



March, 2008

**REPORT ON THE CONFERENCE ORGANISED BY THE CHAMBER OF ADVOCATES,
MALTA**

REMOR is an acronym for Research and E-learning on Maintenance Obligations Recovery; a European Union research programme on maintenance obligations recovery. The aim of this project is to carry out research and didactic activity on maintenance obligations and on the issues arising from the cross-border recovery of the same in case of non-compliance.

One of the main focuses of the REMOR Project is to develop seminars on the subject of Family Law within the European Union and, in particular, on the subject of the recovery of maintenance obligations.

To this purpose, the Chamber of Advocates, Malta organised a conference on the 25th and 26th of March, 2008, held at the Mediterranean Conference Centre, in Valletta; the Conference Program is being herewith attached as Appendix No. 1. It is to be noted that the said Conference could not be organized at an earlier date owing to:

- the recent renewal, by election, in the last quarter of 2007, of the Board of Directors of the Chamber of Advocates, Malta, which Board has affected changes in the persons responsible for the REMOR Project;
- the Malta General Elections on the 8th of March;
- Easter festivities.

The said Conference was open to all representatives of the social sphere; the participants averaged 50 in number, the majority of whom were advocates practicing in the field of Family Law. A list of the participants and a sample of the certificate of attendance are respectively being herewith attached as Appendices Nos. 2 and 3.



The conference consisted of ten 30-minute lectures spread, as already explained, over a period of two days. The lectures were given by expert practitioners in the field of Family Law.

Maximum dissemination was given to this initiative; the advert relative to the same is being herewith attached as Appendix No. 4.

Hereunder is a detailed description of the conference.



Tuesday 25th March, 2008

The conference was opened for registration at 08.30 a.m., following which an introductory speech was delivered by Dr. Andrew Borg Cardona, the President of the Chamber of Advocates, Malta.

Dr. Tanya Sciberras Camilleri went on to introduce the lectures and lecturers for the day:

<p>The Concept of 'Family' & the Obligation of Maintenance - Dr. Keith A. Borg</p>
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Dr. Keith Borg commenced by offering the floor a set of questions with regard to the meaning of the concept of 'family' at Maltese Law. Parallels with regard to the definitional status of today's 'family' with the Roman *familia* were then drawn. Such parallels established that the 'family', despite being still regarded as essential to the integrity of society despite it still being one of the main concerns of legislatures and courts, today, differently from Roman times, the 'family' is difficult if not impossible to define. It was also established that today, the meaning of 'family' exercises an influence in law because the law ascribes consequences to membership in 'families'; consequences which come forward in the form of rights and obligations, amongst which, obviously, the obligation of maintenance.

An overview of the definitional status of 'family' at Maltese Law, was then analysed, establishing that the same definitional status under Maltese Law is based on an understanding rested, limitedly, in the general manner, upon relationships based on blood, relationships based on marriage and households. It was also established that in those Codes, Acts and Ordinances in the Maltese legislative ensemble, where the 'family' is not given meaning to, Maltese Law depends on absent jurisprudential interpretation.

A comparative analyses of the definitional status of 'family' in the Republic of Ireland, Germany, Macedonia, Slovenia and under the United Nations was then delivered. Such



comparative study highlighted the fact that, as observed by the Supreme Court of Minnesota in a 1967 decision “[T]he meaning [of ‘family’] necessarily depends on the field of law in which the word is used, the purpose intended to be accomplished by its use, and the facts and circumstances of each case.” [*LeRoux v Edmundson* (1967) 276 Minn. 120 [148 N.W.2d 812]]

It was therefore concluded that ‘family’ and the Law must be allowed to call upon each other for the safeguarding of rights and the compliance to obligations; that the true importance of defining ‘family’ lies in the ascription of rights and obligations to the institute especially with regard to the right and obligation of maintenance.

Problematic issues with regard to maintenance were then put to the floor in order for the same to be addressed the other speakers.

Paper produced by Dr. Keith A. Borg herewith attached as Appendix No. 5.



The Maltese Legal Scenario
- Dr. Yana Micallef Stafrace

Dr. Yana Micallef Stafrace offered a critical overview of Maltese legislation on the obligation of maintenance. The salient provisions in the Maltese legal scenario were summed up in the following provisions:

- Article 2, Chapter 16 of the Laws of Malta:

(1) The Law promotes the unity and stability of the family.

(2) The spouses shall have equal rights and shall assume equal responsibilities during marriage. They owe each other fidelity and moral and material support.

- Article 3, Chapter 16 of the Laws of Malta:

Both spouses are bound, each in proportion to his or her means and of his or her ability to work whether in the home or outside the home as the interest of the family requires, to maintain each other and to contribute towards the needs of the family.

- Article 3B, Chapter 16 of the Laws of Malta:

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.

- Article 4, Chapter 16 of the Laws of Malta:

(1) The spouses shall on marriage adopt the surname of the husband after which the wife may add her maiden surname or the surname of her predeceased spouse.

(2) The wife may, instead, choose to retain her maiden surname or the surname of her predeceased spouse after which she may add her husband's surname.

(3) The children of the marriage shall take the surname of their father, after which there may be added, in terms of article 292A, the maiden surname of the mother or the surname of her predeceased husband.

(4) Where the wife intends to retain her maiden surname after marriage she shall, before marriage, so declare her intention when applying for the publication of the banns in accordance with the



Marriage Act and shall subscribe the appropriate declaration in the Act of Marriage. Such declaration shall be irrevocable.

*(5) *Sub-article (1) of this article shall apply to a wife who has married prior to the 1st December, 1993, unless and until she delivers or causes to be delivered to the Public Registry Office, the Form Q contained in Part II of the Schedule to this Code showing that she is opting to reassume her maiden surname. Such note may not be made after the lapse of six months after the 1st December 1993, and when delivered to the Public Registry Office, the Director shall register the same in a book kept for the purpose, for which he shall keep an index under the wife's maiden surname and that of her husband.*

(6) Where a wife intends to retain the surname of her predeceased husband after remarriage, she shall, before remarriage, so declare her intention when applying for the publication of the banns in accordance with the Marriage Act and in lieu of the declaration in the Act of Marriage referred to in subarticle (4) she shall subscribe to a declaration, in Form R contained in Part II of the Schedule to this Code and containing the particulars therein indicated, such form shall be delivered to the Public Registry together with the Act of Marriage and shall be signed by the spouses and countersigned by all the other signatories in the Act of Marriage.

- **Article 5, Chapter 16 of the Laws of Malta:**

(1) In regard to maintenance, the spouse shall have a prior right over the parents or other ascendants.

(2) Where both children and spouse claim maintenance, they shall be in a position of equality.

(3) 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.

- **Article 6, Chapter 16 of the Laws of Malta:**

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.

- **Article 7, Chapter 16 of the Laws of Malta:**

(1) Parents are bound to look after, maintain, instruct and educate their children in the manner laid down in article 3B of this Code.

(2) In default of the parents, or where the parents do not possess sufficient means, the liability for the maintenance and education of the children devolves on the other ascendants.

- **Article 8, Chapter 16 of the Laws of Malta:**



The children are bound to maintain their parents or other ascendants, who are indigent.

- Article 12, Chapter 16 of the Laws of Malta:

Where, according to the foregoing provisions of this subtitle, there are more persons liable for maintenance, such persons shall be so liable in the following order:

(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.

- Article 13, Chapter 16 of the Laws of Malta:

(1) The obligation of such persons as according to the order set forth in the last preceding article are placed in the same degree of liability, shall be a joint and several obligation.

(2) The persons, however, who according to such order, are placed in a remoter degree shall have only a subsidiary liability, if those in a nearer degree are unable to discharge their obligation.

(3) Nevertheless, it shall be lawful for the court, in urgent cases, to condemn any of the persons liable for maintenance, in whatever degree, to supply maintenance, reserving to such person the right to claim reimbursement from such other persons as, according to the said order, were bound to supply such maintenance.

- Article 14, Chapter 16 of the Laws of Malta:

(1) Where several persons claim maintenance from a person who is unable to supply maintenance to all of them, the order set forth in article 12 shall be observed in determining the right of priority of such claimants.

(2) Nevertheless, it shall be lawful for the court to depart from the rule laid down in sub-article (1) of this article in cases of great urgency, regard being had to the health, age or other circumstances of the claimants.

- Article 15, Chapter 16 of the Laws of Malta:

(1) The liability for maintenance shall extend to brothers and sisters, of the full or half-blood, only in default of other persons liable for maintenance.

(2) In any such case the liability of brothers and sisters shall be joint and several.



(3) The persons mentioned in article 12 shall, in all cases, have a prior claim over brothers and sisters, except in cases of great urgency, regard being had to health, age, or other circumstances.

- **Article 16, Chapter 16 of the Laws of Malta:**

(1) The liability for maintenance, by reason of consanguinity, shall only exist as between the persons, and in the cases mentioned in the foregoing articles of this Sub-title.

(2) Such liability shall cease even in regard to such persons, if the claimant shall have become indigent through his fault:

Provided that this shall not apply where the claimant are the parents, or other ascendant.

- **Article 17, Chapter 16 of the Laws of Malta:**

(1) Where a brother or sister has received maintenance, and, within ten years of the last supply thereof, becomes able to repay the amount so received, he or she shall be bound to repay such amount to the person supplying the maintenance, provided the demand for reimbursement be made within the said time.

(2) In no other case, in the absence of an agreement to the contrary, can a claim be made for reimbursement of the amount of maintenance supplied under the provisions of this Code.

- **Article 19, Chapter 16 of the Laws of Malta:**

(1) Maintenance shall include food, clothing, health and habitation.

(2) In regard to children and other descendants, it shall also include the expenses necessary for health and education.

- **Article 20, Chapter 16 of the Laws of Malta:**

(1) Maintenance shall be due in proportion to the want of the person claiming it and the means of the person liable thereto.

(2) In examining whether the claimant can otherwise provide for his own maintenance, regard shall also be had to his ability to exercise some profession, art, or trade.

(3) In estimating the means of the person bound to supply maintenance, regard shall only be had to his earnings from the exercise of any profession, art, or trade, to his salary or pension payable by the Government or any other person, and to the fruits of any movable or immovable property and any income accruing under a trust.



(4) A person who cannot implement his obligation to supply maintenance otherwise than by taking the claimant into his house, shall not be deemed to possess sufficient means to supply maintenance, except where the claimant is an ascendant or a descendant.

(5) 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 as well as to any beneficial interest under a trust.

- **Article 27, Chapter 16 of the Laws of Malta:**

(1) The obligation of any person to supply maintenance to another shall cease if the person in whose favour such obligation is established, shall contract marriage, notwithstanding the opposition of the person liable as aforesaid, provided such opposition be made on good grounds, and the demand from the release from such obligation be made by the person objecting within the time of six months following the celebration of the marriage.

(2) Such opposition shall only be operative if it is made by means of a judicial act to be served on each of the parties intending to contract the marriage, and filed in the registry of the civil court, in the island in which the person objecting, or either of the said parties, resides.

- **Article 32, Chapter 16 of the Laws of Malta:**

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.

- **Article 34, Chapter 16 of the Laws of Malta:**

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.

- **Article 37, Chapter 16 of the Laws of Malta:**

(1) All suits for personal separation shall be brought before the appropriate section of the Civil Court as may be established by regulations made by the Minister responsible for justice:

Provided that prior to the commencement of proceedings, a demand may be made for determining the amount of an allowance for maintenance during the pendency of the proceedings and for the issue of a decree ordering the payment of such allowance or a demand for the court to determine by decree who of the spouses, if any, shall during the pendency of the proceedings continue to reside in the matrimonial home.



(2) The application containing the demand referred to in the proviso to subarticle (1) shall be duly appointed for hearing by the court and shall be served on the respondent together with the notice of such hearing:

Provided that where domestic violence is involved, the said application shall be appointed within four days and the court may, of its own motion before or after hearing the parties, issue a protection order under article 412C of the Criminal Code and, or a treatment order under article 412D of the same Code and the provisions of those articles shall mutatis mutandis apply to an order issued under this article as if it were an order issued under the corresponding article of the said Code:

Provided further that for the purposes of this article and of article 39, "domestic violence" shall have the same meaning assigned to it by article 2 of the Domestic Violence Act.

(3) The court shall summarily hear the applicant and the respondent and shall then, by decree, decide on the demand: Provided that the court may decide on the demand where the applicant or the respondent or both the applicant and the respondent fail to appear on the day of the hearing.

(4) The decree referred to in subarticle (3) shall be an executive title deemed to be included amongst the decrees mentioned in article 253(a) of the Code of Organization and Civil Procedure and shall be enforceable in the same manner and under the same conditions in which such acts are executed.

(5) The decree referred to in subarticle (3) shall cease to be enforceable if the action for separation is not instituted within two months of the date of the decree or within such longer period as the court may in the same or in a subsequent decree allow.

(6) The provisions of article 381(3) of the Code of Organization and Civil Procedure in pursuance of which a court of contentious jurisdiction may make the order therein specified shall apply, mutatis mutandis, as if the court in that subarticle were a reference to the appropriate section of the Civil Court before which the demand referred to in the proviso to subarticle (1) is made.

(7) The decree and the order mentioned in this article may be only reviewed, altered or revoked upon an application made by the party seeking such review, alteration or revocation.

(8) Subject to the provisions of article 39 of the Constitution, regulations made under this article may provide for the hearing of causes in camera.

- **Article 38, Chapter 16 of the Laws of Malta:**

Either of the spouses may demand separation on the ground of adultery on the part of the other spouse.



- Article 41, Chapter 16 of the Laws of Malta:

Either of the spouses may also demand separation if, for two years or more, he or she shall have been deserted by the other, without good grounds.

- Article 46A, Chapter 16 of the Laws of Malta:

During the pendency of the action for separation, either spouse, whether plaintiff or defendant, may demand from the other spouse a maintenance allowance in proportion to his or her needs and the means of the other spouse, and taking into account also all other circumstances of the spouses.

- Article 48, Chapter 16 of the Laws of Malta:

(1) The spouse who shall have given cause to the separation on any of the grounds referred to in articles 38 and 41, shall forfeit -

(a) the rights established in articles 631, 633, 825, 826 and 827 of this Code;

(b) the things which he or she may have acquired from the other spouse by a donation in contemplation of marriage, or during marriage, or under any other gratuitous title;

(c) any right which he or she may have to one moiety of the acquests which may have been made by the industry chiefly of the other spouse after a date to be established by the court as corresponding to the date when the spouse is to be considered as having given sufficient cause to the separation. For the purposes of this paragraph in order to determine whether an acquest has been made by the industry chiefly of one party, regard shall be had to the contributions in any form of both spouses in accordance with article 3 of this Code;

(d) 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.

(2) The things mentioned in paragraph (b) of sub-article (1) of this article shall revert to the other spouse, and the acquests mentioned in paragraph (c) of the said sub-article shall remain entirely in favour of such spouse, saving any right which the children or other third parties may have acquired thereon prior to the registration of the judgment of separation in the Public Registry.

- Article 54, Chapter 16 of the Laws of Malta:

(1) 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, where, according to the provisions of Sub-title I of this Title, such maintenance is due.



(2) *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.*

(3) *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 may be.*

(4) *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.*

(5) *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.*

(6) *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.*

(7) *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.*

- **Article 57, Chapter 16 of the Laws of Malta:**

(1) *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.*

(2) *It shall be in the discretion of the court, according to circumstances, to fix the time, place, and manner in which the father or mother shall have access to the children.*

(3) *It shall be lawful for the court entirely to forbid such access if it may be detrimental to the welfare of the children.*



- Article 623, Chapter 16 of the Laws of Malta:

Saving the provisions of article 630, the grounds on which a descendant may be disinherited are the following only:

- (a) if the descendant has without reason refused maintenance to the testator;*
- (b) if, where the testator has become insane, the descendant has abandoned him without in any manner providing for his care;*
- (c) if, where the descendant could release the testator from prison, he has without reasonable ground failed to do so;*
- (d) if the descendant has struck the testator, or has otherwise been guilty of cruelty towards him;*
- (e) if the descendant has been guilty of grievous injury against the testator;*
- (f) if the descendant is a prostitute without the connivance of the testator;*
- (g) in any case in which the testator, by reason of the marriage of the descendant, shall have been, under the provisions of articles 27 to 29, declared free from the obligation of supplying maintenance to such descendant.*

- Article 338 (z), Chapter 9 of the Laws of Malta:

Every person is guilty of a contravention against public order, who -

(z) 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:

Provided that, notwithstanding any other provision of this Code, the criminal action for an offence under this paragraph is barred by the lapse of six months;

- Article 17 (1), Constitution of Malta:

Every citizen incapable of work and unprovided with the resources necessary for subsistence is entitled to maintenance and social assistance.

- Legal Notice 190/2007 & Legal Notice 252/2007, which have introduced the obligation of maintenance within the ambit of *de facto* couples.



- Legal Notice 397/2003, treating The Civil Court (Family Sections), The Civil Court (General Jurisdiction) and the Court of Magistrates (Gozo) (Superior Jurisdiction) (Family Sections).

Paper produced by Dr. Yana Micallef Stafrace herewith attached as Appendix No. 6.



Maltese Jurisprudence on Maintenance Obligations: praise and criticisms
- Dr. Toni Abela

Dr. Toni Abela gave an overview of a substantial number of recent judgments dealing with the obligation of maintenance and the recovery of the same. Extensive quotations were given from the said judgments, which quotations were given in the Maltese language. The judgments represented particular scenarios where the Maltese Courts dealt with the concept of maintenance in its various facets.

One case such dealt with a married couple who separated; in such case, maintenance was indirectly provided to the severely paralysed son of the said couple even though he was of age. Another judgment dealt with the revision of the maintenance allowance requested by the husband/father who had changed job to one with a reduced salary when compared to his previous employment; the latter requested the maintenance allowance to be equally reduced.



The Duty of Maintenance in family law within the human rights perspective
- Dr. Peter Fenech

Dr. Peter Fenech tapped upon the following legal issues: the duty of maintenance in Family Law within a Human Rights perspective, Human Rights and their modern perspective, the European Convention for the Protection of Human Rights and Fundamental Freedoms in general as well as with specific reference to Article 8 of the same, the Charter of Fundamental Rights of the European Union, case-law and cross-border implementation issues.

Human rights were defined as those inherent and inalienable rights born with the human being, and from which the same human being can not be deprived. It was noted that the European Convention for the Protection of Human Rights and Fundamental Freedoms together with its 14 amending Protocols does not mention 'maintenance' as a right *per se*, mainly due to the more imminent necessity, at the time of the drafting of the same, of securing civil and political rights, which at the time, were deemed to be of greater social magnitude. Additionally, the legal issues surrounding maintenance had not yet developed into those burdening legal systems across Europe today. Yet, this point being cleared, it was explained how 'maintenance' may still fall within the interpretation of the said Convention, which has, in numerous circumstances, been interpreted widely, covering modern situations.

Article 8 of the said Convention, guaranteeing the respect for private and family life, home and correspondence was identified as the relevant Article to be discussed in more detail. Such Article lays down that:

Everyone has the right to respect for his private and family life, his home and his correspondence.

It was explained how the term 'family', under this particular Article has been given a broad interpretation to include, as well as married couples, their offspring, adopted children, children from previous marriages and other relatives in cohabitation. It was also explained that despite the existence of wide-ranging jurisprudence relative to this Article, none refers to maintenance. Reason for this state of affairs was identified not in the fact that maintenance *per se* does not fall within the ambit of the Article being here



discussed but in the fact that maintenance, is properly provided for in individual states and therefore not the subject of issues which arrive so far.

In conclusion, the further recognition of the right to maintenance on the one side and the obligation of maintenance on the other were discussed.

Paper produced by Dr. Peter Fenech herewith attached as Appendix No. 7.



Non-fulfillment: penal remedies and their shortcomings
- Dr. Robert Abela

Dr. Robert Abela opened by addressing the floor on the problem of maintenance enforcement and its prevailing importance in Criminal Law. Ample reference was made to Article 338 (z) of Chapter 9 of the Laws of Malta:

Every person is guilty of a contravention against public order, who -

(z) 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:

Provided that, notwithstanding any other provision of this Code, the criminal action for an offence under this paragraph is barred by the lapse of six months;

The penal remedy was recognised as being, in most cases, the most effective means of enforcement in view of the sanctions which can be imposed by our Courts, the relatively short time-frame in which the offender can be brought to justice and its cost-effectiveness.

A historical background of the provision which governs the duty to pay or supply maintenance under the Maltese Criminal Code was delivered and followed by an analytical view of the major shortcomings presently inherent in Maltese Law, and suggestions towards the elimination of the same.

Such shortcomings and suggestions include -

- The fact that Maltese Criminal Law still makes a distinction between children born in wedlock and those born out of wedlock in the sense that whilst it is a criminal offence for a parent not to pay maintenance for the needs of his/her children born in wedlock after having been so ordered by a court or so bound by a contract, it is not so for a parent who has children born out of wedlock and who is still ordered by a court or bound by a contract to pay maintenance to the same. Immediate legislative amendment to eliminate this anomaly was proposed.



- The difficult conditions which the Court of Magistrates as a Court of Criminal Judicature in its Family Division is working in, which conditions (namely the fact that one Magistrate presides over a voluminous number of cases, which often causes the same to necessarily decide the said cases summarily, in one sitting) are creating a situation where cases such as those at hand are not being dealt with in the most expeditious way possible. It was here suggested that the approach which should be adopted by the Magistrates Court, should there be no contestation by the accused that the maintenance was in fact paid by him/her, is to allow the accused one adjournment so as to give him/her sufficient time to regularise his/her position, and if by the date of such adjournment or within a further period which the court may allow, the person accused has still not regularized his position, then the Court is to apply an effective jail term.
- When proceedings are pending before the Civil Court (Family Section) for the variation of a court order in relation to the obligation of maintenance, and at the same criminal proceedings concerning that same court order are also pending, than in genuine circumstances but not necessarily in all cases, the Court of Magistrates as a Court of Criminal Judicature in its Family Division should not pass on to give judgment but is to stay proceedings before it pending the outcome of the civil proceedings.
- Criminal proceedings should no longer to be allowed to be instituted on the basis of a provisional court order for the supply of maintenance, which has not been followed by the party receiving the same, by the necessary proceedings for personal separation within the time frame granted by Law. Appropriate legislative enactment making the situation clear that once a decree loses its effects for Civil Law purposes, it also loses the same for any Criminal Law purposes, was identified as being necessary.
- The term 'maintenance' under Article 338 (z) of Chapter 9 of the Laws of Malta is to stop being interpreted as excluding those expenses which the Civil Court (Family Section) would have ordered a parent to pay in view of the health and education of his/her son/daughter.

Paper produced by Dr. Robert Abela herewith attached as Appendix No. 8.



Three workshops were then held:

- The Concept of 'Family' & the Obligation of Maintenance coordinated by Dr. Keith A. Borg
- The Duty of Maintenance in family law within the human rights perspective coordinated by Dr. Peter Fenech
- Non-fulfillment: penal remedies and their shortcomings coordinated by Dr. Anne-Marie Busuttil.

A *reportage* of the workshops was then delivered to the conference by selected *rapporteurs*, namely:

- Ms. Maria Debono, reporting on the first workshop.
- Ms. Charlene Mizzi, reporting on the second workshop.
- Ms. Fransina Abela, reporting on the third workshop.

The outcomes of the conference were then summed-up by Dr. Tanya Sciberras Camilleri and the conference was adjourned to the following day.



Wednesday 26th March, 2008

The conference was opened for further registration at 08.30 a.m., following which an introductory speech was delivered by Dr. Tanya Sciberras Camilleri, who went on to introduce the lectures and lecturers for the day:

Maintenance Obligations under European Union Law; divergences from the local scenario and significance of the same
- Dr. Lorraine Schembri Orland

Dr. Lorraine Schembri Orland commenced by offering the floor numerous questions with regard to maintenance obligations. The recovery of maintenance in cross-border claims was analysed with particular reference of Council Regulation (EC) NO. 44/2001 on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

What were termed as two 'different generations' of Community instruments were then detailed, namely:

- Council Regulation (EC) NO. 44/2001 on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, aimed at the coordination of the autonomous procedural laws of Member States;
- the development of European Community principles (such as mutual trust and access to justice) modeled under the Hague Programme of 2004, aimed at overcoming the old paradigm of exequatur proceedings whilst providing for the mutual recognition of titles in the European Judicial Area.

The following issues were addressed in detail with due regard given to parallel situations in other Member States and jurisprudence:

- factors giving rise to a maintenance obligation;
- family maintenance;
- establishment of the quantum of maintenance and the modality of payment;
- penal sanctions in case of non-fulfillment;
- the Green Paper on maintenance obligations;
- maintenance arrears.



It was concluded that different domestic laws of different Member States warrant for a variety of types of relationships that may generate a maintenance obligation as well as for a variety of systems of maintenance recovery.

In conclusion, the delineation of Civil and Family matters vis-à-vis procedural concerns was explained; parallels with other Member States and jurisprudence were again drawn.

Suggestions forwarded include that maintenance orders should be defined, that due consideration should be given to whether such orders are to be made extendable to capital sum orders, property adjustment orders, and pension sharing orders made upon divorce or legal separation and that the law of the Member state having jurisdiction with regard to a particular maintenance claim be made applicable to that particular claim.

Paper produced by Dr. Lorraine Schembri Orland herewith attached as Appendix No. 9.



The Recognition and Enforcement of Decisions regarding Maintenance Obligations
between Member States
- Dr. Jacqueline Borg

Paper produced by Dr. Jacqueline Borg herewith attached as Appendix No. 10.



The allocation of state maintenance in the best interest of the child
- Ms. Charlene Mizzi

Ms. Charlene Mizzi commenced by attracting the focus of the floor to the fact that maintenance can also be thought of as a series of obligations of the State towards its citizens, especially towards children.

The delivery of statistics showing the risk level of poverty and social exclusion faced by children at present, both within the European Union as well as in Malta, was followed by the underlining of the fact that children have nowadays become one of the main foci of State action.

An analysis, with regard to parental responsibility, of Council Regulation EC no. 2201/2003 of the 27th November, 2003 Concerning the Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility (in parallel with Chapter 16 of the Laws of Malta) ensued. Parental responsibility has been therein defined as all the rights and duties relating to the person or the property of the child which are given to a natural or legal person, by judgment, by operation of law, or by an agreement having legal effect.

Child maintenance was established as being the ongoing obligation for parents to support their children; reference was made to the Convention on the Rights of the Child, the European Convention for the Protection of Human Rights and Fundamental Freedoms, to the policy of different jurisdictions, as well as to local jurisprudence, highlighting children's rights to maintenance, the principle of the best interests of the child and child care.

State maintenance procedures applicable to cases of personal separation were explained in depth; it was established that in such cases, the State intervenes the moment the party liable to pay fails to pass on the same payment. It was additionally explained that in cases in which the party bound to pay enjoys social assistance as his/her only income, the State has the duty to pass on part of that same assistance directly to the other party if so ordered by a court. The extent of the State's duty to provide for children was further analysed with reference to the provisions of the Convention on the Rights of the Child, and specifically to Articles 3.2, 4 and 26 of the same, which respectively provide that



states have the obligation to provide protection and care for children as necessary for their well-being, taking into account the rights and duties of the parents, that states have the duty to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised under Article 8 of the Convention on the Rights of the Child and that everyone has a right to benefit from social security.

The Maltese Children's Allowance system was detailed and critically analysed in that it is moving away from its intended scope of leveling social inequality. In this connection suggestions, in order to curb abuse were forwarded in the form of the promotion of legislation to the same effect and in the form of precautionary measures.

The constitutive elements of Article 19 of Chapter 16 of the Laws of Malta were individually and thoroughly analysed in view of the State's obligations in connection thereto with parallels drawn with the Convention on the Rights of the Child, the Universal declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Economic, Social and Cultural Rights, the Constitution of Malta, and the Manifesto for Children.

Paper produced by Ms. Charlene Mizzi herewith attached as Appendix No. 11.



Responsibilities of the State: What is the role of the State in maintaining its citizens
- Dr. Jeanine Giglio

Dr. Jeanine Giglio opened by establishing that the State is responsible for establishing and maintaining a stable and financially sound social security system where those persons who cannot earn their own living should be guaranteed a decent standard of living.

Ample reference was made to Chapter 318 of the Laws of Malta which promotes social security standards based on social justice. *Inter alia*, it -

- Provides for two schemes, contributory (a pay-as-you-go insurance, based on the payment of weekly contributions from wages and salaries in the case of employed persons or from gainful activity in the case of self-occupied persons where entitlement to benefits is determined by a contribution scheme) and non-contributory (funded from general taxation and provides financial assistance determined by means testing which provides the basis for maintenance payments by the State).
- Outlines the parameters adopted to determine eligibility to the various means-tested benefits such as Social Assistance and Unemployment Assistance, which are in turn based on the 4 basic criteria of household, means test, employment and benefit rate, each of which was specifically detailed.
- Determines the relative rate of entitlement attached to the claim being made in accordance with the indicated 4 criteria as core indicators of need and as the baseline to help keep people live a decent life.

The following suggestions were forwarded to the State, in that it should:

- ensure that its policies do not militate against labour force participation or discriminate between classes of persons whilst simultaneously complementing other support systems and addressing the priority needs dictated by emerging social patterns and demographic realities whilst however still ensuring a fair and just distribution of resources;



- perform a holistic review of the Maltese Social Security system so as to reflect the current social realities and experiences the country is undergoing;

Paper produced by Dr. Jeanine Giglio herewith attached as Appendix No. 12.



Mediation Consensual Separations & Maintenance Recovery
- Dr. Barbara O'Brien

Dr. Barbara O'Brien opened by defining family mediation as a process in which an impartial person assists those involved in family breakdown, and in particular, separating, to communicate better with one another and reach their own agreed and informed decisions concerning some, or all, of the issues relating to separation, children, finance or property (in a safe and balanced environment).

The basic principles of mediation were subsequently outlined as being: the impartiality of the mediator; the non-decision-making role of the mediator; a private and neutral forum providing suitable facilities for mediation meetings; the encouragement of parents vis-à-vis the requirements of their children; the non-binding outcome of mediation; protection from the risk and/or threats of violence; the confidentiality of the process as per Regulation 4 (7) of Legal Notice 397, 2003 and Article 27 of Act No. XVI, 2004:

4. (7) The spouses and all other persons shall not be required to take any oath and no evidence may be adduced before any Court of anything divulged to the mediator in the conciliation or mediation procedures, of any proposal made by him or any other person during the procedures or of the reaction of either spouse to such proposals.

27. (1) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, mediation is admissible in any proceedings, and disclosure of such evidence shall not and may not be compelled in any proceedings.

27. (2) All communications or settlement discussions by and between participants in the course of mediation shall remain confidential.

27. (3) Except as required under subarticle (4) hereof, a mediator may not submit to any court or adjudicatory body any evidence, report, assessment, evaluation, or finding of any kind concerning a mediation conducted by him other than a report that is mandated by the Court or adjudicatory body, and which only states whether an agreement was reached.

27. (4) A mediator may only divulge such information as established under sub-article (3) to a Court or adjudicatory body as long as all parties to the mediation expressly agree in writing.



Family mediation skills were split into three main areas, namely -

- Process skills.
- People skills.
- Problem Solving skills.

All of these areas were described in detail, leading to the cognisance of the benefits of family mediation:

- participants are helped to reach their own decisions and to retain control over their own lives, rather than having decisions imposed on them by the courts;
- disputes can be settled at an early stage, before the parties become entrenched;
- participants are encouraged to look towards the future, rather than focusing about grievances about the past;
- separated parents are helped to take part in direct discussions about their children and to give as much priority to their children as possible;
- separated parents are helped to take full account of their children's needs and feelings, as well as their own;
- misunderstandings can be cleared up or avoided completely;
- the stress, animosity and bitterness of marital breakdown may be reduced;
- all available options are explored before decisions are taken;
- possibilities of reconciliation are not ruled out and emerge in discussions;
- arrangements can be worked out to fit particular family circumstances and needs;
- meetings are informal;
- legal costs may be reduced and the costs may be avoided altogether.

Regulation 4 (11) (a) and 4 (13) of Legal Notice 397, 2003 were then identified as those provisions which facilitate the mediation process:

4. (11) (a) During the mediation period the parties may jointly request the Court to appoint a judicial assistant in order to receive evidence on oath intended to facilitate the proceedings before the Mediator.

4. (13) Without prejudice to paragraph 11 of this regulation, any party may during the pendency of the procedures in the conciliation, mediation, pre-trial or trial stages, request the Court to make such provisional orders or to issue such writ or warrant as may be necessary to safeguard its interest.



Regulation 5 (1) and (2) of Legal Notice 397, 2003 was then discussed vis-à-vis decree arrangements on collateral matters:

5. (1) Where during the conciliation or mediation stage the parties reach an agreement on the payment of an amount for maintenance that may be payable by one of them to the other either in respect of him or herself or in respect of the children, or agreement is reached as to the custody for visitation rights with respect to, the children, or on who is to continue to reside in the matrimonial home, the mediator shall make a note of such agreement which note shall be subscribed by the parties, and shall forthwith transmit such note to the Court which shall decree on the matter accordingly.

5. (2) Provided that where any party is not assisted by an advocate or legal procurator the mediator shall inform that party of the importance of the agreement and of his or her right to be assisted by an advocate or legal procurator or to take legal advice before subscribing to any such agreement.

Finally, the following maintenance issues were identified and further discussed:

- means and needs of the parties liable to pay and receive maintenance;
- the lump sum payment as opposed to monthly repayments;
- forfeiture of maintenance as opposed to renunciation to the same;
- the satisfaction of maintenance claims from immovable property and the problems ancillary thereto especially in relation to funds;
- maintenance due to children and the ancillary issues of how to mediate upon the same;
- possible modalities for the payment of maintenance;
- mediation and the need for the same to view the financial position of the parties in a long-term manner and flexible manner.

Paper produced by Dr. Barbara O'Brien herewith attached as Appendix No. 13.



Two workshops were then held:

- Maintenance Obligations under European Union Law; divergences from the local scenario and significance of the same by Dr. Lorraine Schembri Orland
- Mediation Consensual Separations & Maintenance Recovery by Dr. Barbara O'Brien

A *reportage* of the workshops was then delivered to the conference by selected *rapporteurs*, namely:

- Ms. Charlene Mizzi, reporting on the second workshop.
- Ms. Fransina Abela, reporting on the third workshop.

The outcomes of the conference were then summed-up by Dr. Tanya Sciberras Camilleri.

Evaluation Questionnaire & Results

The processed data showing the results of the Evaluation Questionnaire is being herewith attached as Appendix No. 14.

Standard Questionnaire for REMOR Partners

The Standard Questionnaire for REMOR Partners is being herewith attached as Appendix No. 15.

Finally, the Financial Statement relative to the Conference is being herewith attached as Appendix No. 16.