surviving spouse." This forfeiture extends to the right of use over the furniture. Article 637 states "The provisions of article 633(8) shall mutatis mutandis apply to the right of use granted by article 635."

[167] Article 604(1) stated "Where a spouse having children or descendants as stated in section 602, has contracted a second or subsequent marriage, such spouse cannot bequeath to any of the children of the second or subsequent marriage, more than that which the least favoured of the children of any former marriage will receive."

The same legal position applied with equal force for adopted children with the difference that there was no requirement for remarriage.[168] Indeed, it is not unheard of or uncommon for a couple to adopt a child and eventually have natural children. In terms of other provisions of the Civil Code, adopted children were considered as legitimate and at a par with brothers and sisters if any, but not where it concerned patrimonial rights under the law of succession.[169]

Both were positive moves endeavored to remove discrimination. They created unnecessary tensions within the family and were a source of trouble. The truth is that these principles were generally forgotten and the testator would unconsciously and inadvertently punish his children from a second marriage or his adopted child by leaving a child of a former marriage or a natural child, as the case may be, the legitim.

The only trace which has been retained, probably more as a result of its being forgotten rather than consciously, is article 909 concerning certain rules of partition and the presumption against children of second and subsequent marriages.[170]

3.4. Removal of other Relative Incapacities

The repeal of the above rules relative to the partial incapacities under the old articles 602, 603 and 634 necessitated other ancillary amendments, particularly a number of cross references to persons

[168] Article 604(2) provided "Where the testator leaves legitimate children or descendants, or children or descendants legitimated by a subsequent marriage, or adopted children or their descendants, legitimate or legitimated as aforesaid, he cannot bequeath to the adopted children or their descendants aforesaid more than that which the least favoured of the legitimate children or descendants or children or descendants legitimated by a subsequent marriage will receive."

[169] Civil Code - Book First, Of Persons - Title III - Of Adoption - Articles 113 to 130A

[170] This states "Any property which, at the time of the opening of the succession of a person leaving children or other descendants from two or more marriages, is found in the estate of such person, shall be presumed, in the interest of the children or descendants of the previous marriage, to have existed therein before the celebration of the subsequent marriage, unless the contrary is made to appear either by means of an inventory made prior to such subsequent marriage in the manner laid down by the Code of Organization and Civil Procedure, or by any other means."

who were then considered as intermediaries in order not to be used as vehicles to circumvent the old rules of total or partial incapacity. These are the father, the mother, the descendants, and the husband or wife of the person under any such incapacity, as the case may be.

The general rule remains that testamentary dispositions in favour of persons incapable of receiving are void even if made through intermediaries. In their absence one could very well avoid the rule and bequeath to the mother of an illegitimate child in order to not be seen as in violation of a rule of public policy.

4. Intestate Succession

The Law used to distinguish between two categories of successions, regular (which were based on the bond of blood), and irregular (mostly based on the bond of affinity). Regular successors were preferred in the following order, descendants, ascendants and brothers and sisters and their descendants, with other collateral relatives coming last. Next, the irregular successors being the surviving spouse and the illegitimate children.

This distinction has been repealed and, subject to one exception, comes as a necessary consequence of the removal of the partial relative incapacities of the surviving spouse and of the illegitimate children and the odious distinction between legitimate and illegitimate children.[171] Before the reforms, when in competition with legitimate children and their descendants, the law was particularly miserly as the surviving spouse and the illegitimate child were only entitled to the reserved portion.[172]

[171] See Part 3.3. of this paper. Article 811 states "Saving the provisions of article 815, children or other descendants succeed to their father and mother or other ascendants without distinction of sex, and whether they are born or conceived in marriage or otherwise and whether they are of the same or of different marriages." Article 815 is the exception which shall be examined later on.

[172] See articles 817 to 829, today all repealed and Parts 2.3.1.; 2.3.2.; 3.2.1.; 3.2.2. of this Paper.

The repeal of the distinction between legitimate and illegitimate children - today children born in or out of wedlock as the case may be - and the removal of their partial incapacities has brought about equality and descendants of the deceased all receive in equal portions subject to one exception. If they compete with the spouse of the deceased, they share one half between them. If there is no spouse, they get the lot.[173]

The surviving spouse is entitled to one-half of the property of the predeceased spouse in full ownership and, subject to the right of habitation and right of use of the furniture in the matrimonial home, the other half is inherited by the children and their descendants in their own right or by right of representation as the case may be. In the absence of any such children, the surviving spouse inherits the whole estate.[174]

These rules reveal a clear direction ın favour of the surviving spouse against other collateral relatives of the deceased, particularly the ascendants. Previously, where there were no children and descendants, the surviving spouse was only entitled to one-half of the estate, with the other half being shared between the closest ascendant or ascendants and the collateral relatives of the predeceased spouse.[175]

Today, the remnant of past social stigma to discriminate stems from article 815; an unfortunate and conscious legislative effort to counter balance its own provisions and reconcile competing claims and interests of children born in wedlock, the surviving spouse and

[173] Article 808(1) "Where the deceased has left children or their descendants and a spouse, the succession devolves as to one moiety upon the children and other descendants and as to the other moiety upon the spouse. (2) The provisions of subarticle (1) shall be without prejudice to the right of the surviving spouse under articles 633, 634 and 635." Article 809 "Where the deceased has left children or other descendants but no spouse, the succession devolves upon the children and other descendants."

[174] Article 810 states "Where the deceased has left no children or other descendants but is survived by a spouse the succession devolves on the spouse."

[175] Ascendants are no longer entitled to a reserved portion over the estate of their predeceased children in the particular instances contemplated under article 619, today repealed. See also articles 825 to 829, today repealed.

children born out of wedlock![176] In my opinion this will not pass the test of time. It oozes discrimination and runs foul of the European Convention on Human Rights. It is hoped that it will not be long before this is attacked and struck off the statute book for failure to pass the tests of proportionality and legitimate aims pursued.

In so far as ascendants and collaterals are concerned, the main amendment was that they only have rights in the absence of a surviving spouse and children of the deceased.[177] Perhaps as a counter-balance, one notices an improvement with the ascendants. Before, the ascendants and the direct collaterals shared between them whilst today the closest ascendant or ascendants are entitled to one-half of the estate with the other half being shared with the other direct collaterals.[178]

5. Miscellaneous Amendments

[176] Article 815 provides "Where a person conceived and born out of wedlock succeeds ab intestato with adoptive children of the deceased or other children of the deceased who are not so conceived or born or descendants of such children, or with the surviving spouse of the deceased, the person conceived and born out of wedlock shall receive only three quarters of the share to which he would have been entitled if all the heirs of the deceased, including such person, had been conceived or born in wedlock, and the remaining quarter of the share to which he would have been so entitled shall devolve on the other heirs of the deceased to the exclusion of any of such heirs who is conceived and born out of wedlock as if it were a separate estate."

[177] Article 812 states "Where the deceased has left no children or other descendants, nor a spouse, the succession shall devolve: (a) if there be an ascendant or ascendants and no direct collaterals: to the nearest ascendant or ascendants; (b) if there be an ascendant or ascendants and direct collaterals: one moiety to the nearest ascendant or ascendants and the other moiety to the direct collaterals; (c) if there be no ascendant or ascendants but there be direct collaterals: to the direct collaterals; and (d) if there be neither ascendant or ascendants nor direct collaterals: to the nearest collateral in whatever line such collateral may be."
Article 813(1) defines direct collaterals as "….. brothers and sisters, whether of the half or full blood or adopted and the descendants of predeceased brothers and sisters, of the half or full blood or adopted."

[178] This was regulated by the old article 813 which stated "Where brothers or sisters of the deceased, or descendants of predeceased brothers or sisters, whether of the half or full blood, compete with the father and the mother, or with the one of them surviving, or in default of both parents, with the ascendants, or the nearest ascendant, in any such case the parents, the ascendants, the brothers and sisters shall succeed per capita, and in equal portions; and the descendants of brothers or sisters, whether of the half or full blood, shall succeed by right of representation, per stirpes."

5.1. Unworthiness and Disherison

A person is presumed capable to inherit either by will and / or by operation of law. However, the law imposes a number of grounds considered so serious such that the beneficiary does not deserve to inherit and is therefore disabled from the capacity to receive from someone. There are grounds of unworthiness which constitute reasons of total incapacity to receive from a particular person imposed by law. This should not be confused with disinheritance; reasons of total incapacity to receive which a testator must rely upon to disinherit someone by stating such a reason/s in his will.

In line with the general positive trend favouring the spouse, the law has extended two of the more serious grounds of unworthiness to include the spouse of the testator and / or the deceased, as the case may be.[179] The reform has introduced some other minor amendments, more of form rather than substance, necessitated by the redefinition of descendants and due to the removal of certain rights of ascendants.[180]

5.2. Abatement

The action for abatement is intended to protect the reserved portion. It consists in the reduction of testamentary dispositions where these exceed the disposable portion of the estate of the deceased. The will is attacked not on the basis of invalidity but for the inefficacy of certain dispositions due to the reserved portion.

The major amendment, in line with that adopted for collation is with respect to the rules for the valuation of property donated

[179] Section 605(1) states "Where any person has - (a) wilfully killed or attempted to kill the testator, or his or her spouse; or (b) charged the testator, or the spouse, before a competent authority with a crime punishable with imprisonment, of which he knew the testator, or the spouse, to be innocent; or......... he shall he considered as unworthy, and, as such, shall be incapable of receiving property under a will."
This provision extends to intestate succession. Article 796 states "Persons who are incapable or unworthy of receiving under a will, for the causes stated in this Code, are also incapable or unworthy of succeeding ab intestato."
[180] See article 623 (f) and (g) and the old article 624, now repealed as it was rendered obsolete.

throughout the lifetime of the deceased. Today, the rule to establish the value of donated property is standard - that at the time of donation. Previously, different rules applied as the law distinguished between movable and immovable property. Valuation of immovable property involved a two fold cumulative test, its condition at the time of donation and its value at the time of death. This caused confusion and created unnecessary complications.

Another minor amendment also in line with that adopted for collation is the repeal of the rule that donations which perished without the fault of the donee before the death of the donor are not taken into account for the purposes of this action.[181]

5.3. Bequests by Singular Title

These are widely defined as legacies or dispositions by singular title. As a general rule, they are obligations of the inheritance and, unless otherwise ordained, heirs who have legal possession of the estate, are liable and burdened with their delivery.[182] The necessary consequence of heirs having the legal possession of the estate is that they are bound to deliver and put the legatees in the material possession of the thing bequeathed by singular title.

There existed confusion on the requirement of a public deed in the case of immovable property and as to who had to foot the bill. Heirs had no interest, they dragged their feet and were reluctant to go into added expenses. The rule has now been clarified and the legatee has a right to demand that he be put into possession of an immovable by public deed but at his expense.[183]

[181] See article 648 as amended for the rules determining the abatement and article 649 now repealed.
[182] See amongst others, articles 589, 590, 591, 733, 734, 836 and 838.
[183] This is the cumulative effect of articles 721 and 726. Article 726(2) provides "In the case of immovable property the legatee may demand the grant of such possession be made by means of a public deed." 726(3) "Unless the testator shall have otherwise provided the expenses relative to the deed shall be borne by the legatee."

5.4. Preterition and Omission of Children and other Descendants

Previous legislation was quite biased in favour of the descendants. Testamentary dispositions by one who, at the time of his will, had no children and who did not provide for such a contingency, were *ipso jure* revoked.[184] This sometimes proved quite costly with far reaching effects, particularly in those instances where young married couples, as yet childless, made wills nominating each other universal heirs.

Their estate ended up being regulated by intestate succession, an institute which, before the reform, was quite miserly in respect of the surviving spouse. The eventual birth of children, normally a happy occasion, operated as the verification of a resolutive condition which nullified their will, more often than not, due to ignorance of the law, improper advice and drafting problems.

Another rule was again based on the presumed intention that a testator did not intend to discriminate between his descendants. Where one made a will and only provided for children already born, without any reservation for the future birth of children, the law held that those who were omitted were entitled to as much as the least favoured of those mentioned in the will upon a proportional abatement of their share.[185]

If the testator nominated his children heirs, then any future children probably as yet unborn, would all inherit equally. Unfortunately this was a double edged sword because the reverse also held true. Where, for some reason or other, the testator only left the legitim to one of his children, then those omitted from a will, probably due to

[184] See old articles 747(1) and 748, today repealed

[185] Article 749 provided "Where at the time of the making of the will, the testator has one or more children or descendants, legitimate or legitimated by subsequent marriage, or adoptive, and thereafter other children or descendants are born or adopted, each of the latter shall be entitled to a share of the estate equal to that which, upon the proportional abatement of all the shares left to the former, is found to be due to the child or descendant least favoured in the will."

forgetfulness rather than intentionally, were only entitled to the legitim.

Whereas the first rule caused an injustice to the unwary, at least the second rule favoured all the children and more often than not, proved to be beneficial to children not mentioned in the will through no fault of theirs as they were not yet born. This has now changed and the rule is in favour of the supremacy of the will of the testator with the removal of all legal presumptions in this area.

Today, the legal position is the same in all instances and the will of the testator is supreme. If one omits the children, whether in whole or in part, they are only entitled to the reserved portion, the presumption and reasoning being, particularly at the parliamentary debate stage, that if parents intend to leave all their children as heirs then they should be on the look out and modify their will.[186]

The only outstanding defect appears to be that unless properly advised, parents would fail to come to grips with the consequences of an omission from their will of a standard clause which mentions their children whether born and yet to be born. Unfortunately, this is a mistake which cannot be corrected and can be the source of future trouble after the death of the parents.

5.5. Presumptions of Survivorship

This area of law operated in those instances where persons who are called to each other's succession, whether due to their will or by intestate succession, perish in a common calamity. There existed a number of artificial legal presumptions as to who died first. These were largely based on artificial criteria which differentiated between sex and age and which probably discriminated against the female sex.

One can mention a practical case to illustrate the legal issue. A young married couple makes a will reciprocally nominating each

[186] See articles 747 and 748 which replaced the old articles 747 to 750 of the Civil Code.

other as heirs where the wife was previously donated substantial properties by her parents. In case of a simultaneous death, in terms of previous rules, if they were in the age bracket of fourteen but not over thirty-five, the male is presumed to have survived. The conclusion is fairly self-evident; the family of the wife gets nothing whilst the family of the husband get the lot.[187]

The old rule was open to criticism. In case of a simultaneous death and with no evidence as to who died first, the presumption should be the other way round, all died together with the necessary consequence that they should not inherit each other. Today the rule is based on common sense, all artificial criteria have been removed and in the absence proof as to who died first, then, they do not inherit each other because they died together. This also did away with old fashioned discriminatory ideas that males are stronger than females.

5.6. Collation

There is a *juris tantum* presumption at law that the deceased did not intend to prefer any of his children and descendants. Any inequalities during his lifetime as a result of certain circumstances are therefore corrected after death by the system of collation. This is defined as the contribution made by a descendant of all that which was received directly or indirectly from the deceased by gratuitous title.

There is the augmentation of the inheritance, the bringing back into the estate of all that was received. This was made either in kind or by imputation. In the mode of collation, the law used to distinguish between immovables, movables and money. Today the law no longer makes such distinctions and collation is today always made

[187] See old articles 832 to 834, today repealed and replaced by one simple rule under article 832 which states "Where several persons die in a common calamity and it is impossible to determine who survived the other, they shall, where any one of them is called to the succession of the other, be presumed to have died at the same time."

by imputation, taking less out of the inheritance by the fictitious addition of all that had been received from the deceased by title of donation.[188]

This has necessitated also changes to the rules of valuation of all that was received. The law used to distinguish between the valuation of immovables, movables and money. For the purposes of imputation, the value of the thing is now that at the time of the opening of succession if this still exists. If it was sold, the value is the higher between that received by the donee or actual value of the thing at time of alienation.

There are some other minor, but related, amendments concerning partition and certain exceptions which are beyond the scope of this paper.

6. Rules Regulating Co-Ownership

The general principle is that co-owners can/may be obliged to remain in a state of community for periods of no longer than five years. This applies also to inheritances.[189] The reforms have brought about certain changes which favour partition, consolidation of property rather than fragmentation, and which are intended to avoid unnecessary delays particularly in the case of multiple inheritances.

In terms of the new sub-article 495(3), when heirs in an inheritance who have continued to hold or still hold property in common with other heirs deriving from an inheritance for more than 10 years, and where no action has as yet been filed for a partition, each co-owner shall be deemed to be co-owner of each and every item of property so held and article 912 shall not be applicable.

[188] This has necessitated amendments to the whole sub-title IV Of Collation. The articles include 910, 913, 917, 919, 927, 931, 933, 935, 936 and 937.

[189] Article 906(3) – It shall also be lawful, by a will, to suspend the partition for a time not exceeding five years, even though no one of the heirs is a minor. Any disposition suspending the partition for a longer time, shall not be operative in regard to the time exceeding five years.

After ten years from the opening of succession, the implication and necessary corollary seems to be that the right of redemption or buy-back (irkupru) exercisable under the law of succession by the other co-heirs is not applicable in the circumstances in which such right exists, (provided always within the current parameters).

We have witnessed also the introduction of a new principle of majority rule very similar to that existing rule under The Condominium Act where, after co-ownership of ten years or more, no partition has as yet been requested.[190] The Court will proceed with the wishes of the majority provided there exists no serious prejudice of dissident co-owners. The law under article 495A(6) gives certain examples of what may be considered as serious prejudice by the dissenting co-owners. The request has to be filed by means of a court application and the law stipulates certain formalities.

One may also notice certain spill-over effects in the law of succession particularly article 634 concerning the matrimonial home which is subject to the right of habitation in favour of the surviving spouse and the right or obligation of first refusal as the case may be and depending on who demands it.[191]

Conclusion

These reforms go a long way to address social inequality and improve the status of certain categories of individuals, particularly the surviving spouse. Whether or not or to what extent the legislator has succeeded still remains to be seen - particularly in the area concerning competing claims between children of different marriages and illegitimate children.

[190] See Article 495A of the reform which stipulates and establishes the parameters explained.

[191] This legislation has introduced and modified certain principles of co-ownership and rights emerging therefrom which are beyond the scope of this paper. For a more in depth study of issues relating to this particular aspect, I invite the reader to refer to another paper being presented by Dr. Anthony Ellul, a colleague of mine in the legal profession, which is being printed elsewhere.

This notwithstanding, they are a huge step in the right direction and should serve as an impetus towards further change. We shall have to wait for the test of time to see the extent to which certain inequalities will remain or whether legal and social developments will induce further changes.

Paul Debono
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