



Appendix 6

MAINTENANCE: THE GENERAL SCENARIO – DR YANA MICALLEF STAFRACE

Article 5 (1) of the Civil Code, stressed the principle that, *“In regard to maintenance, the spouse shall have a prior right over the parents or other ascendants.”* This seems to be quite a justifiable stance taken by the legislator since it shows his evident intention to place the spouse on a different level from the other relatives of the other spouse. Here, the legislator is implicitly stating that marriage, although not cutting all ties with one’s own ascendants and/or other relatives, creates a stronger bond vis-à-vis the issue of maintenance, whereby the other person taken as spouse comes to the forefront.

What of *de facto* couples who are not married? They are not contemplated in our law in this context, however, as per LN 190/2007 and LN 252 /2007 concept has entered our legislation that compensation may be claimed by persons who are maintained in whole or in part by a victim.

However, under sub-article (2) of the same article, the Code stipulates that, *“Where both children and spouse claim maintenance, they shall be in a position of equality.”* Here we see a scenario of parity; parity between the spouse and the children of the marriage. Thus one can apply the general principle established under the first sub-article and apply it *mutatis mutandis* to the children of the marriage.

Under sub-article (3), then, there is sought to be created some balance between the children on the one side and the ascendants on the other since there is established that, *“It shall not be lawful for either of the spouses to claim maintenance from the children or other descendants or from the ascendants if such maintenance can be obtained from the other spouse.”* It is evident that in the ordinary normal picture, the spouses are to seek to maintain one another without seeking such contribution from other sources, provided the other spouse is able to supply the pertinent economic support needed.

The subsequent provision, **Article 6** of the Civil Code holds that, *“The duty of one spouse to maintain the other shall cease if the latter, having left the matrimonial home, without reasonable cause refuses to return thereto.”* This provision is self explanatory and provides for the instance – given rise by the unreasonable abandonment of the matrimonial residence by one spouse – where there arises the cessation of the duty, upon one spouse, to maintain the other (the one who has left) and the cessation of the right, of one spouse, to claim or receive maintenance from the other (the one who has remained). Cases when it is not unreasonable to leave the conjugal home include for example violence towards spouse or children

Under **Article 7 (1)** there is affirmed that the, *“Parents are bound to look after, maintain, instruct and educate their children in the manner laid down in article 3B of this Code.”* Please note the word parents not spouses. Now, **Article 3B** lays down that, *“Marriage imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children.”* Here maintenance is depicted as a salient feature of the conjugal life, whereby it is made incumbent on both spouses, as parents, to contribute to the well being of their children.

It is interesting to note that the interests of the children reign supreme since the legislator even caters for the circumstance where the parents cannot maintain their own children in the eventuality where they do not possess sufficient means to do so. Here, the liability for the maintenance and education of the children devolves on the other ascendants. Thus, in the second sub-article of this provision the duty of protection (always in the ambit of maintenance) afforded to the children is extended to the ascendants, i.e., grandparents, uncles, aunties, etc.

However, an inroad to this general scenario where the children seem the beneficiaries of an absolute right to receive from their elders, is catered for in **Article 32** where there is held that, *“Besides the ground referred to in article 27, parents or other ascendants may refuse maintenance to children or other descendants on any of the grounds on which an ascendant may disinherit a descendant.”* In other words, children forfeit the right to be maintained if they contract marriage, notwithstanding the opposition of the person who is liable to provide for their maintenance (Article 27). Moreover, the provisions of **Article 623** relative to the institute of disherison are rendered applicable and thus if any instance (there are 7 scenarios) therein contemplated is committed by the children against the person who is maintaining them, then they forfeit the right of maintenance. The scenarios contemplated are

- If the descendent has without reason refused maintenance to the testator

- If where the testator has become insane the descendant has abandoned him without in any manner providing for his care
- If where the descendant could release the testator from prison he has without reasonable ground failed to do so
- If the descendant has struck the testator or has otherwise been guilty of cruelty towards him
- If the descendant has been guilty of grievous injury against the testator
- If in the case of a son or daughter or other descendants he or she publicly prostitutes him or herself without the connivance of the testator
- In any case in which the testator by reason of the marriage of the descendant shall have been under the provisions of sub title II of Title I of Book mFirst of this Code declared free from the obligation of supplying maintenance for such descendant

However, under **Article 34** an exception is made to the rule established under Article 32. There is stated that, “*Nevertheless, in none of the cases referred to in the last two preceding articles can maintenance be refused where the injury, or other ground of refusal therein mentioned, has taken place very long before the claim for maintenance is made.*” Therefore, we see an exception to the exception since the time and space between the “deplorable conduct” (envisaged under Art. 27 and Art. 623) and the claim for maintenance have the effect of neutralizing the exception envisaged under Article 32.

Under **Article 8** we find the inverse situation whereby there is provided that, “*The children are bound to maintain their parents or other ascendants, who are indigent.*” Thus, in the case their parents or ascendants are reduced to a state where they lack even necessities (i.e., they become very needy or destitute), and thus incapable of maintaining them, the duty of maintenance falls on the children. Here the query that is bound to arise is what if the parents or other ascendants are indigent, but the children are, for instance, fifteen years of age? Would it still be incumbent upon the child to provide for their maintenance?

The Civil Code imposes the duty to provide and the correlative right to receive maintenance also on other persons. Sometimes more than one person may be liable to maintenance and therefore **Article 12** states the order by which different relations shall be liable to maintenance:

- (a) the children or descendants of the person claiming maintenance, in the same order in which they would according to law be vested with his or her succession;
- (b) the parents;
- (c) the other ascendants in the same order in which they would according to law be vested with the succession of the claimant.

However, the law may due to urgency ignore this order [*vide Article 13(3)*], but the persons providing maintenance may claim reimbursement. The order established under **Article 12** is important to give priorities to the people claiming maintenance from a person who is unable to “*supply maintenance to all of them*” [*vide Article 14(1)*].

Other relevant provisions which are self-explanatory are **Article 15**, **Article 16** and **Article 17** which speak of, *inter alia*, the order of liability for maintenance, that this obligation may be one *in solidum* or one *in subsidium* and where several persons claim maintenance.

A very important provision in relation to maintenance is Article **19** where under sub-article (1) there is held that, “*Maintenance shall include food, clothing, health and habitation.*” Here we are provided a definition of the term “*maintenance*” and it is made to consist, principally, of nutrition, clothing, health and the provision of a dwelling place. However, one is to note that this definition is a wide one and not exhaustive, since the legislator wisely used the phrase “*shall include*”. Therefore, the things therein mentioned are merely few aspects or forms from the wider spectrum covered by the concept of “*maintenance*”. The definition provided under the first sub-article is then further qualified and rendered more specific under the second sub-article where there is provided that, “*In regard to children and other descendants, it shall also include the expenses necessary for health and education.*” Here, one can find the reiteration of the principle established under **Article 3B** above already cited, namely that marriage imposes on the parents, amongst other things, to

instruct and educate the children of the marriage, and in so doing they ought to take into consideration the children's abilities, natural inclinations and aspirations

Article 20, entitled "*Amount of maintenance*", provides in sub-article (1) that, "*Maintenance shall be due in proportion to the want of the person claiming it and the means of the person liable thereto.*" Here, it is manifest that the law is seeking to establish proportionality and also a state of equilibrium between the person receiving and the person supplying maintenance. A person can claim maintenance according to the economic capacities of the other and thus, it follows that a person cannot impose, demand or force another, for example, to sell property in order to get maintenance. This is so because under sub-article (3) of this Article the Civil Code states that maintenance has to be paid according to the individual's "*earnings from the exercise of any profession, art or trade*" and to the individual's "*fruits of any movable or immovable property*". In the other four sub-articles that compose this provision, there are established the mechanisms and principles how to compute the means of the person who must supply maintenance. Article 20(5) is particularly interesting in that it states "in estimating the means of the person claiming maintenance regard shall also be had to the value of any movable or immovable property possessed by him.

One may conclude this general part on maintenance by making reference to **Article 338(z)** of the Criminal Code where there is provided that, "*Every person is guilty of a contravention against public order, who [...] when so ordered by a court or so bound by contract fails to give to his or her spouse the sum fixed by that court or laid down in the contract as maintenance for the spouse and, or, the children, within fifteen days from the day on which, according to such order or contract, such sum should be paid.*" Moreover, **Article 17(1)** of the Constitution also recognizes the importance of maintenance and provides that, "*Every citizen incapable of work and unprovided with the resources necessary for subsistence is entitled to maintenance and social assistance.*" These two Articles, emanating from two completely diverse scenarios go to stress the import and significance of maintenance, both as a bond that fasten humans inter-relationships together (as in the case of parents or ascendants towards their children or *vice versa*) and as a principle recognized for the proliferation of stability (under the Constitution) and as a mechanism at the basis of public order (under the Criminal Code).

MAINTENANCE – THE SEPARATION CONTEXT

Introduction

The complex and multifaceted set of relationships between members of a family includes an economic aspect, part of which is provision of means to support the family, which plays an important part during the course of family life. In the event of a family breakdown the issue of financial support becomes even more important and certainly creates more problems, since the way of life of spouses, distribution of their responsibilities and income change, and hence, require new solutions.

Marriage, being a *sui generis* type of contract, imposes specific rights and duties on the spouses entering this contract. Indeed, material support of the family – maintenance – is one of the main duties of a spouse. The question is which of the spouses is to be granted maintenance? And, what is the degree of maintenance due?

Before the 1993 amendments to the Civil Code, the obligation to maintain was not a reciprocal one since it was the duty of the husband to maintain his wife according to his means and position [past **Article 3(2)**]. Moreover under the then **Article 4(3)** there was stipulated that the wife was "... *bound to contribute to the maintenance of the husband if he does not possess sufficient means.*" One is to point out that this difference was mainly due to the old **Article 3(1)** which stated that, "*The husband is the head of the household.*"

Today the scenario is completely different, since both parties (the husband and the wife) are placed on the same footing. In fact under the **Article 2(2)** of the Civil Code we find laid down that, "*The spouses shall have equal rights and shall assume equal responsibilities during marriage ...*". Moreover, under the new **Article 3** there is stressed that, "*Both spouses are bound each in proportion to his or her means and of his and her ability to work whether in the home or outside the home as the interests of the family requires to maintain each other and to contribute towards the needs of the family.*" Thus, the onus has shifted from the husband and is placed upon both parties, and therefore transforming an exclusive authority, so to say, of the husband into a shared and equal responsibility of the couple.

As was seen in the general scenario, maintenance as between the spouses, according to **Article 19**, shall include food, clothing, health and habitation. With regards to the children and other descendants, it shall also include the expenses necessary for health and education.

Art. 37 and 46 A of the Civil Code

Now, coming to the separation aspect *in se*, it is clear that when a spouse commenced the relative procedures for separation, such spouse, be it the husband or the wife, may claim maintenance *pendente lite*. This is obviously a necessity because of the period of time that proceedings can take.

Art. 54 of the Civil Code

Moreover one is to underline that even when the procedures are terminated, this right for maintenance may subsist. **Article 54(1)** where there is provided that, “*The spouse against whom the separation is pronounced shall not, as a result of such separation, be relieved from the obligation of supplying maintenance to the other spouse ...*”.

Now, **Article 54(2)**, which was introduced via the 1993 Civil Code amendments, says that, “*The amount of such maintenance shall be determined having regard to the means of the spouse bound to supply maintenance and the needs of the other spouse, taking into account also all other circumstances of the spouses.*” The phrase, “*... means of the spouse bound to supply maintenance*

Under **Article 54(3)** there is stated that, “*Notwithstanding any other provision of this Code, on separation being pronounced, the court may if it deems it appropriate in the circumstances, order the spouse liable to supply maintenance to pay to the other spouse, in lieu of the whole or part of such maintenance, a lump sum, which the court deems sufficient in order to make the spouse to whom maintenance is due financially independent or less dependent of the other spouse, as the case maybe.*”

Succinctly, this provision provides that instead of ordering one spouse to pay maintenance on a weekly basis, the Court has both the discretion and the clout, when pronouncing its judgement, to order that a lump sum of money is given so as to make the other spouse financially independent, or at least less dependant on the other spouse. This is a useful especially in order to ensure maintenance in the future .

Article 54(4) holds that, “*For the purposes of sub-article (3) of this article, the court shall, among the circumstances, consider the possibility of the person to whom maintenance is due, of receiving training or retraining in a profession, art, trade or other activity or to commence or continue an activity which generates an income, and order the lump sum for that purpose.*” Here the spirit of the law is manifestly one which seeks to establish equilibrium and fairness amongst the parties. Therefore, in utilising its discretion to order the assignment of a lump sum of money the Court is to delve into the matter further and examine whether the party who is to receive such maintenance can possibly be trained in a profession or retrained in such profession, art, trade, etc., in order for such party (who is to receive maintenance) to be able to get back on its feet and become economically autonomous, independent and self-sustainable. In addition, this possibility has mainly two advantages, namely:

- i. it gives the opportunity to a separated spouse to being or continue a career and he her/himself the source of income; and
- ii. it avoids potential problem from arising in a near or distant future, as for instance, if the other spouse is not in a position to give this maintenance any more.

Article 54(5) lays down that, “*The court may direct, according to circumstances, that the payment of a lump sum referred to in the previous sub-articles of this article, be made by equal or unequal instalments spread over a reasonable period of time.*” Here we are in the same sphere of application of sub-article (3) with the sole difference that the lump sum of money is not given to one party in one whole payment, but may be divided into instalments.

Under **Article 54(6)** we find stated that, “*The court may also direct that in lieu of all or part of the lump sum referred to in sub-article (3) of this article, the spouse liable thereto shall assign to the other spouse property in ownership or in usufruct, use or habitation.*” Here we see that the lump sum need not necessarily consist in money but that it may even take the form of tangeable things such as immovable property. A case in point is that of **Emma Borg vs L-Avukat Dr John Mizzi et noe**,¹ decided by the Court of Appeal (Civil, Superior) on the 5th of october, 1998 where the Court of Appeal reversed the decision reaced by the first Court because of the difficulty faced by the wife to recover maintenance (in monetary value) from her absent husband. In its sentence, the Court of Appeal ordered that, “... *sehemu minn proprjetà jigi assenjat lilha in sodisfazzjoni ta` dritt ta` mantenimnet ghaluha u ghal uliedha u sehemha mill-komunjoni ta` l-akkwisti b'dan li tassumi d-debiti li jistghu jaggravaw il-proprjetà*”. This is again a very useful and practical tool

Article 54(7) holds that, “*Where there is a supervening change in the means of the spouse liable to supply maintenance or the needs of the other spouse, the court may, on the demand of either spouse, order that such maintenance be varied or stopped as the case may be. Where however, a lump sum or an assignment of property has been paid or made in total satisfaction of the obligation of a spouse to supply maintenance to the other spouse, all liability of the former to supply maintenance to the latter shall cease. Where instead, the lump sum or assignment of property has been paid or made only in partial satisfaction of the said obligation, the court shall, when ordering such lump sum payment or assignment of property, determine at the same time the portion of the maintenance satisfied thereby and any supervening change shall in that case be only in respect of the part not so satisfied and in the same proportion thereto.*”

This sub-article deals with the effects of this option in case of supervening changes in the means of the liable spouse. If the said lump sum has already been paid in whole, then the liable spouse cannot ask for a refund for the maintenance paid by him/her. However, if the said sum was only paid in part, then supervening changes in the means of the liable spouse only effect that part of the sum which has not already been paid. If, for example, the liable spouse loses his job, s/he can file an action to reconsider the amount which has yet to be paid without any prejudice to that sum already paid. The same happens if the liable spouse inherits a great amount of property; the other spouse can file an action for the reconsideration of that sum which still has to be paid, without effects on the sum already paid.

However , one cannot just stop giving maintenance or adjust maintenance without the prior consent of the other party if circumstances change . The authority of the court has to be obtained. This is very important in the criminal scenario.

Art. 57(1) of the Civil Code

Article 57(1) states that, “*Whosoever may be the person to whom the children are entrusted, the father and mother shall maintain their right to watch over their maintenance and education, and shall still be bound to contribute thereto, according to law.*” Therefore, it goes without saying that irrespective of the fact to whom the children are materially entrusted, the duty to continue providing for their well-being as established under Article 19 still subsists on the party who has solely the right of access towards them.

Art. 48(1) (d) of the Civil Code

It is interesting to note that maintenance is not always due. Apart from the inroads and exceptions catered for and explained in the general introduction to this paper, here we find a sanction, a penalty, which terminates one’s right to claim or continue from receiving maintenance.

The relevant provision here is **Article 48(1)(d)** which states that, “*The spouse who shall have given cause to the separation on any of the grounds referred to in articles 38 and 41, shall forfeit [...] the right to compel, under any circumstances, the other spouse to supply maintenance to him or her in virtue of the obligation arising from marriage.*”

In other words, that spouse who has given cause to the separation (i.e., the party who is at fault), because s/he has committed adultery or s/he, for two years or more, has deserted the other spouse without good grounds, then, the right of maintenance is to be forfeit.

¹ Vol.LXXXII-ii-598