

## THE FINANCIAL ASPECT OF FAMILY LAW

*Ann Marie Mangion\**

**Abstract.** The aim of this study is to determine whether family law, be it filiation, marital breakdown or otherwise, is influenced or driven by financial matters, and whether financial hardship has escalated with the introduction of divorce in Malta. The study will be corroborated with Maltese case-law.

### Introduction

Family law is an interesting legal branch since it is not found in a vacuum cut off from the rest of the legal branches. In fact family law has many legal facets, be it criminal law, the law of succession and more. However, family law does not stop at that and has an economic side to it as well. One might argue that family law and financial matters are relative and one cannot live without the other. The study starts off with a general introduction regarding family law and two of its main sections, that is, marital breakdown and filiation. This is followed by economic considerations relating to each section. A case-law analysis of the legal and economic situation of each section is carried out. The closing section analyses whether finance does in fact play a major part in family law and if so to what extent.

### Family Law

The Maltese Civil Code is divided into two books, the Book of Persons and the Book of Things, with the latter being divided into two further parts, (i) of rights over things and (ii) of the modes of acquiring and transmitting property and other rights over or relating to things. The first book, the

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\* Dr Ann Marie Mangion is a practicing advocate in the Courts of Malta and she is a member of the Chamber of Advocates. She holds a Master of Laws in Family Law from the University of London. She is currently in the final stages of completing an MA in Matrimonial Canon Law and Jurisprudence.

Book of Persons is the book within which family legal provisions are found. The Maltese Civil Code is based on the Roman legal system and subsequently on our 1784 Code de Rohan. Sir Adrian Dingli was appointed to draft our Civil Code and he heavily relied on the Code Napoleon – thus basing our legal system on the Civil model used in Continental Europe (Farrugia, 1996: 329).

The Book of Persons which deals with family law lists down various areas among which, marriage which incorporates separation and divorce. This area of family law may be the most recognised familial legal aspect – however, it would be erroneous to associate family law with marital breakdown only since family law is much broader than that. In fact, the Book of Persons does not simply stop at marital breakdown but lists also filiation and adoption which are two recognised areas of family law. Other areas which form part of family law are parental authority which many associate with marital breakdown because, although parental authority does not come into play during and after marital breakdown, many are mostly concerned with it when marital breakdown occurs. Other areas within family law that may not be as familiar as marital separation, filiation and adoption, are tutorship, interdiction and incapacitation, curatorship, and the acts of civil status.

### *Marital breakdown*

Marital breakdown is perhaps the most known aspect of family law. Marital breakdown can be divided into separation and divorce governed by the Civil Code, and annulment which is governed by the Marriage Act 1975 if it is a civil annulment, and by the Code of Canon Law if it is an ecclesiastical annulment.

The first step to marital breakdown is separation – separation can either be amicable or contentious. In an amicable separation, the division of assets, the amount and allocation of maintenance, and care and custody, as well as visitation rights are agreed on by the separating couples. However, in a contentious separation which is the second step, and is only taken if an amicable separation is not reached, the issues of the division of assets, the amount and allocation of maintenance, and the issue of care and custody and visitation rights, will be decided by the Court.

The type of divorce pursued very much depends on the couple's separation. If the couple is legally separated then the divorce will be a relatively quick process – since it will be based on a no-fault aspect just like an amicable separation which is based on a no-fault separation. However, if the couple has been separated de facto, that is they have not been legally separated, they would have to go to mediation first and if subsequently an amicable agreement is impossible to reach, a court case will ensue. On the other hand if a couple is currently undergoing separation proceedings and have been living apart for the legally required number of years, then such separation proceedings can be transformed into divorce proceedings.

Annulment is applied for if there is proof that the couple can never be reunited – such proof can take on the form of legal separation or proof of separation proceedings or divorce. However, for a decree of nullity to be issued there must be proof that the marriage was null *ab initio*. Therefore, technically the couple need not be separated or divorced or about to get separated or divorced because if the marriage is null *ab initio*, it will be declared null. However, very often, couples pursue an annulment in the course of a marital breakdown.

### *Separation*

There are two forms of separation – the legal separation and the *de facto* separation. In the latter one the spouses live separately and divide the assets amongst themselves – however, since it is not a legal separation no one is technically entitled to maintenance or visitation rights. On the other hand, legal separation is further divided into two types: the amicable separation and the contentious separation. The amicable separation is the first step towards legal separation and only if an agreement cannot be reached between the parties that a contentious separation is proceeded to. An amicable separation is a no-fault separation. The division of assets, the care and custody, the visitation rights and maintenance are all decided between the parties aided by their respective legal counsel in the presence of a mediator whose role is an impartial one. However, if such amicable separation cannot be reached, the next step would be a contentious separation, and this is a fault-based separation, with the division of assets, care and custody, visitation rights and maintenance being decided by the

Court. The grounds for separation are set in our Civil Code and these are, adultery, domestic violence, threats, excesses, cruelty, or grievous injuries against the other spouse or against their own children, abandonment and desertion and the blanket provision of irretrievable breakdown of the marriage.

### *Divorce*

Divorce is a recent introduction in our legislative system. The divorce legislation was modelled after Ireland's divorce model due to the fact of Malta's and Ireland's religious similarities and also due to the fact that Ireland legalised divorce by the introduction of the Family Law (Divorce) Act 1996 which took effect in February 1997 (Simon, 2003: 48), making it the last European state introducing divorce before Malta did in October 2011. Just like the Irish divorce, the Maltese divorce is a no-fault divorce where it is preceded by a legal separation, be it an amicable or a contentious one. Divorce is granted when the couple have been legally separated for four years out of the last five years, there is no reasonable prospect of reconciliation, and maintenance is adequately provided for. However, if the couple are merely *de facto* separated or not separated at all, they can opt for a no-fault divorce through mediation and if a divorce agreement is not reached, then a contentious divorce is entered upon in which it becomes a fault-based divorce with the grounds of separation being applicable to divorce.

### *Annulment*

An annulment, be it civil or Ecclesiastical, is not the same as divorce, since a decree of nullity means that the marriage was null *ab initio*. A marriage between two baptised persons can be deemed valid but not consummated, thus the phrase, '*ratum et non consummatum*' and in this case there will be the dissolution of the marriage (Snee, 1958: 366). This is different from a decree of nullity since a decree of nullity refers to a marriage being null from the moment of consent.

The grounds for a decree of nullity are several, such as simulation, error, deceit, and impotence. However, the most common grounds are those found in Canon 1095 for Ecclesiastical annulments:

- those who lack the sufficient use of reason;
- those who suffer from a grave defect of discretion of judgment concerning the essential matrimonial rights and duties mutually to be handed over and accepted;
- those who are not able to assume the essential obligations of marriage for causes of a psychic nature.<sup>1</sup>

Before the introduction of divorce in Malta, annulment was sought by separated couples who had the intention of getting married. Now, with the introduction of divorce, civil annulment is sought by persons who do not satisfy the time requirement of divorce, that is, they have been separated for less than four years out of the last five years.

However, there are couples, who although do satisfy the time requirement imposed in the divorce legislation, they still would like to opt for an annulment.

Ecclesiastical annulments differ from civil annulments in that if one of the parties has the intention of getting married within the Church, a divorce would not suffice, nor would a civil annulment, but only an Ecclesiastical annulment would authorise the parties to get married within the Church. This is so because the previous marriage would either have been dissolved because of '*ratum et non consummatum*', or it would have been declared null *ab initio*. Civil annulments, on the other hand, are not governed by the Code of Canon Law but by the Marriage Act 1975. The grounds found in the Marriage Act 1975 are similar to those found in the Code of Canon Law.

### *Filiation*

Filiation is a topic which touches many legal areas. Filiation deals with the paternity of the child. Maternity is never in question since we follow the Roman dictum, '*Mater semper certa est*' which means that the mother is always certain. However, the question of paternity can be put to question. For this reason, filiation is legally divided into two sections – with children born in wedlock and children born out of wedlock. The main difference

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<sup>1</sup> Code of Canon Law, <[http://www.vatican.va/archive/ENG1104/\\_P3Z.HTM](http://www.vatican.va/archive/ENG1104/_P3Z.HTM)> accessed on 27 February 2012.

between the two is presumption of the father. In children born in wedlock the husband of the mother is presumed to be the father of the child and repudiation of the child can only be made if it can be proven that, as stated in Article 70 of the Maltese Civil Code:

- if he proves that during the time from the three hundredth day to the one-hundred-and-eightieth day before the birth of the child, he was in the physical impossibility of cohabiting with his wife on account of his being away from her, or some other accident; or
- if he proves that during the said time he was *de facto* or legally separated from his wife;
- Provided that he may not repudiate the child if there has been, during that time, a reunion, even if temporary between him and his wife; or
- if he proves that during the said time he was afflicted by impotency, even if such impotency was only an impotency to generate; or
- if he proves that during the said time the wife had committed adultery or that she had concealed the pregnancy and the birth of the child, and further produces evidence of any other fact (which may also be genetic and scientific tests and data) that tends to exclude such paternity.<sup>2</sup>

On the other hand when a child is born out of wedlock the child's paternity is not presumed and it has to be acknowledged.

## **Economic Implications**

Family law is intertwined with economic implications and marital breakdown and filiation are no exception. This study is going to tackle these two aspects only since these are two aspects which tend to be a bone of contention among the parties, whereas other aspects of family law such as interdiction or incapacitation do not.

### *Marital Breakdown*

Marital breakdown is perhaps one of the most family aspects fraught with economic implications. Each and every marriage in Malta is ruled by one of

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<sup>2</sup> Civil Code, The Laws of Malta, Chapter 16, Article 70.

these matrimonial regimes: the community of acquests, the separation of estates, or the CORSA, with the two former regimes being the most popular and with the first one being the most used regime. The community of acquests is the most popular due to the fact that it is applied by default to each and every married couple unless such married couple decides to choose another particular regime. The community of acquests means that everything bought or acquired after marriage belongs to both spouses equally. This is done to protect the less financially able spouse. Therefore, if in a marriage the husband is the only breadwinner and the wife is a stay-at-home wife, the wife is still entitled to half of the assets, even though she did not technically financially earn it. However, everything that was paraphernal, that is, it used to belong to the spouses personally before contracting marriage will still belong solely to them. Inheritance is also deemed to be paraphernal even though acquired during marriage. The separation of estates, on the other hand, is a regime used to keep the assets separate, that is what is acquired by the husband will belong solely to the husband and what is acquired by the wife will belong solely to the wife. This regime is usually adopted by businessmen to protect the family assets from being sought by creditors of the business in case of bankruptcy.

During marital breakdown the assets such as the matrimonial home becomes a bone of contention. If an agreement cannot be reached as to whom the matrimonial home will be allocated, the matrimonial home will be sold either through a real estate agent, or if an agreement cannot be reached on what price to be sold for, or as to which real estate agency to be used, it will be sold by judicial auction. Financially the sale by judicial auction is not the best choice since it will be sold for a lesser price than it would have been sold if it were sold through a real estate agency. Therefore, the sale by judicial auction is the last resort. However, if an agreement is reached as to who should use the matrimonial home, and usually the matrimonial home goes to the wife if she has young children so as not to disrupt their daily lives, the wife will have to give the husband his share which will amount to half the price of the matrimonial home. Maintenance is also another bone of contention - spousal maintenance differs from maintenance due to the children. Legally the spouse who is not at fault of the marital breakdown is entitled to be maintained by the spouse at fault. However, Court decisions very much depend on the working

ability of the spouses. Therefore if the spouses, especially the wife, is working or deemed to be capable to work, she will not be maintained by the husband, especially if the fault is shared by the two of them. In an amicable separation spousal maintenance can even be renounced. In fact, with the recent amendments in our family law, the newly amended Article 54(2) states that maintenance "...shall be determined having regard to the means of the spouses, their ability to work and their needs and regard shall also be had to all the other circumstances of the spouses and of the children..." This practice has already been the norm in the Civil Court (Family Section), but now it has become law.

The law also provides for the needs of the children with a disability, whether mental or physical. It states that disability pension will be taken into account when calculating the amount due in maintenance and for circumstances of illness where, due to such illness as well as the ability of the spouses to maintain themselves and/or their children is diminished (Mangion, 2011).

The norm is that the husband remains working full-time, whereas the wife has either to change jobs or work at reduced hours or even gives up her job if the husband does not share work-life responsibilities with his wife. The new amendments aim to compensate the wife as regards her chances of employability. That is, the wife, who has had her chances of employability diminished for having been out of the workforce for many years to take care of the family, would have maintenance due to her, and the amount of such maintenance would take into account such diminished chances of employability. Thus in effect the law is compensating the wife for giving up her employability chances to take care of the family. The sub-article takes also into account every other income or benefit the spouses may receive other than social assistance paid to them under the Social Security Act (*Ibid*). Accommodation requirements of the spouse and of the children, and also the amount that would have been due to each of the parties, such as a benefit under the pension scheme, which are being forfeited due to separation, are taken into consideration (*Ibid*).

An interesting new concept regarding maintenance is the monetary guarantee which did not exist prior to the amendments brought forth by

the divorce legislation which amended crucial features relevant both to separation and divorce such as maintenance. This monetary guarantee will not exceed the amount of maintenance due to the child and/or the other spouse for five years. However, such monetary guarantee is relegated to divorce proceedings and such will be ordered by the Court in each and every case, but only in those cases where the spouse or the parent responsible for maintenance has failed to consistently give maintenance when this was due, and this to the detriment of the other spouse. In the case of separation there is the option of a lump sum payment – that is, if there is the possibility that the person responsible of maintenance will fail to pay the maintenance due or has already failed to do so during separation proceedings, the Court will order that such maintenance will be paid in the form of a lump sum payment or else in the form of more property share.

Unlike spousal maintenance, maintenance due to the children can never be renounced. And if the spouse bound to maintain the children refuses to give maintenance or even stops maintenance, that spouse will be criminally prosecuted. Maintenance is legally due till eighteen years of age. However, children will be allowed to be maintained till the age of twenty-three as long as they are in full-time education, and to *loco parentis* (that is, maintenance provided for children whom one of the spouses treated as his/her own children even though they were not), have been incorporated in separation proceedings too and not only in divorce cases (*Ibid*).

A marital breakdown will also give rise to issues of inheritance. It is the norm for couples to give up the right to inherit each other.

### *Filiation*

Filiation is another legal area which is fraught with financial implications. Unlike marital breakdown, where financial implications are of concern when the marriage has collapsed, in filiation, particularly where there are children born out of wedlock, the financial implications are a prime concern. When children are born in wedlock financial implications are of concern when there is marital breakdown. But in the case of children born out of wedlock financial implications are the first and foremost concern of

the parents. Many believe that mothers of children born out of wedlock do not allow the fathers to acknowledge the child and list the child as having an unknown father to claim social benefits. However, in reality, although there might be some mothers who do just that, the majority of them do not do so purposely to claim social benefits, but in fear that the father might have a claim over the child. The social benefits available to a single mother are very low, and if such mother has a full-time or even a part-time job, she exceeds the threshold of allowable income, she will forfeit the social benefits due. Once a child is acknowledged the father will be obliged to provide maintenance for the child. In reality, the difference between the financial implications arising from children born in wedlock and those arising from children born out of wedlock and acknowledged by the father, are none save the legal usufruct. In the case of children born out of wedlock even though they are acknowledged by the father, the father will still not have the right of legal usufruct. With regard to inheritance children who are born in wedlock will be entitled to the reserved portion of both their parents. However, children who are born out of wedlock will only be entitled to the reserved portion of the father if the father has acknowledged them– otherwise they will be entitled to the reserved portion of the mother only.

### **Maltese Case-Law**

In Maltese legal practice, unlike in the common-law system, we do not follow the legal precedent, that is, our case-law does not have any binding power. Our legislation is the binding power. On the other hand, our case-law can be looked upon for direction.

In *AB v CB* decided by the Civil Court (Family Section) on 31<sup>st</sup> October 2007 the Court noted:

“As regards maintenance due to the plaintiff herself, the Court observes that as aforementioned before she has rendered herself guilty of grievous injuries against her husband since 1999 with her unnecessary friendships with other men, which such fact has been confirmed by their son. In the Court’s opinion the plaintiff’s behaviour should justify her forfeiture

from the right to be maintained and therefore the plaintiff's demand as regards spousal maintenance due to her in the future cannot be entertained."<sup>3</sup>

In a contentious separation maintenance is not allocated to a spouse who is at fault or has part of the fault.

In AB and CB vs X decided by the Civil Court (Family Section) on 23<sup>rd</sup> February 2012 the joint divorce application stated:

"According to the contract, the parties forfeited their right from reciprocally maintaining each other and there is no maintenance due to the son due to the fact that he is of age and is in employment."<sup>4</sup>

In a consensual separation where the wife is in employment it is the norm to '*tiddekadi*' ['forfeit'] from the right to maintenance. This is different from simply renouncing maintenance because when a party '*jiddekadi*' ['forfeits'] it means he or she is indirectly admitting fault to the marital breakdown, whereas, if a party simply renounces, that party is not admitting fault or otherwise.

However, in a consensual separation fault is not an issue. As regards the son, in this case it is being stated that although he is of age he is in employment. This is due to the fact that the amended legislation on maintenance specifically states that maintenance is up till twenty-three years of age if in full-time education.

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<sup>3</sup> The original Maltese text is the following: *Illi in propositu ghall-manteniment dovut lill-attrici ghalha, il-Qorti tosserva li huwa rilevanti l-fatt li kif fuq spjegat dina kienet irrendiet ruhha hatja ta' ingurji gravi fil-konfront tar-ragel taghha sa mis-sena 1999 bil-hbierja zejda li kellha ma xi rgjel, liema fatt jinsab konfermat mit-tifel taghhom, kif ukoll mid-diversi affidavits ta' xhieda, prezentati mill-konvenut. Fil-fehema tal-Qorti dan il-komportament ta' l-attrici ghandu jiggustifika d-dekadenza mid-dritt tal-manteniment ghalha, u ghalhekk it-talba attrici in kwantu diretta ghall-manteniment ghalha fil-futur, ma tistax tigi milqugha. (Application Number 1641/1999/1)*

<sup>4</sup> The original Maltese text is the following: *Illi skont il-kuntratt, il-partijiet iddekkadew mid-dritt li jmantnu lil xulxin u ma hemmx manteniment ghat-tifel stante li huwa maggorenni u jinsab f'impjeg. (Joint Application Number 417/2011).*

In another divorce application, the Court noted that:

“It observed that as proven by the evidence brought forth there is no reasonable prospect of reconciliation between the parties and it also observed that it results that the parties’ children are nowadays of age and moreover there does not exist any problem as regards maintenance due to the plaintiff by the defendant and this as the plaintiff herself stated while giving evidence”.<sup>5</sup>

In this case the Court also noted that maintenance due to the applicant is being paid consistently and therefore subsequently divorce was pronounced. The only financial matter of concern in divorce proceedings is maintenance and if that is being paid consistently divorce will be pronounced. In this respect economic hardships have not escalated.

## Conclusion

Financial factors do not seem to be the driving force of marital breakdown unless there is domestic violence characterised by financial hardships. However, during separation or divorce, financial factors such as the assets and maintenance are hard fought for in most circumstances. In a divorce application—where spouses have already been legally separated, the financial factors do not come into the equation since most of the time the children are of age. Financial factors come into play mostly where the provider of the maintenance lacks in the duties to provide it consistently. There is the misconception that filiation is driven by financial matters – mainly social benefits. However, in the majority of cases children born out of wedlock are not acknowledged by the father due to fear that the child will be taken away.

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<sup>5</sup> The original Maltese text is the following: *Rat ukoll illi irrizulta mill-provi illi ma hemm l-ebda prospett ragonevoli ghal rikonciljazzjoni bejn il-partijiet u rat ukoll illi irrizulta illi ulied il-partijiet illum il-gurnata huma maggorenni u illi ma tezisti l-ebda problema fir-rigward tal-manteniment illi ghandu jithallas mill-intimat lir-rikorrenti u dan kif xehdet l-istess rikorrenti.* (Application Number 350/2011, AB vs CD, Civil Court –Family Section, 20<sup>th</sup> January 2012).

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