

Master of Notarial Studies

The elements of Art.495A of the Civil Code, and its effects on the right of co-ownership in the light of recent judgements.

By Andreas Anastasi
(149294M)



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Chapter 1: Introduction

It is obvious that people owning property have rights over their possessions, which rights include disposing and using one's own property without any interference from third parties. Notwithstanding this, there might be a situation where different persons share the ownership rights over a particular property. This is the right of co-ownership which effectively emanates from the right of ownership itself. The difference between the two is that whilst ownership implies the property is fully owned by one person, co-ownership rights are shared between two or more people. This commonly results from inheritances where multiple people are instituted as heirs.

When drafting the Civil Code, our legislator followed mostly the Italian Civil Code and sometimes even made reference to the French one. The Civil Code of Malta provides different guidelines as to how this property is to be managed by the different co-heirs. Amongst other duties, co-owners should be responsible for maintaining the property which forms part of the community property, indemnifying each co-owner for any expenses incurred for this reason and to agree on any alterations to that same property.

Due to the ever-increasing properties being co-owned, and the difficulties for these properties to be sold, many properties have been left vacant for too many years. For this reason, the legislator had to find a solution and as a result, Article 495A was introduced back in 2004 and through this, the legislator introduced a possibility for co-owners to dispose of their property held in common. What this provision holds mainly is that whenever the majority of the co-owners enter into an agreement with a purchaser for the transfer of the property, then they can enforce the minority to sell as well, and as a result the property is sold in its entirety. For this to occur, certain requisites must be met, including the duration of the time for which the property has been held in common, whether there are or were any judicial proceedings instituted with the intention to divide the property, and most importantly that the minority is not prejudiced with this sale.

Before this article was introduced, each co-owner was in a much steadier position as one could not force another co-owner to sell his undivided share. Today, it might be said that this is a double-edged sword as despite making life easier for co-owners who want to dispose of their property, their ownership rights have been to an extent weakened. For this reason, it is clear that the legislator's primary intention was to eliminate as much as possible situations of co-ownership.

This professional report focuses on the primary elements of this provision of law, and how it has effected the rights of co-ownership and the notarial profession.

By dissecting the provision sub-article by sub-article, and by also making reference to the interpretations of the Maltese courts in the judgments, this professional report firstly highlights the intrinsic elements of this provision. By understanding these elements, one can concretely grasp the intentions of the legislator and understand the reasons for which this law had to be introduced. Subsequently, this professional report delves into the rights, limitations and obligations of co-ownership and how the introduction of this article has affected them. Later, the report also goes into the effects this article has on the notarial profession and how notaries have benefited from its introduction.

Chapter 2: Methodology and Literature Review

For this professional report, the author had to use various types of research methods. Primarily, the research was of an analytical nature and in order to do so, the majority of the research which was conducted was done through extensive desk research. Once the data was collected, the author analysed it and sought to deeply comprehend the subject to be able to produce this professional report.

The research also includes a descriptive research form and the author delves into the details of the provision itself, and the right of co-ownership. By making reference to what was established when the elements were analysed, the author could then also see how the rights and obligations of co-ownership were effected.

Ultimately, the research method which the author pursued here is that of a research of a qualitative nature, whereby most research was made through the Civil Code, judgements of the Courts of Malta, and previous studies on the same matter. With regards to research tools, the author used the law itself, court judgments, newspapers, journals, website articles, and other professional reports and thesis. These tools are mostly easily accessible, very informative and quite accurate, however it was kept in mind that the information therein might be affected by bias.

With regards to the literature review, this is essential to any research and as for this particular professional report, most research was carried out using the research tools above mentioned.

Firstly, to be able to carefully analyse the Article 495A and the notion of co-ownership, primarily the author had to dissect the provision of the law itself which is provided in Chapter 16 of the Laws of Malta, the Civil Code of Malta. Reference to the Acts with which this law was enacted and amended had to also be made.

The Author had to also use works from other authors such as thesis, research projects and professional reports which delved into the same subject. Mainly, the author makes reference to 'Changes in the Rights and Obligations of Co-owners by the introduction of Article 495A in the Civil Code of Malta' by Mark Ellis, 'The Nature of the Right of Co-Ownership and its Consequences' by Joel Grima, and 'Community Property Before and After Act XVIII of 2004' by Roberta Rapa. These three in particular have helped the author grasp the notion further and compare his findings and opinions with theirs.

The article in Id-Dritt, named 'The Civil Code Amendments of Act XVIII of 2004 Community of Property Arising from Succession' by Dr. Anthony Ellul was also particularly useful for the author the analyse the law as initially enacted and any shortcomings which were highlighted. The author has also made reference to two books being Francesco Galgano's 'Diritto Civile e Commerciale', and Luigi Borsari's 'Commentario del Codice Civile Italiano', where the notion of co-ownership was commented upon by the respective authors.

Most essentially, the author had to carry out most of his research by going through case law. In fact the author has mostly analysed cases which relate to the application of Article 495A, starting from those which firstly applied the law to more recent ones, and through this the author could even compare how the courts have interpreted the notion and if there were any changes to this interpretation. The author also did research by going through case law where the courts have dealt with co-ownership more specifically. By doing so, the notion of co-ownership could be further understood and commented upon.

To finish off his research, the author has consulted with various Notaries and Lawyers to further supplement his findings. His aim was primarily to obtain comments on whether there are any current concerns with how the law is applied or any way in which things can be improved.

Chapter 3: An Analysis of Article 495A of the Civil Code, in the light of recent Court Judgements.

When it comes to the elements of Article 495A of the Civil Code, one of the cases which delved most into the elements of this provision *per se* is Abela Carmelo Et v. Abela Fiorella, First Hall Civil Court (2018). This particular case dealt with a situation where the transfer in question related to a property which was inherited by ten descendants back in 1986 from a certain Tereza Abela. One of these descendants had passed away, and inherited by his wife Fiorella Abela, the defendant, who lived in England¹.

When they arrived at a situation where they wanted to transfer this property, the plaintiffs had argued that there was no way in which they can communicate with this Fiorella Abela, and therefore pleaded the Court to allow the sale of the property to go ahead without the need of the defendant's consent. After hearing the claims, the Court went on to explain that Article 495A was enacted back in 2004, as a derogation from the right of a co-owner being part of the minority, to oppose to a sale of a property held in common with others². The Court went in to explain the first three provisions of this Article and held that in sub-article one, the law states that saving from cases of condominium or necessary community of the property, where the co-ownership has lasted for more than ten years and none of the owners has instituted an action before a court or other tribunal for the partition of the property held in common, and the co-owners fail to agree with regard to the sale of any particular property, the court shall, if it is satisfied that none of the dissident co-owners are seriously prejudiced thereby, authorize the sale in accordance with the wish of the majority of co-owners regard being had to the value of the shares held by each co-owner³. One must note that the ten-year period mentioned herein, was reduced to three years in virtue of Act No. XIV of 2016.

The second sub-article holds that the request to the court shall be made by application which shall be accompanied by a declaration of the owners who agree to the sale as well as a prospectus showing the number and value of the shares held by each of them as well as the terms and conditions under which the sale is to take place. The application shall also indicate the date on

¹ Carmelo Et Vs Abela Fiorella [2018] (First Hall Civil Court) (Hon Judge Mark Chetcuti)

² Ibid.

³ Art.495A(1), The Civil Code of Malta

which the co-ownership arose and the circumstances thereof⁴. The third sub-article then states that this application shall be served on the co-owners who do not agree with the sale, as well as on curators to be appointed by the court to represent such of the co-owners who are unknown or who cannot be traced. The registrar shall cause a copy of the application to be published in the Gazette and in one daily newspaper⁵.

The Court held that therefore, for such a claim to be ultimately considered, there are five conditions which have to be met. It stated that the co-ownership must have existed for at least ten years (reduced to three years as stated above), that during those years, none of the co-owners instituted any action before the courts with the aim of partitioning the property being held in common, therefore there must be no pending actions and no judicial actions were instituted with this aim.

Another condition is that there must exist a disagreement between the co-owners on whether the property should be sold or not. Save for the provision where it speaks of the need for the application to be served on the curators, the court here fails to mention the other situation where a co-owner cannot be contacted or traced, even though it is one of the possibilities wherein this provision can be used. It also stated that the majority of the total number of co-owners agree to transfer the property, and finally that the Court must be satisfied that the defendant is not being seriously prejudiced by the conditions of the sale being proposed.

The Court stated that the necessary nature of these requisites shows that the claim is one which is restricted to co-owners wishing to proceed with a sale against those who do not. Its purpose is to avoid losing profitable opportunities arising from the sale of a property in its entirety due to the minority of the co-owners who are not complying with the others. It continued to explain that even though the law does not state that a promise of sale must have been entered into, if this is done, this promise of sale grants no rights whatsoever to the acquirer over the shares of the co-owners being part of the minority which do not want to sell in the event that the court does not authorize the sale of the property in its entirety.

⁴ Art.495A(2), The Civil Code of Malta

⁵ Art.495A (3), The Civil Code of Malta

Finally, the Court had decided that in this case, the price for which the property was being sold was more than its market value and therefore it was not causing prejudice to any of the co-owners, thus proceeded to authorize the sale.

A case where the defendant argued serious prejudice was being caused was *Josephine Grech pro et noe v. George Joseph Parnis*⁶. Here the plaintiffs owned 7/8th undivided shares of the property whilst the remaining owned the remaining 1/8th. Here the defendant held that he is being seriously prejudiced due to the fact that his wish was to purchase the property for himself, and the other co-owners opted to start negotiating with other third parties. Then, he was only notified about this after they had already signed the promise of sale with a relative of one of the plaintiffs, thus arguing he was not even given a chance to negotiate. Even though his offer was of the same price, his offer included a condition whereby an amount of the consideration was not declared. For this reason, the court stated that his offer was less advantageous as he is risking tax evasion problems. This judgment shows that with the promulgation of this article, co-owners can now find it easier to sell community property to whoever they deem most appropriate.⁷

Another important case where the primary elements of Article 495A were further discussed in is *Philip Agius Et v. Avv. Josette Sultana et noe et*, First Hall Civil Court (2019). Here the Court apart from the sub-articles mentioned in the previous judgement, also mentioned the fourth sub-article which provides that a declaration that any co-owner is not known or cannot be traced, shall be confirmed on oath by one of the applicants⁸.

In this case, the Court held that it is not enough that the defendant presents a property valuation showing the value of the property being different from that for which the sale is being made. This Article's purpose is not to ensure the correctness of the property's market value, but to see whether the price for which the property being sold is fair and which does not prejudice any co-owner⁹.

⁶ *Josephine Grech pro et noe v. George Joseph Parnis* [2017] (First Hall, Civil Court) (Hon. Judge Lawrence Mintoff)

⁷ Mark Ellis, *Changes in the Rights and Obligations of Co-owners by the introduction of Article 495A in the Civil Code of Malta* (2019)

⁸ Art.495A (4), *The Civil Code of Malta*

⁹ *Philip Agius Et v. Avv. Josette Sultana et noe et* [2019] (First Hall Civil Court) (Hon. Judge Robert Mangion)

The Court held that the aim of this article was to facilitate the transfer of property in its entirety when the minority of the co-owners do not want to appear or cannot appear for the transfer of the sale being held in common. Therefore, the acceptance of the plaintiff's claims leads to the forced sale of all the shares, and for this reason, the Court must ensure that there is no abuse and prejudice against the minority. Josephine Grech pro et noe v. George Joseph Parnis, First Hall Civil Court (2017), was quoted where in that instance the Court had stated that the one supreme condition of this article is that the dissidents are not seriously prejudiced¹⁰. Emphasis was given on the word “*gravement*”. This shows that even though in the event that the conditions of the sale are not optimal, the sale should still be made. The importance to the grievousness of the prejudice was also explained in Nutar Richard Vella Laurenty et v. John Vella Laurenti et, Court of Appeal (2017)¹¹. The Court stated that the aim of this article was not to seek to obtain the precise value of the property, as this is something which is ultimately subjective, but to obtain a fair price for all the owners¹².

Ultimately, the Court stated that the *raison d'être* of this provision is to release the co-owners from the co-ownership of a property when the minority does not comply. Quoting Carmelo Spiteri et v. Josephine Debono Et, First Hall Civil Court (2017)¹³, the Court held that “*il-kawża u r-raguni tal-artikolu 495A hu l-hall tax-xirka tal-komproprjetarji meta l-minoranża ma tkunx trid tinhall mill-koproprjeta.*” It went on to state that it is useless to speculate whether a better price could have been obtained, what is relevant is that the price meets the market value and whether the sale causes serious prejudice or not. “*Tali pregudizzju ma jistax jittqies b'mod ipotetiku jew teoretiku jew fondat fuq raguni li tista jew ma tistax issebb¹⁴.*”

Whilst the Court clearly relies heavily on the terms ‘serious prejudice’, there seems to be no definition in our law as to what this constitutes. Even though it is understandable that the Courts are left the discretion in this regard because cases vary one from another, the only factors which are consistently mentioned are the value of the property and the price proposed. Dr. Anthony Ellul, in his article The Civil Code Amendments of Act XVII of 2004, Community of Property

¹⁰ Josephine Grech pro et noe v. George Joseph Parnis [2017] (First Hall Civil Court) (Hon. Judge Lawrence Mintoff)

¹¹ Nutar Richard Vella Laurenty et v. John Vella Laurenti et [2017] (Court of Appeal) (Hon. Judge Silvio Camilleri, Hon. Judge Tonio Mallia, Hon. Judge Joseph Azzopardi)

¹² Ibid.

¹³ Carmelo Spiteri et v. Josephine Debono Et [2017] (First Hall Civil Court) (Hon. Judge Mark Chetcuti)

¹⁴ Ibid.

Arising from Succession¹⁵, states that a thorough reading of the law suggests that the Court should not only consider these factors only. In *Margaret Camilleri et v. Joseph Camilleri*¹⁶ the court held that ultimately, whilst the law stated that the price of the property is just one of the factors which need to be regarded to decide whether serious prejudice is being caused, it might be the issue for which most disagreements with regards to the sale of community property arises.

In its considerations, the Court stated that since the value for which the property was being sold, was much less than that which the court appointed expert valued it, had this sale had to go through, the minority would have been grievously prejudiced, as the value was neither realistic nor reasonable. Due to this, the Court authorized the sale on the condition that the shares of the dissenting co-owners are sold at the price of the expert's valuation, and not that originally indicated in the promise of sale¹⁷. In sub-article six, it is in fact held that when assessing whether there will be any serious prejudice to any of the co-owners, the court shall consider all relevant factors, including the property's value, and the price for which it is being sold¹⁸. For this reason, the Court may order for the property to be appraised as per Article 306 of the Code of Civil Procedure¹⁹.

One of the cases whereby the court rejected a sale on the basis of serious prejudice was *Giovanni Zahra v. George Zahra*²⁰. Here the court did not even go into the value of the property to establish whether the prejudice was being caused. The Court delved into the testator's wishes, and as it was established that these were not being respected, then it was decided that such action was of grave prejudice and therefore could not approve the sale. From this it is clear that it is at the court's sole discretion to establish what causes serious prejudice and this after taking all the relevant factors into consideration.

In judgements where the Court rejected Article 495A, it was made clear that for this article to be applied, these elements must strictly be present. One of these judgments was *Alexandra Ellul noe v. Dr. Patrick Valentino et noe*²¹, where the plaintiff owned 11/12 undivided shares in the property

¹⁵ Dr Anthony Ellul, "The Civil Code Amendments of Act XVIII of 2004 Community of Property Arising from Succession" [2006] XIX Id-Dritt

¹⁶ *Margaret Camilleri et v. Joseph Camilleri* [2022] (First Hall, Civil Court) (Hon. Judge Christian Falzon Scerri)

¹⁷ *Philip Agius Et v. Avv. Josette Sultana et noe et* [2019] (First Hall Civil Court) (Hon. Judge Robert Mangion)

¹⁸ Art.495A(6), The Civil Code of Malta

¹⁹ Art.306, The Code of Civil Procedure

²⁰ *Giovanna Zahra v. George Zahra* [2009] (First Hall Civil Court) (Hon. Judge Joseph R. Micallef)

²¹ *Alexandra Ellul noe v. Dr. Patrick Valentino et noe* [2017] (First Hall, Civil Court) (Hon. Judge Silvio Meli)

held in common, and entered into a promise of sale to transfer the property, which was subject that the defendants also sell their share. Whilst the time-period and the condition that no proceedings were instituted for the partition of the property, the Court held that the plaintiff did not present a list of the co-owners who are willing to sell, and the amount and worth of their shares which are held in common. For this reason, the Court stated that Article 495A could not be enforced and rejected the sale.

Ultimately, after deciding whether the sale is to go through or not, the Court must also determine the time, date and place of transfer, any of which can be changed with the approval by the court, upon an application by any interested party. Where the sale is to be made via a public deed appoint the notary who is to publish the final deed, and also appoint a curator to represent any co-owner who fails to appear on the final deed or instrument of transfer²². The last sub-article of this article finally states that in cases where multiple co-owners disapprove the sale of the property, or where the court rejects the application, it may still order the sale by licitation²³.

When analysing these elements, it results that our law does not favour the community in ownership of property, which has been considered for a long time as damaging to the economy of the state, as this relies heavily on the transferring of property²⁴. This can be seen in various provisions of our Civil Code, such as the fact that it favours the person owning the property adjacent to one being partitioned, in the sense that he has the right to be assigned that property. In the meeting of the 11th May 2004, of the Kumitat Permanenti għall-Konsiderazzjoni ta' Abbozzi ta' Ligi, Hon. Carmelo Mifsud Bonnici had indicated that *“L-intenzjoni kienet biex “nipprovaw inkissru dak il-power of veto u qed ngħidu li trid tkun ilek ten years in common.” Il-ħsieb tal-ligi hu li tingħata procedura relativament semplici u ta' malajr biex jintemm stat ta' komunjoni ta' proprjeta li l-ligi ma tiffavorihx”*²⁵.

²² Art.495A(7), The Civil Code of Malta

²³ Art.495A(9), The Civil Code of Malta

²⁴ Nutar Richard Vella Laurenty et v. John Vella Laurenti et [2017] (Court of Appeal) (Hon. Judge Silvio Camilleri, Hon. Judge Tonio Mallia, Hon. Judge Joseph Azzopardi)

²⁵ Dr Anna Felice Et v. Dr Mark Mifsud Cutajar nomine [2013] (First Hall Civil Court) (Hon. Judge Joseph Zammit Mc Keon)

Chapter 4: The Notion of Co-Ownership and it's development since the enactment of Article 495A.

The definition of co-ownership in the Maltese Civil Code is a “community of property” which arises where the ownership of the same thing, or the same right, is vested pro indiviso in two or more persons²⁶. Galgano in fact holds that the community of ownership is merely the plurality of persons having control on the rights²⁷. These undivided shares can be either equal or unequal, but however, unless contrary is proven, the law presumes they are held as equal²⁸. The court in Paolo Tonna v. Paola Vella²⁹ held that the presumption of the law is that the shares in co-ownership are to be considered as equal, unless contrary is proven.

Objects held in common with others confer upon the owners' various rights and obligations. One of the fundamental rights tied to co-ownership is that a property is to be enjoyed by all co-owners in common. This means that a co-owner cannot hinder another's right to use or possess that property.

Another one is that each co-owner has full ownership over his share, and the profits or fruits thereof³⁰. This goes hand in hand with the fact that anyone may dispose of his undivided share, separately from the others, and this as provided for in Article 495 of the Civil Code. Therefore, a co-owner is free to dispose of his undivided share *in toto* or *in parte*. The Civil Code states that he may substitute for himself another person in the enjoyment thereof, meaning he can even grant usufruct to another person over that share³¹. Similarly, a co-owner can also use his own personal share as a security, meaning he can hypothecate that property in favour of his creditors. This indicates that despite the ownership is one of an undivided nature, as long as any alienation or hypothecation is restricted only to the share of the co-owner, he or she has full ownership of his or her own undivided share. The other co-owners remain in a position where the share which comes to them upon a partition being made will remain free and exempt from any burden which any other co-owner may have contracted³².

²⁶ Art.489(1) of the Civil Code of Malta

²⁷ Francesco Galgano, *Diritto Civile e Commerciale*, (Volume I Terza Edizione Cedam, Padova 1999) 528.

²⁸ Art.490(1) of the Civil Code of Malta

²⁹ *Kollezzjoni tad-Deċiżjonijiet tal-Qrati Superjuri ta' Malta*, Volum XXXIIIB (1949) Pt.1, p.496

³⁰ Article 496(1) of the Civil Code of Malta

³¹ Art.495(2) of the Civil Code of Malta

³² Joel Grima, *The Nature of the Right of Co-Ownership and Its Consequences* (2012)

Apart from the above rights, co-ownership brings with it also certain limitations and obligations. Whilst the rights of each co-owner are identical to those rights of an individual owner, the exclusivity here is vested in all co-owners together. In fact, the Civil Code holds that the use of the common property must be according to the destination of the property as established by usage and also must not be made against the interests of the community, or in a way as to prevent the others in the community from making use themselves according to their rights³³. This sub-article reflects Pothier's statement that "*Ciascun dei soci puo servirsi delle cose appartenenti alla società purché non ne usi in modo da non impedire ai suoi soci di usarne egualmente*"³⁴.

The first limitation in Article 491³⁵ speaks of destination fixed by usage. Destination means the purpose for which the thing is being held in community. An example would be a house held in community for the purpose of habitation. Borsari brings an example with a bull, which he says may either be considered as a draught animal or eater for slaughter³⁶. The term usage generally is understood as the normal usage of the particular thing. It may also be understood as the immediate use being made as to why it is held in community.

Secondly, the thing being co-owned may not be used against the interests of the community, and thirdly, the use thereof cannot prevent the other co-owners from using it according to their rights. Various authors, including Duvergier, Malpeyre and Jourdain, hold that this rule is difficult to adhere to as when a thing is being used by one, it is difficult not to cause indemnity to the others in the community³⁷.

Other limitations include that of not being able to carry out any alterations to the property without the consent of the others in the community, even if it may be considered as beneficial for the entire community³⁸. There are only a few instances when such a co-owner can exercise certain rights independently from the others, even if they disagree. These include acts done for the preservation

³³ Art.491 of the Civil Code of Malta

³⁴ Luigi Borsari, Commentario del Codice Civile Italiano (Volume II Unione Tipografico, Torino 1912) 1034 citing Trattato Della Società no.84

³⁵ Art.491 of the Civil Code of Malta

³⁶ Luigi Borsari, Commentario Del Codice Civile Italiano (Volume II Unione Tipografico, Torino 1872) 1034

³⁷ Joel Grima, The Nature of the Right of Co-Ownership and Its Consequences (2012)

³⁸ Art.493 of the Civil Code of Malta

of the property, which acts entitle the co-owner who carried out the necessary works to be reimbursed.³⁹

As stated above, apart from rights, subjected to certain limitations, co-ownership brings with it also its relative obligations. Article 492 of the Civil Code in fact holds that every co-owner is compelled to contribute towards any expenses which may arise in relation to the administration of the property. If this obligation is not adhered to, the others have the right to impose this obligation on the person defaulting from his or her obligations. A person effecting necessary expenses has the right to ask for reimbursement from the other co-owners as proportionate to their share. Importantly, these expenses must be necessary for the preservation of the property, and do not include any other expenses for innovation or amelioration⁴⁰.

Often, the larger the number of co-owners, the more disagreements may arise, and therefore the Civil Code of Malta guides co-owners as to how a property being owned by multiple persons should be managed. They should in fact all be responsible for the upkeep of the property, meaning that they are to indemnify each other with regards to any expense which may arise in relation to the co-owned property. Today, several co-owned properties are being left vacant, often due to the fact that they are co-owned by plenty of persons *pro-indiviso*⁴¹. Due to the limited amount of land, this started to be a problem, and a solution was needed. For this reason, Article 495A was promulgated into our laws. As noted in Chapter 3 above, this article created a way whereby such properties can be sold.

Before this article was introduced, one can say that every co-owner was in a stronger position, and today, whilst this provision surely has a lot of advantages, it might be stated that a person in a state of co-ownership is in a weaker position, especially *vis-à-vis* his say on whether the property is to be sold or not⁴². In fact, even though the law imposes certain limitations over the rights of co-owners, the biggest threat is in fact imposed by Article 495A itself. Reason for this is that even if the co-owners adhere to all their rights and duties, if they form part of the minority who do not want to sell, it is very easy for them to lose their ownership rights over their share. This Article

³⁹ Joel Grima, *The Nature of the Right of Co-Ownership and Its Consequences* (2012)

⁴⁰ *Ibid.*

⁴¹ Mark Ellis, *Changes in the Rights and Obligations of Co-Owners by the Introduction of Article 495A in the Civil Code of Malta* (2019)

⁴² *Ibid.*

creates a situation where even though each co-owner has full right of ownership over his share, he or she may still be forced to sell. Whilst granting an opportunity for situations of community property not to be stagnate, the law tries to mitigate this by including certain limitations such as the abovementioned fact that the community must have existed for at least three years and that no judicial action was instituted beforehand⁴³. This Article also cannot be used when the property is subject to the personal rights including use and usufruct, or when the property is a condominium.

Before the law was amended in virtue of Act XVIII of 2004, problems arose both where the community resulted from an inheritance and also when it was brought voluntarily by the parties. When analysing Article 495 abovementioned, prior to the amendments, it was not clear whether a sale of an undivided share by a co-heir prior to a partition was valid or not.

When analysing various judgments, we can see that in such cases, co-heirs were not entitled to transfer their undivided share as the court considered such transfers carried out before the inheritance was partitioned as null. This is evident in the case *Maria Assunta Casha et v. Joseph Mary Cutajar et*⁴⁴ where the court argued that a person may never be sure that he will be due a part of that particular immovable property in case of a partition. There were also cases where the court argued that the validity of the transfer depended on whether the property, or the share thereof, was eventually transferred to the vendor, implying the sale was made under the condition that when the partition is made, the property is transferred to the vendor. A judgement where the court put forward this argument was *Carmelo Sultana noe v. Noble Guido Sant Fournier et noe*⁴⁵ where it held that if the thing sold remains in the share acquired by the vendor, then the sale may be considered as “*effikaci*”. In *Giuseppe Chircop et v. George Portanier et*⁴⁶, the court had suspended the proceedings until the action for liquidation and division of the community was concluded, and proceeded to revoke the prior judgment, thus having put forward a different arugement, holding that a sale in such case in not absolutely null. In the judgment of the Court of First Instance, the Court concluded that the sale of a share of a tenement forming part of a community is null since

⁴³ Art.495A(1) of the Civil Code of Malta

⁴⁴ *Maria Assunta Casha et v. Joseph Mary Cutajar et* [2004] (First Hall, Civil Court)

⁴⁵ *Carmelo Sultana noe v. Noble Guido Sant Fournier et noe* [1969] (Court of Appeal)

⁴⁶ *Giuseppe Chircop et v. George Portanier et* [1944] (Court of Appeal)

it is made against the law, as co-ownership, does not give the co-owners the right to dispose of a determinate thing forming part of the common patrimony⁴⁷.

With the introduction of Article 495A, every co-owner became deemed to be a co-owner of everything which forms the community, and therefore that particular thing could now be sold without needing to liquidate and divide. This shows that by introducing this Article a remedy was created solving one of the biggest problems resulting from co-ownership. The effects of this article therefore create a way to overcome all the obstacles which used to exist with regards to sales of community property⁴⁸. In cases of inheritance, a demand for the sale of the property held in common may now also be made without having the need to file action for the partition of the inheritance. In *Margaret Camilleri et v. Joseph Camilleri*⁴⁹ the court held that our civil law does not lean towards the community of property and this has been the situation for a long time, as this was always considered as harmful to the country's economy which ultimately depends on transfers of property. This can be seen from various provisos in the Civil Code which address the division of property held in common. The court also made a reference to another judgment, *Lino Attard et v. Jennifer Calleja*⁵⁰, and held that this shows that the reason for which this article was introduced in our law was to liberate property from co-ownership.

⁴⁷ Giuseppe Chircop et v. George Portanier et [1944] (First Hall, Civil Court)

⁴⁸ Roberta Rapa, *Community Property Before and After Act XVII of 2004* (2007)

⁴⁹ *Margeret Camilleri et v. Joseph Camilleri* [2020] (First Hall, Civil Court)

⁵⁰ *Anthony sive Lino Attard et v. Jennifer Calleja* [2017] (Court of Appeal)

Chapter 5: The Effects of the Introduction of Article 495A on the Notarial Profession

The notarial profession is far reaching and carries with it various obligations. As an impartial professional, the notary is entrusted to help guide the parties who are in the process of carrying out a transfer of property. This includes helping the parties decide on particular conditions, explain any ramifications and legal issues which may arise with what they are doing, and ultimately help them arrive to an agreement which is beneficial to all parties.

When it comes to ownership, most cases are quite straightforward, however there are multiple instances where establishing the ownership or part thereof might prove to be complicated, or even impossible. This causes problems to the notary, who due to this, will find it really difficult to establish correctly the title to the property, which might cause the transfer of the property to fall through.

This difficulty might be caused due to unknown co-owners. This situation often arises when the property has been inherited for generations, and people from various families end up having an undivided share in the property. As people emigrate, or simply lose contact with each other, along the years, some become untraceable. As a result, when carrying out the necessary searches, the notary would arrive to dead ends, with little to no information for him to formulate and establish a title to the property. Therefore, as long as it is established that the known co-owners own the majority of the shares in the property subject to the transfer, then the Notary can advise the clients to seek the courts approval for the sale of the entirety of the property via the proceedings provided for by Article 495A. As this is done, irrespective whether or not the Notary can establish who had inherited or acquired that part of the shares pertaining to the unknown co-owners, the sale can go through. Therefore, where in previous cases, the Notary would have been unable to proceed and aide the parties finalise the transfer, with the promulgation of Article 495A, this has been made easier and possible. For instance, one of the earliest cases where the application of Article 495A was sought was *Alicia Calleja et v. Kuraturi Deputati*⁵¹. Here, the plaintiffs were seeking the court's approval for the sale of a property where the owners of a 1/7th undivided share could not be established and were unknown. In this case the court had decided that all the requisites of Article 495A. Since the property had been co-owned for the requisite period of time applicable at that

⁵¹ *Alicia Calleja et v. Kuraturi Deputati* [2009] (First Hall, Civil Court)

time, and no serious prejudice was being caused, the court approved the sale and the share of the unknown co-owners, as represented by the curators, was deposited in court under its authority.

This same situation might also lead to a difficulty in establishing the shares of each co-owner. This also causes the same problem to the notary, and through these proceedings this may be solved and the transfer of the property can go ahead. As a result, the purchaser acquiring the property would have no issue with any co-owners and the title to the property acquired would be clean.

Another instance which notaries face relatively often is disapproving co-owners. This happens for multiple reasons including that part of the co-owners just does not want to sell, or else they believe they should sell at a higher price. Whilst the notary does try to guide the parties to maybe reach an agreement on a common ground, this often proves to be very difficult. If the parties fail to agree, the notary would have wasted a lot of time and effort meeting and discussing with them for nothing. With the introduction of Article 495A, when the majority of the co-owners are in agreement, they can seek the court approval, saving themselves and the notary a lot of time, and ultimately, ensure that the transfer can be made.

Another issue which notaries face in relation to proceedings of Article 495A is the time which it takes for the court to conclude the proceedings and make a decision. Taking too much time causes a problem as the value of the property in Malta changes quite often. Apart from the value of the property changing, it also causes problems with regards to the time-period of validity of the promise of sale. Parties might get frustrated having to extend time and time again, and after some time, one of the co-owners might decide not to further extend, causing further difficulties and problems mostly for the other parties but also for the notary who is working on the transfer of the property. If the agreement falls through due to this, then everything will have to start from scratch, and expenses might be incurred for nothing. In *John Anthony Cuschieri pro et noe v. Alton Scerri et*⁵² the court in fact held that the fact that the purchaser is not a party to the proceedings is irrelevant. It held that these proceedings are not for the purchaser to be forced to purchase but for the court to authorise the sale. If the purchaser then does not proceed with buying the property, he cannot be forced to do so when there is no promise of sale binding the parties, and the authorisation would have been obtained for nothing.

⁵² *John Anthony Cuschieri pro et noe v. Alton Scerri et*⁵² [2021] (Court of Appeal)

Despite this, the introduction of this article has helped Notaries in carrying out their duties and has made it easier for the parties to find a way to transfer the property in its entirety, and therefore, it was accepted and welcomed across the board by Notaries in general.

Chapter 6: Conclusion and Recommendations

From the analysis of Article 495A of the Civil Code, it is clear that the introduction of this provision was much needed and is now considered as an essential tool for persons who are involved in a co-ownership. As a consequence to these changes, the rights and obligations attached to co-ownership have changed. It can be stated that these amendments did in fact enhance the legal position where co-owned property needs to be sold, but due to one of the reasons abovementioned cannot.

Today with the possibility that the minority shareholders can be forced to sell their share, the Courts are in a position where they have to make a decision which is fair and is to an extent beneficial to all parties. After analysing the court judgments, it can be stated that the courts have constantly interpreted the law as it was originally intended by the legislator and has strictly followed the conditions which the article imposes. Therefore, where it was advantageous to the parties, the court has constantly approved the sale, whilst also protected the rights of the minority where serious prejudice would be caused, in which cases, the courts rejected the application of the article. In general however, it is clear that the position of the courts is to naturally lean towards the sale of the property which is co-owned.

The fact that this article can be used to force someone to sell his share in a property, has substantial effects on the notion of co-ownership itself. Since, this article was promulgated, dissident co-owners are almost given no option but to co-operate with the others, as if they do not, they would still lose their share and in addition would also incur other expenses which include the lawyer's and the court's expenses. Thus, it can be stated that this law has a direct effect in the sense that if applied, it has direct effects on the rights of the co-owners whilst also having an indirect effect in the sense that despite not being applied, it might still have repercussions on the way co-owners chose to act in situations where they do not agree with the others.

Notwithstanding having left a clear effect on co-ownership, evident from the ever-increasing judicial proceedings seeking to apply this article, there are still ways in which this can be improved and become more effective. The author believes that there are still a few points which have not been properly addressed.

One of the issues which the author feels the need to highlight is the fact that the Civil Code fails to define the term 'serious prejudice' even though this article makes such a big emphasis on it.

Most probably this was done to leave the interpretation at the court's discretion, however, this may lead to situations where judgments might contradict each other, especially when delivered by different judges. Therefore, whilst leaving the definition of this term up to the interpretation of the courts at a case-by-case basis has its own benefits, it still leaves an element of uncertainty which can be avoided.

Another matter which was left up to the court's discretion is what relevant factors are to be taken into consideration when determining whether serious prejudice is being caused to any of the co-owners. Here again, there might be conflicting judgments as what is relevant ultimately depends on the judge making the decision. For this reason, one might argue that a list of these factors may be made to provide further legal certainty. Notwithstanding this, if any list is to be formulated, the author believes that it is not to be made exhaustive, as it would be impossible to limit the instances where serious prejudice can be caused.

The law also fails to mention the right of first refusal for co-owners to buy the property themselves. It might further facilitate the transfer of the property if co-owners who perhaps do not wish to sell the property to third parties, have the opportunity to purchase the property themselves for at least the same price for which third parties are willing to purchase it, and subject to the same conditions. The fact that it is bought by one of the co-owners themselves does not cause any prejudice to the others, and therefore creating this possibility further increases the chances to eliminate a state of co-ownership, which ultimately was the aim of the law itself.

Another important factor which the author believes needs to be tackled is the efficacy and time periods within which judicial proceedings concerning the application of Article 495A are decided. As previously stated, the more time passes, the more problems can arise, both for the parties themselves and for the notary as well. The property *per se* might also suffer, especially if it is already in a dilapidated state. It is well known that the courts are heavily burdened and since the problem is more of an administrative nature rather than legal or procedurally, one could also add a proviso whereby promises of sale which are subject to the issuance of a court approval for the sale through Article 495A do not expire until the judicial proceedings are concluded. This would help avoid situations where any one of the parties decides not to extend whilst proceedings have already started, and thus creating a further problem. In this way, all parties to the agreement are protected and bound by what was agreed.

When everything is considered, there is no doubt that the introduction of this article has been a well needed step forward, and today it is much easier for community property to be transferred. Nonetheless, there are still plenty of shortcomings which the author feels need to be addressed with future amendments.

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