Reforms in the Maltese Civil Code

The Removal of Relative Incapacities of Children in the Amendments of Act XVIII of 2004

Dr. **Ruth Farrugia**
LL.D., M.Phil., Dip.Trib.Eccle.Melit.[96]

The amendments to the Civil Code which came into force through Act XVIII of 2004 affect a large number of sections spread throughout the Code. They include the removal of the term "illegitimate", the introduction of the rights subsequent to this removal, a number of other amendments within the law of succession, co-ownership and acts of status. My brief in this article is to highlight the removal of relative incapacities of children[97].

1. Background

1.1 Roman Law

Very briefly, in Roman Law, illegitimate children did not belong to any particular family. They were subject to no paterfamilias and were not legally related to their brothers and/or sisters. Up until the time of the Republic they had no hope of inheriting. Hadrian removed the Lex Minicia whereby a child was given the least possible status and the presumption in favour of Roman status was applied. Justinian introduced legitimation *per subsequens matrimonium.*[98]

[96] Advocate and Senior Lecturer, Faculty of Laws University of Malta
[97] This article is based on a paper presented at a Seminar organised by the Chamber of Advocates, Notarial Council and Gh.S.L. on the 16th April 2005 and deals principally with the Amendments to the Civil Code brought about by Act XVIII.2004
[98] Gardner J., Family and Familia in Roman Law and Life, 1998, p.252-261

In this respect, Maltese law is based on Roman Law as amended by the Code de Rohan, the Code Napoleon, the amendments of 1965, 1973, 1993[99] and the present amendments under scrutiny of 2004.

1.2. International Law

The main sources of reference at international law are the:

- Universal Declaration of Human Rights Articles 2 + 25(2);
- European Convention on Human Rights Articles 8 + 14;
- European Convention on the Legal Status of Children Born outside Marriage
- Resolution (70)15 relating to the Social Protection of Unmarried Mothers and their Children (Council of Europe);
- UN Article 2: prohibition of discrimination on the basis of "social origin, birth or other status" and
- Article 25(2) "*All children born in wedlock or outside wedlock shall enjoy the same social protection*".

This sentence was added at the recommendation of Yugoslavia and Norway who drew attention to the discrimination practised against children born out of wedlock which brought about the lack of observance of their fundamental human rights.[100]

This Declaration however fails to make any mention of legal rights and it is readily apparent that social and legal rights are not the same.

[99] Farrugia R., Parentage and Civil Status Matters, Council of Europe, 1999, p115-126
[100] Van Beuren G., The International Law on the Rights of Children, 1998 p.41 et seq

Within the Covenant on Civil and Political Rights, Poland suggested the inclusion of: "Birth outside marriage should not restrict the rights of children" and Yugoslavia agreed to second the proposal, however Saudi Arabia objected and was joined by other states who felt this inclusion offended the sentiments of Muslim principles. The compromise clause proposed: "State parties to this convention agree to take steps to better the legal status of children born outside marriage" but even this was deemed unacceptable as a number of countries felt that the distinction in matters of succession was positive to safeguard the family.[101]

When the United Nations Convention on the Rights of the Child was being discussed, China proposed that children born out of wedlock should benefit from all the rights listed under the convention and Australia proposed that children should have the right to establish both maternal and paternal filiation but both proposals were rejected.

The Convention on the Legal Status of Children born out of Wedlock 1975 has two main aims: 1. to provide child born outside wedlock with a status equal to children born within wedlock and 2. The harmonisation of laws relating to filiation within Council of Europe States. Because of the large differences between legislations of different states, the adoption of this convention was made possible on the proviso that states would have time to amend their local laws slowly. For instance Article 9 makes specific reference to the rights of all children, whether born in or outside wedlock, to inherit equally from father, mother and all family members of the father and mother. [102]

Notwithstanding this rather sad background, within the international judicial scenario, case law from Strasbourg is much clearer and coherent.

[101] Van Beuren op cit + UN/Doc A/C.3/SR 1263
[102] Boucaud A, The Council of Europe and Child Welfare, Strasbourg 1989, p14-16
Resoluzzjoni dwar protezzjoni socjali ta' ommijiet mhux mizzewga u uliedhom jittratta t-tnehhija ta' terminologija li jista' jiddiskrimina kontra t-tfal.

Article 8 refers to the universal right to respect for family life. This has been interpreted as meaning that no discrimination is permissible between legitimate and illegitimate children.

2. Selected Article 8 Cases [103]

2.1. Johnston v Ireland: respect for family life includes children of parents who are not married. This case is about a man who was unable to marry his daughter's mother because he was legally separated from his wife and unable to marry the daughter's mother because of Irish law prohibiting divorce. Ireland introduced the Status of Children Act in 1987as a response to this decision. The result was not to give married and unmarried couples analogous rights but to ensure respect for family life interpreted to mean that both couples should have the right to establish legal ties between those family members.[104]

2.2. Marckx v Belgium treated the issue under Belgian law whereby an unmarried mother had to adopt her own child in order to establish legal status of motherhood. The Court found that respect for family life requires the State to act in such a way as to permit the relationship between family members develop in a normal way, adding that this should be possible by recognition of the relationship between mother (unmarried or not) and child from the moment of birth. Belgium immediately amended its law. A year later the Committee of Ministers of the Council of Europe adopted the European Convention about the Legal Status of Children Born out of Wedlock, 15 Oct 1975 [vide also the Brussels Convention on the Establishment of Maternal Affiliation of Natural Children].

2.3. Kroon v Netherlands has more specific relevance to the local problem. A child was born to an unmarried couple where the mother was still married to another man. She could not trace her

[103] Swindells H. et al, Family Law and the Human Rights Act 1998, 2000, case summaries 303-362

[104] O'Donovan K., Family Definitions and Human Rights, Family Law and Family Policy in the New Europe, 1997, p 27-42

husband in order to seek a divorce from him and entries in the public registry showed that he had not married anyone else. According to the Courts in the Netherlands, the child's father could not acknowledge the child as his own until such time as the wife's husband had repudiated the child.

2.4. Inze v Austria deals with a case under Austrian law whereby a child born in wedlock received preferential treatment vis a vis a child born outside wedlock by acknowledging the child born in wedlock as the principal heir. In this case, the son born out of wedlock stood to lose a farm which he should have inherited from his mother along with another son born in wedlock. Austria argued that the rural population believed that birth in wedlock was an important criteria in establishing succession rights. The Court decided that Austria had breached Article 14 of the European Convention of Human Rights and Article 1 of Protocol 1. In 1980 Austria had also ratified the Convention on the Legal Status of Children born out of Wedlock.

3. Local Case Law

3.1.Ronald Apap v Ruby Ritchie proprio et nomine – This was a case about a child born outside marriage whose mother gave him up in adoption to third parties. Subsequently the father of the child contested the placement and the Court decided to give the child to his illegitimate father making the following remarks:

"L-emendi li saru fl-1973 kellhom l-ghan ewlieni li jinewtralizzaw kemm jista' jkun id-distinzjoni u d-differenzi bejn il-wild illegittimu u dak legittimu. Dan b'mod partikolari f'dawk li huma relazzjonijiet personali bejn it-tfal u l-genituri li jirrikonoxxuhom bhala uliedhom

Dan ghaliex il-ligi riedet tekwipara kemm jista' jkun il-vantagg li jkun anke hu sottomess ghas-setgha u d-direzzjoni ta' missieru. Sa mill-emendi ta' l -1973 wiehed allura jista' jghid li l-ligi bdiet tirrikonoxxi n-nukleju familjari illegittimu li fih ir-relazzjoni bejn il-genituri u l-ulied, avolja barra l-vinkolu taz-zwieg beda, fl-

interess tal-minuri, jigu regolati kwazi bl-istess mod ghal dawk gia' familjari fiz-zwieg..."

Rough translation: *The amendments which took place in 1973 had the principal aim of neutralising, as far as possible, the distinction and difference between legitimate and illegitimate children. This was done with particular reference to personal relationships between children and parents who acknowledge them as their children.*

This is because the law wished to balance, as far as possible, the advantage of being subject to the authority and direction of the father. Since the amendments of 1973 one can therefore say that the law started to acknowledge the illegitimate nuclear family wherein the relationship between parents and children, albeit outside the bond of marriage, started, in the interests of the child, to be regulated in the same way as those already familiar in marriage.

Locally, various vox pops highlighted popular sentiment as being in favour of the abolition of discrimination between children born in and outside wedlock. This is hardly the place to enter into a debate as to whether society shapes the law or the law shapes society but it is apparent that the term "illegitimate" is no longer viewed as politically correct..

There are a number of reservations to the practical outcomes to this judgement; however it is being cited to show how the Court affirmed the fact that the time for discrimination between legitimate and illegitimate children should be viewed as long gone.

3.2. Buttigieg v AG et[105]

[105] Mario Buttigieg f'ismu proprju u bhala kuratur ad litem ta' ibnu minuri Keith Buttigieg versus l-Avukat Generali u jekk jidhirlu li ghandu interess l-Onorevoli Prim Ministru Deciza 17 Jannar 1997, Rik. Kost 544/96AJM (Mario Buttigieg in his own name and as curator ad litem of his minor son Keith Buttigieg versus the Attorney general and for any possible interest the Honourable Prime Minister decided on the 17 January 1997, Constitutional Application 544/96AJM)

Buttigieg had two children, one born in marriage and the other outside wedlock. He wished to leave them equal shares in his will but was advised that the law did not permit this. He decided to go to court and instituted proceedings on the basis of articles 37 and 45 of the Constitution and Articles 8 and 14 of the European Convention of Human Rights and the First Protocol[106].

Buttigieg made reference to articles 602, 640, 822 and all the articles between 614-646 and 817-824 and requested that changes be directed in order to eliminate the existing discrimination. Mr Justice Alberto Magri found for Mr Buttigieg and declared a number of the articles cited under succession law to be null and to go against the Constitution and the European Convention on Human Rights and ordered that a copy of the judgement be served on the House of Representatives.

The Attorney General failed to appeal the decision and it is interesting to note that the last official act of outgoing President Mifsud Bonnici in 1998 was to remind the House of Representatives that the said articles were still awaiting amendment. [107] Today, 8 years after the judgement on this case the amendments have finally gone through.

"Illi fil-meritu jidher li t-talba tar-rikorrenti hija gustifikata inkwantu l-provvedimenti tal-Kodici Civili aktar il fuq imsemmija jiddiskriminaw bejn genituri legittimi u illegittimi u bejn tfal legittimi u illegittimi, liema diskriminazzjoni tincidi b'mod negattiv fuq it-tgawdija tal-hajja familjari protetta bl-artikoli fuq imsemmija jammontaw ghal indhil minn l-awtorita' pubblika dwar l-ezercizzju ta' dan id-dritt minghajr ma jikkonkorru r-rekwiziti imsemmija fis-sub inciz (2) tal-Artikolu 8 ta' l-Ewwel Skeda tal-Att XIV tal-1987. Daqstant l-artikoli fuq imsemmija jincidu b'mod negattiv fuq id-dritt ghat- tgawdija pacifika tal-proprjeta"

[106] Malta has had the right to individual petition since 1987
[107] Farrugia R., as reported in the International Survey of Family Law 2001, pp 258-289

Rough translation : As to the merits it would appear that the request of the applicant is justified insofar as the provisions of the Civil Code mentioned above discriminate between legitimate and illegitimate parents and legitimate and illegitimate children, which discrimination negatively affects the enjoyment of family life protected by the aforementioned articles and which amount to interference by a public authority in the exercise of this right without being in line with the requisites mentioned in Article 8(2) of the First Schedule to Act XIV of 1987. In a similar way the article aforementioned negatively impacts on the right to peaceful enjoyment of property.

4. The Amendments

4.1. Definitions

The first amendment to be discussed is (inevitably) the definition.

Legitimate children are termed children conceived or born in wedlock. The word illegitimate has been eliminated and the word legitimate is used interchangeably with being conceived or born in wedlock.

Article 68 remains the same:

"A child born not before one hundred and eighty days from the celebration of the marriage, nor after three hundred days from the dissolution or annulment of the marriage, shall be deemed to have been conceived in wedlock."

Under the heading "Filiation of children conceived or born in wedlock"

Article 67 remains:

"A child conceived in wedlock is held to be the child of the mother's husband".

The reasons for repudiation of children (as in an action for *denegata paternita'*) have also remained the same. The only changes in Articles 76 and 77 substitute the word legitimate with the word filiation but are not substantive changes to this right to repudiation. Similarly in the second subtitle regarding the proof of filiation of children conceived or born in wedlock, Articles 78-85 are amended solely to substitute the word "conceived or born in wedlock" for legitimate.

Subtitle III refers to Filiation of children conceived and born out of wedlock and the presumption that a person was conceived or born in wedlock.

The first real change comes in the provisos to Article 86:

Provided further that the acknowledgement of a child born out of wedlock by a person claiming to be the father of the child, made separately from the mother, shall not have effect and shall not be registered unless the mother of such child, or her heirs if she is dead, and the child himself if he is of age, shall have been served with a judicial letter by any person interested stating that such person intends to apply for the registration of such acknowledgement and the mother or her heirs as the case may be, and the child, shall not have within a period of two months from such service, by a note filed in the acts of the said judicial letter, agreed to such registration, in which case the said judicial letter and agreement note showing agreement shall be served upon the Director of the Public Registry who shall register the said acknowledgement in the relative acts of civil status;

Provided further that where the mother or the child where he is of age does not as aforesaid agree to such registration, any person interested may proceed by application before the competent court against the person or persons who shall not have so agreed, for the court to declare that the person making the acknowledgement is the father of the child and to order the registration of such acknowledgement in the relative acts of civil status;

Where the acknowledgement of a child born out of wedlock is made by a man who claims to be the father and this acknowledgment is carried out separately from the mother, legal procedures are required for such acknowledgment to take effect.

This article retains the premise that a father who is still not of the age of majority cannot acknowledge his child. Although he may marry and enter into full time employment at the age of sixteen he may not acknowledge his child before he attains the age of eighteen.This may be explained on the basis of parental authority which places all minors until the age of eighteen under the authority of their parents. However, in the case of minor females the distinction does not seem to matter and the parents of a minor daughter must assume responsibility for her child and she automatically acknowledges the child at birth. In fact, should the minor girl wish not to acknowledge the child, this is not possible under our law. [108]

The first article with any real impact on children comes at article 86 when an innovative and detailed proviso introduces amendments relating to notification and procedure.

4.2. Judicial Letter

A judicial letter must be sent by the person wishing to acknowledge the child and be notified to:

1. The mother of the child or her heirs if she is deceased; and
2. The child him/herself if s/he is of age.

There are two Possible Responses:

Response 1 – Agreement

Within two months from the date of notification of the official

[108] Unlike the articles in neighbouring civil law countries on the continent where anonymous birth is possible since recent amendments whereby both mother and father may choose not to automatically acknowledge their offspring. (so called accouchement sous "x")

letter, the mother or her heirs and the child according to the case must file a note in the acts of the official letter indicating their assent to the registration. The official letter and the note are then notified to the Director of the Public Registry who registers this information in the relative act of civil status.

The problem relating to the child's right to know his/her father remains. Is it possible for a man who does not wish to acknowledge his child to refuse to undergo a DNA test? The issue centres round the right of the individual over his bodily integrity as opposed to the right of the child to establish his/her origins.[109] According to the United Nations Convention on the Rights of the Child which Malta ratified in 1990, article 7(1) states:

"A child shall have the right to be registered immediately upon birth and shall have the right form birth to a name. Insofar as is possible s/he shall have the right to know and be cared for by his/her parents."

Response 2 – Lack of Agreement

Within two months from the date of notification:

Where the mother or the child have not signified their consent or have not replied whosoever has an interest may proceed by application before the competent court against the person who has disagreed so that the court may order the acknowledgment of the father and the relative registration.

What happens when only one party agrees or disagrees?

Take the case of a child who has attained majority disagreeing with the acknowledgment while the mother is in agreement. It would appear that the opposition of only one party is sufficient. Will the Court listen to the parties prior to making its decision and confirm

[109] Frank R., Compulsory Physical Examinations for Establishing Parentage, International Journal of Law, Policy and the Family.10(1996) p. 205 et seq

the application of the applicant? The motivation for this amendment lies in the procedure which used to give the father the automatic right to acknowledge a child by having his name inserted on the act of civil status without the need to inform the child or the mother.

This new procedure ensures the need for notification but also seems to introduce the right to oppose such acknowledgement. Otherwise there would only have been the need for notification by the Director of the Public Registry on his/her registration of the acknowledgment in the act of civil status. Our law has persistently done all it can to ensure that a child is considered to be born or conceived in wedlock and this amendment seems to give the opportunity to oppose such status.

This new system resembles that pertaining in Belgium, Germany, Italy, the Netherlands, Portugal and Spain. In Germany, however, if the child opposes the acknowledgement the Court may still override the opposition by means of a decree. In Belgium the consent of the mother and the child who has attained the age of fifteen years or the consent of the child who has attained the age of eighteen as the mother's consent is no longer required at that stage. Spain expects the Court to decide in those cases where there is opposition but leaves a period of one year within which the father may notify the child by means of legal documents. In Italy, the mother's consent is required where the child has not yet attained the age of sixteen and where the child opposes the acknowledgement.

In the Netherlands, the mother's consent is only required where there is a minor and once that minor attains the age of twelve years his/ her consent is also necessary. Portugal does not require the consent of the mother. France, Luxembourg, Austria and Switzerland, for example, have a system which resembles ours prior to the amendments although there are a number of exceptions to the rule. France, for instance, gives power/authority to the Notary to accept a declaration of filiation in secrecy which means

that although an annotation is made to the child's certificate this remains confidential until the death of the father.[110]

4.3. Choice of Surname

Article 92 has added a proviso making reference to Article 292A which is a completely new addition.

Article 92

"Provided that when the child born out of wedlock has been acknowledged jointly by both the father and the mother on the Act of Birth, the surname by which that child shall be known shall be determined in terms of article 292A."

Article 292A

"The person giving notice of the birth shall also deliver a declaration by the parents of the child indicating the surname to be used by the child in terms of article 4(3) or of article 92, and such surname shall be registered in the column under the heading "Name or names by which the child is to be called" in the act of birth immediately after such name or names. Where no such declaration is made in the case of a child conceived and born in wedlock the father's surname shall be presumed to have been so declared and in the case of a child conceived and born out of wedlock the maiden surname of the mother shall be presumed to be the surname so declared."

When this does not happen and the child is conceived and born in wedlock the presumption is that the father's name has been declared. Where the child is conceived and born outside wedlock, the presumption is that the child shall bear the maiden name of the mother. The debate relating to surnames has been going since the amendments enacted in 1993. At the time it was suggested that all

[110] Granet F., International Commission on Civil Status, Legal Problems relating to Parentage, Council of Europe, 1987

children should take their mother's surname and in this way discrimination against children born outside wedlock would be diminished as they would not be so easily identifiable.

This is the case in Germany (Abs 1617BGB) and Austria (Abs165ABGB), for instance. In Greece children take the surname of their mother and may add the surname of the father. Spain and Greece have a rather interesting option related to the lack of an entry under father's name and the possibility of listing the name as unknown. In Spain the registrar sets down a fictitious name simply to conceal the fact in the register and this may be removed by the child when s/he comes of age (Art 191 RRC). In Greece the mother may request the entry of a fictitious name under the entry for father's name but contrary to the process in Spain, the child has no right to remove this entry at any time. (N2307/1995 Art 9 (9))[111]

4.4. Retention of Surname

Article 92 is complemented by the notion in subarticle (6) so that a person whose surname is to change in virtue of the procedure of filiation, notification or application relating to the presumption may request the competent Court by means of an application against the Director of Public Registry to be permitted to use another surname.

Where the Court decides that such use would not prejudice the rights of third parties and in the case of minor, where it is shown that this would be in the best interests of the minor, the application shall be acceded to and the Director shall be ordered to annotate the decision on the relative Act of Birth.

Similarly in Article 110, the child shall take the surname of the parent who shall have claimed acknowledgement of the child so that where the presumption is made by the father and the mother the child shall take the surname of the father.

[111] Granet F.,op.cit. , p.59-81

4.5. Obligations of the Children

According to Article 93;

"Without prejudice to the provisions of article 89, parents of children conceived and born out of wedlock shall have in respect to such children and their descendants the same duty to maintain and educate them as they have with regard to children born or conceived in wedlock, and such children shall have in respect of their ascendants and other relatives the same rights and duties as children born or conceived in wedlock."

It is interesting that the obligation of parents subsists in a personal way between them and the child and his/her descendents while the obligation of the child extends towards "other relatives" with no indication of the level of proximity of such relationship.

4.6. Parental Responsibilities

Articles 94 and 95 have been deleted and Article 93 has been amended so that it is unequivocal that parents of a child conceived and born outside wedlock shall have the same duties to maintain and educate that child as they would a child conceived or born within marriage. This obligation extends to the descendents of the children.

However some sort of discrimination continues to apply where Articles 96 and 97 have remained *in vigore*. These articles declare that a parent may *"deny maintenance to the child, if such child refuses, without just cause, to follow the directions of the parent in regard to his conduct and education and / or if such child refuses to live in the house which the parent for just cause and with the approval of the court has appointed for his habitation, as also in any other case in which according to law it is competent to a parent to refuse maintenance to a child conceived or born in wedlock."*

It should be noted that the articles dealing with parental authority (articles 131-156) make no such mention of this treatment to children conceived or born in wedlock. It is a shame that this vestige of discrimination continues in the care and support given to children conceived or born outside wedlock.

4.7. Presumption that a person was conceived or born in wedlock

Article 101 now reads:

"Where parents of children conceived and born out of wedlock subsequently marry, or where the court of voluntary jurisdiction so decrees, such children shall be deemed iuris et de iure to have always been conceived or born in wedlock."

The words legitimation have been deleted and substituted with the words "*presumption that a person was conceived or born in wedlock*". The difference from the article prior to the amendment lies mainly in the fact that what used to be known as legitimation is now automatic although the declaration of the parents in an act of marriage or declaration by court decree is still necessary according to article 102.

This presumption continues to extend to children who predeceased and therefore the presumption operates in favour of the descendents of those children whether conceived or born in wedlock. (Article 105)

Effects of Presumption

But it should be kept in mind that there is the old presumption which operates between the father and mother of the child born and conceived in wedlock that the child is a product of the marriage. This is so fundamental that Article 111(2) has remained constant and states that:

Such child shall not acquire any other right deriving from consanguinity.

Pater is est quem nuptia demonstrant

5. Acts of Birth

5.1. Father Unknown

According to Article 279:

(1) In the case of a child conceived and born out of wedlock, the name of the father shall not be stated in the act, except at the request of the person acknowledging himself before the officer drawing up the act to be the father of such child.

(2) Where the child is not acknowledged jointly by both the father and the mother, the provisions of article 86 shall apply.

(3) Where no such request is made, there shall be stated in the proper place in the act that the father of the child is unknown.

5.2. Documents

A request for annotation by the Director of the Public Registry in the case of adoption or conception or birth in wedlock as well as such a request in relation to paternity or maternity must be accompanied by an authenticated copy of the public deed, court judgement or in the case of marriage the reference to the date of registration or document proving the celebration of the marriage.

Article 291:

"(1) The party making the request for any entry as provided in the last two preceding articles shall deliver to the Director an authentic copy of the public deed, judgment or decree, relating to the judicial declaration of paternity or maternity, or presumption in virtue of articles 101 to 112.

(2) In the case of a presumption arising out of subsequent marriage, which has been duly registered, a reference to such registration shall be made in the note: where the marriage has not been registered, the entry shall not be made unless the party making the request for the entry shall deliver to the Director a document attesting the celebration of the marriage."

6. Reserved Portion

Article 616:

"(1) The reserved portion due to all children whether conceived or born in wedlock or conceived and born out of wedlock or adopted shall be one-third of the value of the estate if such children are not more than four in number or one-half of such value if they are five or more.

(2) The reserved portion is divided in equal shares among the children who participate in it.

(3) Where there is only one child, he shall receive the whole of the aforesaid third part."

Now substituting the term legitim the law uses the term reserved portion and where the law previously made a distinction there is now clarification that this portion shall apply to those children who were conceived or born in wedlock or conceived or born outside wedlock or adopted.

7. Equal children?

However the situation is not as equal as it might first appear. If one takes a look at Article 809:

"Where the deceased has left children or other descendants but no spouse, the succession devolves upon the children and other descendants."

Then at Article 811(1);

"...children or other descendants succeed to their father and mother or other ascendants without distinction of sex, and whether they are born or conceived in marriage or otherwise and whether they are of the same or of different marriages."

Prior to Act XVIII this article provided a definition for legitimate children however today it is said that all children are to be treated in the same way, without any discrimination. For this purpose any distinctions between children of the first and subsequent marriage were also eliminated together with remaining discrimination against adopted children who were precluded from inheriting more than the least portion of a legitimate child.

The Surprise Comes at Art. 815:

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

Children conceived or born outside marriage who compete with other children, or with the surviving spouse, stand to lose out where the parent failed to make a will in their favour. The rules of intestate succession maintain that this child may only inherit three quarters of what would have been his due had there been a will. It is interesting that the remaining quarter does not go to the children conceived or born in wedlock – it would appear that the surviving spouse is the beneficiary although the position of the adoptee is also unclear.

This distinction and emphasis on the remaining quarter being considered as a separate estate may be a sop towards those who criticise this measure as discriminatory. Whatever the analysis of the issue, the final account shows clearly that the child conceived or born outside wedlock does not receive the same share as the child conceived or born in wedlock – the question is how long will it take for another court case to be instituted to remedy this?

Ruth Farrugia
March 2006