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Introduction to the Laws of Timor-Leste

**Family Law:
Marriage
in Timor-Leste**

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Preface to the Series: *Introduction to the Laws of Timor-Leste*

Timor-Leste has enjoyed a decade of formal independence. The country's democratic institutions have grown during this period. But, as thoughtful Timorese are quick to point out, much remains to be done. Building viable and professional state institutions takes time. And growing the human resource capacity within those institutions is always a major challenge to new states.

The capacity building imperative in Timor-Leste is both striking and compelling. Establishing state agencies in the first instance is relatively much easier than filling those agencies with effective professionals that uphold their duties and responsibilities. Building the capacity of a pool of Timorese who hold, or may hold, positions within legal and other state institutions is crucial. Likewise, building an educated understanding and awareness of the obligations and responsibilities of key actors within legal institutions, and government institutions more broadly, contributes to setting demands and expectations for performance among the polity. Encouraging professionalized capacity within state institutions, on the one hand, and thoughtful and calibrated demands for performance by citizens, on the other hand, are essential dynamics for the development of the rule of law and a democratic state in Timor-Leste. Institutions of higher learning, such as universities and professional training centers, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

This paper is part of the *Introduction to the Laws of Timor-Leste* series of papers produced by the Timor-Leste Legal Education Project (TLLEP). This series seeks to critically engage the reader in thinking about the laws and legal institutions of Timor-Leste, and is based on a model of educational writing first introduced in TLLEP's *Introduction to Professional Responsibility in Timor-Leste* textbook, published in 2011. Founded in March of 2010, TLLEP is a partnership between The Asia Foundation and Stanford Law School. Working with local actors in the Timor legal sector, the project's goal is to positively contribute to the development of domestic legal education and training in Timor-Leste. USAID provided funding for this series through its Timor-Leste Access to Justice Program.

The authors of the legal working papers focused on writing in clear, concise prose, and on using hypothetical legal situations, discussion questions, and current events. Through this style of writing and pedagogy, the aim is to make these texts accessible to the largest possible audience. The texts are designed to be broadly accessible to experienced Timorese lawyers and judges, government officials, members of civil society, Timorese students in law, and the international community. They cover topics ranging from constitutional law to inheritance law to the Petroleum Fund Law.

These working papers represent the dedicated efforts of many individuals. Stanford Law School students authored the texts and subjected each working paper to an extensive editing process. The primary authors for this series were Peter Broderick, Daniel Cassman, Margaret Hagan, Brian Hoffman, Lexi Shechtel, and Anne Johnson Veldhuis, all Class of 2013, Jessica Fox, Hamida Owusu, and Samuel Saunders (all Class of 2014) edited the series under the guidance of Stanford Rule of Law Fellow Megan Karsh ('09). The students benefitted from the substantial and extensive guidance provided by Brazilian lawyer Dennys Antonialli (LLM '11) and Geoffrey Swenson ('09), TLLEP's former in-country director and legal advisor to the Asia Foundation's Dili office.

The program has also received extensive support from Kerry Brogan, previous Country Representative Silas Everett, current Country Representative Susan Marx, Juliao de Deus Fatima, and a host of other Asia Foundation staff. USAID Timor-Leste provided vital financial and programmatic support to the program. We especially thank USAID Director Rick Scott and USAID staff Ana Guterres and Peter Cloutier. The US Embassy in Dili, especially Ambassador Hans Klemm and Ambassador Judith Fergin, have been incredibly supportive. I would be remiss if I did not thank the former and current deans of Stanford Law School, Deans Larry Kramer and Liz Magill, for their unwavering support of this project.

Finally, this series of papers simply would not have been possible without the many thoughtful and critical insights from Timorese judges, educators and lawyers, and those who work within Timorese institutions. Prosecutor General Ana Pessoa, Public Defender General Sergio de Jesus Hornai, and President of Court of Appeals Cláudio Ximenes were extremely gracious in clarifying issues related to their respective organizations and offering constructive suggestions. The textbooks received vital input from National University of Timor-Leste (UNTL) faculty and staff throughout the drafting and review process including comments from Rector Aurelio Guterres, Law Deans Tome Xavier Geronimo and Maria Angela Carrascalão, Professor Benjamin Corte Real, and Vasco da Cruz of the Portuguese Corporation. Feedback from UNTL students themselves on draft text was immensely helpful for the final text. The Judicial Training Center (CFJ) has also been a source of wisdom throughout the drafting process, particularly CFJ Director Marcelina Tilman, Erika Macedo, and Bernardo Fernandes. The text benefited as well from the contributions of Charlie Scheiner and La'o Hamutuk, the staff of the Ministry of Justice Legislation Unit, AALT Executive Director Maria Veronika, Judge Maria Netercia, Judge Jacinta Coreia, JSMP Executive Director, Luis de Oliveira, JSMP Legal Research Unit Coordinator, Roberto da Costa, ECM director Lino Lopes, and Sahe Da Siliva. We are also grateful to Gualdinho da Silva, President of the National Petroleum Authority, for two wonderfully engaging meetings.

In addition to this series and the already-published texts on professional responsibility, constitutional rights, and contracts, TLLEP has plans to complete the first edition of a new textbook in 2013 entitled *An Introduction to Criminal Law in Timor-Leste*. All texts are updated as the legal landscape changes. The most recent versions of all published texts are always available for download online free of charge on TLLEP's website: www.tllep.law.stanford.edu.

To the students, educators, legal and government professionals that use this book, we sincerely hope that it sparks study and debate about the future of Timor-Leste and the vital role magistrates, prosecutors, public defenders, private lawyers, and government officials will play in ensuring the country's future is bright.

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Family Law: Marriage in Timor-Leste

OBJECTIVES

- To explain the laws and regulations governing marriage and divorce.
- To understand the formalities necessary to become legally married and the obstacles that prevent marriage.
- To explain the difference between marriages, annulments, divorces, and other relationships that are legally permissible and those that are legally invalid.

OVERVIEW

- There are three types of legal marriages in Timor-Leste: Catholic, Civil, and Customary.
- Only people over the age of 16 with mental capacity may marry.
- A couple who intends to get married must publish written announcements (called “banns”) declaring their intention to marry so that people may alert the authorities of potential problems with the marriage.
- Weddings must be performed in front of the proper authorities; both spouses must consent; all marriages must be registered.
- Some marriages may be declared null based on a variety of circumstances or problems.
- Marriage changes the duties of the spouses; in a prenuptial agreement, couples can name their heirs and choose one of three systems for how they wish to share their property.
- The couples may choose to end their marriage through divorce, either by mutual consent or through the fault of one of the spouses.

I. INTRODUCTION

Society is organized into family units. People feel connected to their sons and daughters and their husbands and wives. Besides the bond of direct kinship and ancestry, marriage is what binds family units together. Countries around the world recognize marriage as an enduring relationship between two people. This is also true in Timor-Leste.

Constitution of Timor-Leste

Section 39 (Family, marriage and maternity)

...

3. Marriage shall be based upon free consent by the parties and on terms of full equality of rights between spouses, in accordance with the law.

The definition of **marriage** in the Civil Code of Timor-Leste is a “contract entered into by two persons of different genders who intend to constitute a family by means of full cohabitation, in terms of the provisions of this code” (Article 1467). For the state to recognize this contract, and the rights, duties, and obligations that come with the status of being “married,” certain procedures must be followed. The types of benefits married couples receive from the government varies from country to country, but can include protection against disinheritance, the right to sue for the wrongful death of a spouse, the right to payment or benefits from a spouse's employer, to visit a sick spouse in a hospital, and the right to receive spousal support.¹ In order to qualify for these benefits and protections, marriages have to comply with the law.

In Timor-Leste, there are **three types** of marriages recognized by the law:

1. Civil Marriage
2. Catholic Marriage
3. Monogamous Customary Marriage.

Monogamous Customary Marriages are defined by local customs, but must be between two people of different genders (Article 1478).

¹ D. Marianne Blair, Merle H. Weiner, Barbara Stark & Solangel Maldonado, *Family Law in the World Community: Second Edition* (Durham: Carolina Academic Press, 2009), 91/

The Civil Code of Timor-Leste

Article 1475: Civil, Catholic, and Monogamous Customary marriage

1. Marriage is either civil, catholic, or monogamous customary.
2. Civil law recognises value and efficacy of marriage in catholic matrimony and in monogamous customary matrimony, in terms of the following provisions.

Betrothed couples choose what type of marriage they want to have. It must be one of these three types of marriages. Some marriages, such as **urgent marriages**, are allowed to happen without the necessary formalities because of imminent death of one of the betrothed or imminent childbirth. In these cases, the type of marriage is determined by the intent of the parties, either the explicit intent or the intent inferred from “the formalities adopted, the betrothed's beliefs, or any other elements” (Article 1479). For example, if Luis and Natalia married without any official paperwork and did not follow the usual pre-marriage procedures because they feared that Natalie was close to death, their marriage is an urgent marriage. If Luis and Natalie are both devout Catholics and were married by a priest, the marriage will be considered Catholic marriage based on their religion (“the betrothed's beliefs”) and the fact that the ceremony was performed by a priest (“formalities adopted”).

Questions

In Carlos's village, custom allows a man to marry two or more women at once. May Carlos marry Ana and Alia at the same time in a Customary marriage ceremony under Timorese Law?

Answers

1. No. Although Customary marriages are recognized by the state, they must be monogamous. As mentioned above, this means that the marriage can only be between two people.

II. WHO MAY GET MARRIED? MATRIMONIAL CAPACITY AND IMPEDIMENTS

SECTION OBJECTIVES

- To understand who may get married and the obstacles that stand in the way of marriage.
- To understand which obstacles to marriage can be solved or waived and how to resolve these problems.
- To explain the process for obtaining marriage certificates.

To be married in Timor-Leste, both parties must have **Matrimonial Capacity**. This means they must have the ability to become legally married to each other (for example, they are not close kin), and have no impediments that would stop the legal marriage (such as being underage or mentally incompetent) (Article 1485). Matrimonial capacity is required for all types of marriages, Catholic, Monogamous Customary, and Civil.

In order for a couple to get married, the first step is **assessing matrimonial capacity**. This is achieved through publishing an announcement of marriage (called **Banns**) with the civil registrar's office or the parish priest before the marriage takes place. From the point that the Banns are published until the celebration of marriage, any person (not just the betrothed couple) must declare any impediments to the marriage as soon as he or she becomes aware of the problem. Once a declaration of an impediment is made, the couple may only get married if the impediment goes away or if the civil registrar waives it.

There are two types of impediments: (1) impediments that can be waived and (2) impediments that cannot be waived. If an obstacle to a marriage cannot be waived, they are called "**Absolute**" **Impediments** and they prevent the parties from marriage in all circumstances. Other impediments can be waived by the civil registrar or can be resolved on their own.

Table 1: Examples of Absolute and Waivable Impediments

Absolute Impediments	Waivable Impediments
<ul style="list-style-type: none"> ❖ One of the parties is under 16 years old ❖ Noticeable dementia or mental 	<ul style="list-style-type: none"> ❖ The Parent or guardian does not give permission for a party aged 17 to marry

Incapacity

- ❖ A previous Catholic or civil marriage has not been dissolved.
 - ❖ The betrothed are direct descendants of each other; or are siblings.
 - ❖ The betrothed are marrying a deceased spouse's relative.
 - ❖ One party has been convicted of being the agent or accomplice in the murder of the other party's previous spouse.
- ❖ A guardian or trustee, or other person responsible for managing an incapable party's assets attempting to marry the incapable party.
 - ❖ The **Internuptial Period** has not ended: a widow or divorcee is not allowed to marry again for certain periods (180 days after the previous marriage is dissolved for men; 300 days after the marriage is dissolved for women).
 - ❖ Attempting to marry a nephew or niece.

After the couple has published banns and any impediments have been declared, the civil registrar has to pronounce a final judgment stating whether he will authorize the marriage (if there are no impediments or the impediments have been waived) or will dismiss the case (if there are remaining impediments to marriage) (Article 1501). If the registrar authorizes the marriage, then the couple is given a **marriage certificate**. No one may be legally married without this marriage certificate (Article 1487).

Questions

1. Victor and Nina want to get married. What steps must they go through before the wedding?
2. Nina is 15 years old, but her parents consent to the wedding. Can she get married?
3. Lena and Jorge want to get married. In which cases may they marry?
 - a. Lena is Jorge's aunt.
 - b. Jorge is already married to Maria in a Catholic marriage.
 - c. Jorge was married to Maria and got divorced 290 days ago.
 - d. Lena was married to Julio and was divorced 290 days ago.
4. Jorge and Lena want to get married and have published banns; Lena's friend Fernando learns that Jorge is mentally ill. What happens?

Answers

1. First, they must publish a marriage announcement (banns) with the civil registrar. If they, or anyone else, know of an impediment, it must be reported to the registrar. Then the registrar decides whether the marriage is permissible and if any impediments can be waived. If there are

no impediments to marriage (or all impediments are waived), the registrar authorizes a marriage certificate.

2. No. Being under the age of 16 is an absolute impediment and cannot be waived, no matter what her parents say.

3a. They can get married only if the Civil Registrar grants a waiver for this impediment.

3b. Jorge and Lena may not marry. An un-dissolved previous marriage prevents additional marriage, even if the previous marriage is another type of marriage.

3c. Jorge and Lena may marry; a man must only wait 180 days after his previous marriage ended.

3d. Jorge and Lena may not marry for another 10 days because a woman must wait 300 days after her previous marriage ends.

4. Fernando *must* declare this impediment to the civil registrar's office or public prosecutor. Since this impediment is absolute, Jorge and Lena will not be granted a marriage certificate.

III. FORMALITIES: CELEBRATION, REGISTRATION, AND INVALIDITY

SECTION OBJECTIVES

- To understand the requirements when celebrating a marriage, including consent.
- To explain which marriages must, or may be, registered.
- To explain the circumstances under which a marriage is legally inexistent.
- To understand how a marriage may be declared null, including who may seek such a judgment and on what grounds it may be granted.

Once a couple has published banns and the civil registrar has ruled that there is no impediment to marriage, the couple must go through two more steps: they must celebrate the wedding and they must register their marriage.

For civil marriage, the celebration must be **public** (Article 1503) and must be **celebrated in the presence of** both parties or their attorneys, the civil registrar, and two witnesses (Article 1504). Catholic and Customary marriages are not subject to these requirements, although as discussed above, they require banns and authorization from the civil registrar as well. In all types of marriage, both parties must consent to the marriage. Sometimes consent is called “**declaration of will.**” Both parties must also consent during the wedding ceremony itself; it is not enough to rely on what the parties expressed about their desire to get married (Articles 1505, 1507). Where special permission is given by both parties, one person’s attorney can consent for them (1508). *Both* parties to a marriage cannot consent through attorneys (Article 1504).

After the ceremony, all marriages must be registered according to registration laws (Article 1539). If the marriage is not registered, no one can claim that the marriage is valid. Look at Article 1538 below; all types of marriages (Civil, Catholic, and Customary) in Timor-Leste must be registered, as well as some types of marriages entered into abroad.

The Civil Code of Timor-Leste

Article 1538: Marriages subject to registration

1. Registration is compulsory:

- a) For marriages entered into in Timor-Leste in any of the forms provided for by Timorese law;
- b) For marriages of a Timorese person or persons entered into abroad;
- c) For marriages of foreigners who, after entering into the marriage, acquire Timorese nationality.

2. Registration, at the request of an individual who demonstrates a legitimate interest therein, of any other marriages that do not contradict the fundamental principles of international public order of the Timorese State, is also permitted/

In order for a couple to be considered legally married, and entitled to all the benefits and rights of marriage, they must publish banns, obtain a marriage certificate, consent to marriage during the marriage ceremony, and register their marriage.

Sometimes a marriage is authorized and duly celebrated but is later declared **null** or **invalid**. Invalidity and annulment differ from divorce or separation in that they are declarations that the marriage never existed. A divorce or separate ends an existing marriage. Invalidity is when a marriage is **legally inexistent**. This means that the marriage is not recognized as legal. It has no legal consequences and legal inexistence can be invoked by any person, at any time, without the need for a judicial declaration (Article 1518). Article 1517 lists many ways a marriage is considered invalid, but it is usually the case that one or more of the requirements of the marriage were not fulfilled. For example, in Article 1517(c) and (d), the celebration was invalid because there was not true consent.) Catholic marriages are not subject to article 1517 because in Catholic marriages nullity is governed by the ecclesiastical courts (Article 1513).

The Civil Code of Timor-Leste

Article 1517: Inexistent Marriages

1. It is legally inexistent:

- a) A marriage celebrated before someone who did not have functional competence for the act, except in the case of urgent marriage;
- b) An urgent marriage that has not been endorsed;
- c) A marriage in whose celebration a declaration of will of one or both betrothed parties, or of the attorney of one of them, was missing;
- d) A marriage contracted through an attorney when celebrated after the effects of the

power of attorney have ceased or when the latter has not been granted by the person referred to therein as the grantor, or when it is void due to failure to either grant special powers for the act or expressly designate the other contracting party;

e. A marriage contracted by two persons of the same gender.

2. However, a marriage celebrated before a person who, without having functional competence for the act, publicly exercised the corresponding functions, is not considered as legally inexistent, except if both betrothed parties were, at the time when the marriage was celebrated, aware of the lack of such competence.

Unlike nonexistent or invalid marriage, a judicial order is necessary to grant an **annulment**; otherwise, the marriage remains valid (Article 1520). The reasons for annulment include absolute impediment, lack of valid consent by the parties, or lack of witnesses at the celebration (Article 1519). Annulments have to be brought before the court within certain time limits, but the time limits vary depending on what the problem with the marriage is (Articles 1527-33). In most cases, the annulment suit must be brought within six months after the celebration of marriage.

Questions

1. Marcos and Mariana plan to get married and have been granted a marriage certificate. On the day of the wedding, however, they both fall very ill and send lawyers (with correctly granted permission) to the ceremony in their place. Both lawyers consent to the marriage at the ceremony. Is the marriage valid?

2. João and Santina plan to get married and have been granted a marriage certificate. The day before the wedding, they see the civil registrar at the market. Both João and Santina tell the civil registrar how excited they are to get married and that they both consent to the marriage. There are several family members at the same market who witness this consent. Is this consent sufficient for the marriage to be valid?

3. Christiano and Carla, who are Timorese, get married in a Customary ceremony in Indonesia. Does it need to be registered?

4. Artur and Jacinta had a Catholic marriage. The marriage ceremony was performed by someone they thought was a priest, however, he was actually pretending. Soon after the marriage, Jacinta wants an annulment. Can she obtain a civil annulment on the grounds that the marriage was performed without a competent official?

5. Martino and Rosario had an urgent civil marriage because Rosario was very sick. She recovers after the celebration, and then the civil registrar learns that Rosario is only 15 years old. Is Rosario's marriage invalidated or annulled?

Answers

1. No. According to Article 1504, only *one* member of the couple can be represented by their attorney at a ceremony; not both.
2. No. Although the spouses, the civil registrar, and witnesses are present, the consent must also take place at the celebration itself to be valid.
3. Under Article 1538, any marriage of Timorese persons entered abroad must be registered.
4. Not necessarily. Nullity in Catholic marriages is decided by the ecclesiastical courts and is not subject to the same rules as civil annulments. The decision would be up to the ecclesiastical courts. If Artur and Jacinta had had a civil marriage, they might not be able to get an annulment because both parties thought the official was competent.
5. Her marriage is invalid, because the civil registrar never endorsed the urgent marriage. Because Rosario is 15 years old this is an absolute impairment. If the couple had been granted a marriage certificate and *then* Rosario's age had been discovered, there would have to have been an annulment to end the marriage.

Marriage Registration in Practice

The Judicial System Monitoring Programme (JSMP) is a non-governmental organization that monitors the legal system in Timor-Leste. JSMP has raised concerns about the requirement of marriage registration in Article 1538 because many people are not aware of this requirement.² For example, the JSMP used the case of a woman named Luiza who was married in a traditional ceremony. She lives with her husband and her children. Her husband is abusive to her. Because her marriage was not registered she may not be able to leave her husband or obtain a legal divorce. She cannot just leave the home because she will not have rights to financial support from her husband (called **alimony**) for herself and her children because the courts do not formally recognize her marriage. "JSMP believes that for this registration process to be relevant there must be extensive awareness raising efforts across Timor-Leste to emphasize the

² JSMP Proposal for the Draft Civil Code to Reflect the Real Situation in Timor-Leste: Proposal for Committee A of the National Parliament. 23 September 2010. Available at http://www.jsmp.minihub.org/English/webpage/pwp/Submisaun%20Kodigu%20Sivil%202023%20Setembru_e.pdf

importance of registration.”³ Without spreading awareness of registration, the provisions of the Civil Code regarding marriage (including those that protect a woman's right to divorce her abusive or cheating husband and receive alimony) will not apply to many traditional marriages in Timor-Leste. Alternatively, JSMP believes that “the law must acknowledge ‘de facto’ relationships for those who live as husband and wife without formal registration.”⁴

What do you think? How does the registration requirement affect women's rights? What is the benefit, if any, of requiring registration in the first place?

³ *Id.*

⁴ *Id.*

IV. THE EFFECT OF MARRIAGE ON INDIVIDUALS- RIGHTS AND DUTIES

SECTION OBJECTIVES

- To understand the duties and responsibilities that come with being married.
- To learn about spouse's rights to manage their own and their partner's property.

At this point, we have learned what a couple must do to obtain a marriage certificate, celebrate the marriage, and register the marriage. Now we will learn what being “married” means under Timorese law. There are many legal benefits including giving both spouses certain rights and making them responsible for certain duties. In Timor-Leste, marriage is based on equality of rights and duties between the spouses (Article 1559).

The Civil Code of Timor-Leste

Article 1559: Equality Between Spouses

1. Marriage is based on equality of rights and duties between the spouses.
2. Management of the family falls on both spouses, who shall agree as to the orientation of their life together, taking into account the best interests of the family and the interests of the other spouse.

Both the husband and wife have equally important legal roles in marriage. For example, spouses are free to make their own decision, including practicing any profession or participating in activities without the consent of the other (Article 1569). The spouses each have duties of **respect, fidelity, cohabitation, cooperation, and assistance** to each other (1560). Spouses must treat each other with **respect** and be **faithful** to their partner.

1. The Duty of Cohabitation

The duty of **cohabitation** means that the couple must mutually agree on a family home that safeguards the unity of family life (Article 1561). If the couple cannot agree on where to have the family home, either spouse can request that the court decide. Except in cases where there are substantial reasons not to, both spouses must live in the family home. Couples cannot

choose to live separately unless there are unusual circumstances. One possible circumstance might be if a husband or wife has to live in a different city in order to find work and there are financial or familial reasons why the rest of the family cannot live in the same city. Unless there are exceptional circumstances, couples must live together in a family home.

2. The Duty of Cooperation and the Duty of Assistance

The duty of **cooperation** is an obligation of mutual help and assistance and a joint assumption of the responsibilities inherent to family life (Article 1562). Couples must run their home and their family *together*; they must share the chores and duties that are necessary to maintaining a home and raising children. The duty of **assistance** is the obligation to supply food and to contribute to the responsibilities of family life (Article 1563). This includes financial support. Both spouses have the duty to contribute to the responsibilities of family life in line with their means. This contribution can be economic or housekeeping or child-rearing (Article 1564).

The duty of assistance can overlap with the duty of cooperation, because both require the spouses to contribute to the running of the household. For example, if Juan contributes all the income to the family while his wife takes care of the household chores and the children, both are fulfilling their duties of assistance and cooperation. If Juan and his wife both have jobs and contribute to the household income, but only Juan's wife takes care of the household chores, Juan may not be fulfilling his assistance or cooperation duties. These duties depend on the circumstances in each case. So, if Juan is disabled and cannot perform household chores, he does not have to, because the law only requires contribution “in line with [one’s] means” (Article 1564). If one spouse does not give enough contribution, the other spouse can ask the court to require them to pay. If one spouse contributes more than is necessary, however, he may not demand compensation from the other spouse. For instance, if Juan pays for all the household expenses and does all the household chores, he can request that a court force his wife to contribute, but he cannot demand that his wife compensate him for the amount he has contributed to the household.

3. Rights Over Property

The spouses also have rights over each other's property. Each spouse manages his or her own property, which includes the types listed in Article 1570:

Civil Code of Timor-Leste:

Article 1570: Management of the couple's property

1. Each spouse shall manage his or her own property
2. Each spouse shall also manage:
 - a) The proceeds received from his or her or her work;
 - b) Copyright;
 - c) Communal property brought by him or her into the marriage or acquired gratuitously after the marriage, in addition to any that is subrogated in the place of this;
 - d) Property that has been given or left to both spouses, with the exclusion of that to be managed by the other spouse, except in the case of property legitimately given or left to this other spouse;
 - e) Movable property owned by the other spouse or communally, for exclusive use by this spouse as a working tool;
 - f) Property owned by the other spouse, if this spouse is prevented from the management thereof for reasons of being in a remote or unknown location or for any other reason, and provided that power of attorney has not been granted to manage this property;
 - g) Property owned by the other spouse if this spouse grants this power to him or her by mandate.

Both spouses can maintain their own bank accounts if they want to (Article 1572). For **common property**, both spouses can practice **acts of ordinary management** individually; however, bigger decisions need the consent of both spouses. For example, if the spouses own a car together, each spouse can wash the car or fill it with gas individually. Decisions that require consent from both spouses might include selling or renting the car to someone else for six months, because this transaction would not be considered an act of ordinary management (Article 1570). If a husband wants to sell the family's car, he must ask for his wife's consent. When it comes to leasing the family home, both spouses need the consent of the other to create or end the rental contract of the tenant, choose a tenant, or sublet (1576).

Common property also includes **moveable property** used jointly by both spouses in domestic life or as a communal working instrument (for example, the right to fish or hunt on communal property). This type of property *always* requires the consent of both spouses, unless

the spouses have agreed on a **Matrimonial Property Regime** that requires something different. Matrimonial Regimes are discussed in more detail in Section V.

The spouses do *not* require the consent of the other to *accept gifts, inheritance, or legacies* (Article 1577). *Rejecting* a gift or inheritance requires the consent of both spouses, unless the marital property regime is separation of property (discussed in Section V below). If Ana receives an inheritance from her father, she may accept it without consulting her husband. If she decides to reject the inheritance (perhaps she is angry with her father and does not want it), she must get her husband's consent unless she and her husband have a separation of property regime. Some special provisions govern gifts given to the spouses (by each other or by third parties) in celebration of the marriage (refer to Articles 1630-1643 for more information).

4. *Barlake* in Timor-Leste

In Timor-Leste, the practice of *Barlake*, also called bride price or dowry, is very common. Although the practice varies widely among ethnic and geographical groups, the main principle is that the husband's family pays the bride's family with money and goods. The idea is that the families become joined and united once the *barlake* is paid. The entire agreed-upon commitment is “rarely given all at once, [and] instead [is] staggered over the life of the marriage at significant ceremonies of life and death. This staggering of payments and the ongoing relationship it creates between the families provides the bride’s family with some leverage over the treatment of their daughter and the children.”⁵

Barlake can cause problems however; for example, a “husband may think that he has the right to hit his wife because there is an incentive” for the wife’s family “to pressure their daughter to go back to her husband’s family”⁶ so that the wife's family can receive the rest of the *barlake*. *Barlake* can also discourage divorce for this reason. In a divorce, repaying the *barlake* is required.⁷ If a family cannot repay the *barlake*, a woman who is being abused or harmed by her

⁵ Sara Niner (Forthcoming 2012) ‘Is *barlake* changing in Timor-Leste?’, *Local-Global: Identity, Security, Community*, Globalism Research Centre, RMIT: Melbourne.

⁶ JSMP Proposal for the Draft Civil Code to Reflect the Real Situation in Timor-Leste: Proposal for Committee A of the National Parliament. 23 September 2010. Available at http://www.jsmp.minihub.org/English/webpage/pwp/Submisaun%20Kodigu%20Sivil%2023%20Setembru_e.pdf

⁷ Silva, Kelly. (2010) Bridewealth or brideprice? Moral Regimes in dispute during marriage negotiations among urban East-Timorese elites. Paper presented at the VI Euroseas Congress.

husband may not be able to leave because she and her family cannot return assets to the husband's family.⁸ This can lead to problems of domestic violence not being solved.

Questions

1. Antonio and Esmerelda were married and are now de facto separated. Esmerelda works as a nurse and Antonio is a mechanic. Since Antonio has moved out of the house, he claims that he has no responsibilities to Esmerelda. Is this true? Does the answer change if they have children?
2. Jose and Alia are married. Alia owns a toolbox that Jose has come to use for his carpentry job. He usually leaves the toolbox at his job. One of the screwdrivers needs to be sharpened. Can Jose sharpen the tool without Alia's permission?
3. Jose and Alia have leased the workshop of the home they own to Roberto. They both agreed to this lease but are both becoming increasingly annoyed with Roberto's noisiness late into the night. They have both discussed the fact that they want him to leave, but they need the money from the rental. Late one night, Jose cannot take the noise anymore and storms out to the workshop and tells Roberto that his lease is terminated and he must leave. Is this termination valid?

Answers

1. Antonio still has a legal duty of assistance to supply food and contribute to the responsibilities of family life. Exactly what this burden is depends on the circumstances. If Antonio still has the responsibility for contributing to the finances of the household, especially if the couple has children.
2. Yes. Under Article 1570(2)(e), each spouse has the right to manage property that they use exclusively in their work, even if it is property of the other spouse. Jose uses Alia's toolbox in his work, and since he leaves it at work, Alia cannot use it and Jose is using it exclusively.
3. The termination is not necessarily valid. Because Alia did not consent to the termination of Roberto's lease required by Article 1576, Roberto's lease may still be valid.

⁸ *Id.*

V. THE EFFECT OF MARRIAGE ON INDIVIDUALS - PROPERTY RIGHTS

SECTION OBJECTIVES

- To explain how to set up a prenuptial agreement and the agreement's permissible functions.
- To understand the types of property regimes and their effects on a couple's property.

1. Marital Property Regimes

One of the most important effects of marriage is how it changes how a couple owns property. Depending on what **Matrimonial Property Regime** they choose, property is shared in different ways. A property regime is a system for deciding which property belongs to each spouse individually and which property is the communal property owned by both spouses. The couple declares the type of property regime they choose in their prenuptial agreement. A **Prenuptial Agreement** is a contract that both future spouses sign before they get married. It addresses certain monetary aspects of the marriage. It is optional. A couple does not have to create a prenuptial agreement. A prenuptial agreement sets out which marital property regime the couple will follow (1591) and who has a right to each spouse's property upon death. There are three possible types of Marital Property Regimes:

1. **Community of Property Acquired After Marriage,**
2. **Community of Property,** and
3. **Separation of Property.**

If there is no prenuptial agreement that decides the regime, the default regime is Community of Property Acquired After Marriage (Article 1610).

The couple has a lot of freedom to decide the rights and obligations they will have towards one another in a Prenuptial Agreement. Besides the marital property regime, spouses can use a prenuptial agreement to designate heirs in case of death (Article 1593). A prenuptial agreement cannot alter paternal or matrimonial obligations, however, or regulate inheritance given *to* the spouses, among other things (Article 1592). A prenuptial agreement can be freely revoked or altered before the marriage, as long as both spouses agree (Article 1605). Once the spouses are married, they cannot change the prenuptial agreement or the Marital Property Regime except in a few situations, such as simple legal separation of property or judicial

separation of persons or assets (Articles 1607-08).. These situations are discussed below in Section VII.

2. Community of Property Acquired After Marriage Regime

This is the default Marital Property regime. If couples do not choose another system, their property is shared under this system. In this regime, **community property** (the property of both spouses) is limited to property acquired by the spouses during the marriage and the proceeds of the work of the spouses during the marriage (Article 1617). If property or debts are communal, each spouse owns half (Article 1623). There are some exceptions to items considered communal property. The following list shows property that is considered **individual**, not communal, property (Article 1615):

1. The property that each owns when the marriage is entered into.
2. The property that comes to each spouse through succession, inheritance, or gift after the marriage is begun.
3. The property acquired after marriage through **Prior Personal Right**. Prior personal right includes property acquired because of a right, easement, ownership, or situation that existed prior to marriage.

Additionally, Individual property includes money obtained from selling individual property (Article 1616). For example, if Maria owns a car before she gets married, this car is considered her individual property under this Marital Property Regime. If she sells the car after the marriage, the cash from the sale of the car is also Maria's individual property- it does not count as proceeds from the work of the spouses and is not communal property.

Property that is acquired by virtue of ownership of individual property is also considered individual property (Article 1621). This includes **accessions** (when the value of a property grows because of labor or new materials, such as planting crops or trees), materials resulting from demolition or destruction of property (such as if Maria crashes her car but then sells the tires), and any part of a treasure acquired by a spouse in his capacity as owner. Finally, if the **working instruments** of each spouse are communal property, the spouse who needs them for the exercise of their profession has the right to them when community property is partitioned (1624). For example, if Odete and her husband purchase a sewing machine for her business as a seamstress

and later divorce, Odete would likely keep the sewing machine (her working instrument) when the marriage ends.

3. Community of Property Regime

Under this regime, communal property includes all of the couple's present and future property that is not specifically excluded under the law (Article 1625). In the regime of *Community of Property*, all property is communal unless it is listed in Article 1620 below. This property is considered **non-communicable** property because it is not communal:

Civil Code of Timor-Leste:

Article 1620: Non-communicable property

1. The following are excepted from community:
 - a. Property donated or bequeathed, even as an inheritance, under a clause of non communicability;
 - b. Property donated or bequeathed with a reversion or trust clause, unless the clause has lapsed;
 - c. Usufruct⁹, use or habitation and other strictly personal rights;
 - d. Compensation owed, through verifiable facts, against one of the spouses or against that spouse's individual property;
 - e. Insurance policies that mature in favour of each spouse or cover the risks relative to individual property;
 - f. Garments, clothing and other objects for personal and exclusive use by each spouse, as well as their diplomas and correspondence;
 - g. Family records with low financial value;
2. The non-communicability of property does not include the fruits thereof or the value of improvements thereto.

Finally, even though certain property may not be communicable, the fruits of that property or the value of the improvements are still communicable. For example, if Odete is given a piece of property in her father's will that she rents to a friend, the money she receives from the tenant would be considered community property. Compare this to a Community of Property Acquired After Marriage Regime, where the rent would be Odete's individual property just like the land.

⁹ **Usufruct** means the right to use and enjoy property, as well as the right to receive profits from items that are taken from the property (for example, keeping the money from selling crops that grow on a piece of land).

Although in this property regime, more types of property are considered communicable, there are some similarities to the Community of Property Acquired After Marriage Regime. For example, even in a Community Property Regime, the working instruments go to the spouse who needs them to perform their profession when community property is partitioned (Article 1624).

4. Separation of Property Regime

This regime is the simplest because there is no communal property. Each spouse retains ownership and enjoyment of all of his or her present and future property and can dispose of it freely (Article 1628). Each spouse has separate control over their own property and income. In the prenuptial agreement, the spouses may state who owns which movable property that in other regimes would be considered communal (Article 1629). If there is a question about exclusive ownership, then the property shall be regarded as belonging to both spouses (Article 1629).

Sometimes, the spouses can move to a Separation of Property Regime after they are married. If the couple has a Community of Property Acquired After Marriage Regime or a Community of Property Regime, either spouse may request a **legal separation of persons and assets** if they are in danger of losing their property due to poor management by the other spouse (Article 1644). Only the aggrieved spouse can bring the suit (Article 1646). The effect of this action is that, after the final sentence, the marital regime becomes Separation of Property and the existing communal property is divided as though the marriage was dissolved. This action is **irrevocable** (Article 1648). Once the spouses have decided to legally separate their assets, they cannot choose to go back to a different regime. Note that the couple is still married; the only thing that has changed is the way ownership of their property is divided.

The following chart will help clarify the differences between the regimes. Remember that for all regimes, if there are doubts as to the communicability of property, it is considered communal property (Article 1618).

Table 2: Martial Property Regimes

	Community of Property Acquired After Marriage	Community of Property	Separation of Property
Communal Property	<ul style="list-style-type: none"> • Property acquired by the spouses during the marriage (except for the exceptions below) • Proceeds of the work of the spouses during the marriage 	<ul style="list-style-type: none"> • All of the couple's present and future property that is not specifically excluded under the law (see box below) 	<ul style="list-style-type: none"> • No property is communal, except that if there is a question about exclusive ownership, then the property shall be considered communal
Individual Property	<ul style="list-style-type: none"> • The property that each owns when the marriage is entered into • The property that comes to each spouse through succession, inheritance, or gift after the marriage is entered • The property acquired after marriage but through virtue of prior personal right 	<ul style="list-style-type: none"> • Property donated or bequeathed (including inheritance) where the grantor explicitly stated that the property is non-communicable • Property donated or bequeathed with a reversion or trust clause (unless the clause has lapsed) • Usufruct (the right to use and enjoy property, as well as the right to receive profits from the fruits of the property), use, or habitation or other strictly personal rights • Compensation owed against one of the spouses or their individual property Insurance policies that mature in favor of each spouse or that cover individual property • Garments, clothing, or other objects for personal and exclusive use by each spouse (includes diplomas and correspondence) • Family records with low financial value <p>Note: Even though certain property may not be communicable, the fruits of that property or the value of the improvements are still communicable.</p>	<ul style="list-style-type: none"> • Each spouse retains ownership and enjoyment of all of his or her present and future property

Questions

1. Martino and Rosalia create a prenuptial agreement. Martino and Rosalia contract that only Martino will have financial or other obligations towards their children. In return, Rosalia will have sole financial responsibility for the house. Is this legal?
2. Manuel and Joana are about to be married and they want to share as much as possible with each other. Which regime should they choose?
3. Miguel and Mariana get married without a prenuptial agreement. After the wedding, Mariana inherits some money from her father. Is this her individual or communal property?
4. Ruel and Joaquina are married under the Community of Property Acquired After Marriage Regime. Ruel individually owns some land (he owned it before they married). After the marriage, he works hard and builds a barn on the property, increasing its value. Is the land communal property? Is the barn?
5. Leopoldo and Ismenia are married under the Community of Property Acquired After Marriage Regime. They jointly own a car (it is communal property). Leopoldo uses the car exclusively for his job as a taxi-driver in Dili. If Leopoldo and Ismenia divorce, what happens to the car?
6. Victor and Ana are married under the Community of Property Regime. While they are married, Jorge grants Victor the right to pick apples from Jorge's trees. One day when Victor is sick, Ana goes and picks apples from Jorge's trees instead. Is this legal?

Answers

1. No. A prenuptial agreement may not alter paternal obligations. Terminating Rosalia's responsibility to her children is not a permissible function of the agreement.
2. The Community of Property Regime because most property under this system is communal property. In the Separation of Property Regime nothing is shared. In the Community of Property Acquired After Marriage Regime, the property acquired before marriage is not communal.
3. Since there was no prenuptial agreement, the regime is the default, which is the Community of Property Acquired After Marriage regime (see Article 1610). Under this regime, inheritances are individual property. Maria's inheritance is her individual property. In contrast, if the regime was Community of Property, the inheritance would be communal property unless the will explicitly stated that it was non-communicable.
4. Neither the land nor the barn are communal property. The land is still Ruel's individual property. Under Article 1621, property acquired by virtue of ownership of individual property is still considered individual property. An explicit example of this is accessions such as the barn. Ruel has added value to the land through the barn, but the barn is still part of his individual property. However, if Ruel's profession is as carpenter and rents out or sells the barn, these profits are communal property, since it is proceeds from his work.

5. Leopoldo gets the car because it is his working instrument and is necessary for the exercise of his profession (see Article 1624). This is true under the Community of Property Regime as well.

6. No. In the Community of Property Regime (and all other regimes), usufruct (the granting of a right to use land) is a strictly personal right that is non-communicable. The right that Jorge granted to Victor was a usufruct right (he could enjoy the profits from the fruit of the property) and a strictly personal right. Unless Ana specifically asked Jorge if she could pick apples too, Victor's right to Jorge's apples is non-communicable.

VI. THE EFFECT OF MARRIAGE ON INDIVIDUALS: DEBTS

SECTION OBJECTIVES

- To understand how marriage affects debt liability.
- To explain when the spouses are both liable for debts and when they are individually liable.
- To explain the process for paying communal and individual debt.

Above we learned that each spouse can work as they please or have their own bank account without the consent of the other. Each spouse can also contract debts or take out loans without the consent of the other (Article 1583). In most cases, a person is individually liable for the debts they personally accumulate either before or after marriage. Being **individually liable** means that only the person who owes the money, and *not their spouse*, is legally responsible for paying back the debt. However, there are a few categories of debts for which both spouses are liable (Article 1584). This means that the debt of one spouse automatically becomes the debt of *both* spouses. This happens in the following circumstances:

1. Debts acquired before or after marriage by both spouses or by one spouse with the consent of the other.
2. Debts acquired by either spouse before or after marriage to meet expenses related to family life (for instance, to buy a house or apartment, car, or home appliances).
3. Debts contracted after marriage by the managing spouse for the common advantage of the couple (within the limits of managerial power). For example, a husband manages an apartment that the couple owns and rents out to tenants. He takes out a loan to repaint the apartment and make it more valuable. Both spouses are liable for this loan because the rent from the apartment benefits each spouse.
4. Debts acquired by either spouse while doing business, unless the debt was not for the common advantage of the couple or unless there is a matrimonial regime of Separation of Property.
5. Debts that impact gifts, inheritances, or legacies if those gifts enter communal property (Article 1586).

6. If the couple has adopted a Community of Property Regime, then both spouses are liable for debts acquired by either spouse prior to the marriage, if the debt was to the common advantage of the couple.

In cases where both spouses are liable for a debt, they must first use communal property to pay back the debts. If this is insufficient, the spouses use their individual property (Article 1588). For example, if Carla and Alfonso jointly owe \$500, and they have \$600 in their communal bank account and \$200 each in their individual bank accounts, they would pay the entire debt out of their communal bank account. If the debt was \$800, however, then they would pay \$600 out of their communal bank account and pay the difference out of their individual accounts. Carla and Alfonso do not start to use individual money to pay the communal debt until there is no more communal property left. Also, if the debt was \$800, and Alfonso has \$200 in his individual account but Carla has \$0, then Alfonso would use his \$200 to pay the rest of the debt once the communal funds (\$600) were exhausted. If this is the case, then Alfonso becomes Carla's "creditor" (Article 1590). This credit is only payable when the couple's property is partitioned, like in a Separation of Property Regime or if the couple gets divorced. Question #2 below provides an example.

In cases where only one spouse is liable for a debt, he pays using his individual property first and then his part of communal property (Article 1589). If Alfonso individually owes \$500, he will first take \$200 from his own account. When that is exhausted, he can take the rest from the communal account. If the communal account has \$600, and Alfonso takes \$300 to pay his debts, he does not "owe" anything to Carla because he only used half of the communal funds. But if he needs to use the entire amount in the communal account, Carla becomes his "creditor." He owes Carla that money and would have to pay if the couple's property was ever separated. then the entire communal \$600 to pay the debt, he would "owe" Carla \$300, to be paid if the couple's property was ever separated.

Note that if the communal account is \$600, Alfonso's personal account is \$800, and the debt is \$500, Alfonso may not use the communal money at all. He must pay the entire debt from his individual property. It is only when Alfonso has no more individual property left that he can use the communal funds.

Questions

1. Tomas and Brigida are getting married. Right before the wedding, Tomas surprises Brigida with a new car he has purchased. He bought it on a payment plan so he is still liable for part of the purchase price. Is Brigida liable for this debt?

2. Antonio and Cecilia are married. They are both liable for a \$1,000 loan they took out to pay for their son's school. They have no communal property so Antonio pays the debt out of money that is his individually (he had it before the marriage). What happens when they get divorced?

Answers

1. Yes. Although this debt was contracted before the marriage without Brigida's consent, it was contracted to meet expenses related to family life. Therefore, the debt is communal.

2. Antonio receives a credit for \$500 when they divorce, because this was the amount of Cecilia's debt that Antonio paid off. Since the couple jointly owed \$1,000, each individual owed \$500. By paying the entire debt, Antonio was technically giving \$500 to Cecilia by relieving her of the burden of paying that money. Therefore, Antonio receives a \$500 credit in the divorce. If in the divorce, he owes Cecilia \$2,000 for alimony or other reasons, he only has to pay her \$1,500.

VII. ENDING THE MARRIAGE: DIVORCE AND SEPARATION

SECTION OBJECTIVES

- To understand the acceptable grounds for divorce.
- To understand the process of divorce and the differences between divorce by mutual consent and litigious divorce.
- To explain judicial separation of persons and assets, and how it differs from divorce.

Besides annulment or death, marriages can end when a couple decides to dissolve the marriage. The most drastic choice is **divorce**, in which the marriage is dissolved. Spouses can also choose to have a **judicial separation of persons and assets**, where the marriage is not dissolved but the obligations of cohabitation and assistance (except alimony) are no longer required.

1. Divorce

There are two types of divorce: divorce by mutual consent and litigious divorce. In **divorce by mutual consent**, both spouses agree to get divorced and petition the court together. In **litigious divorce**, one spouse brings suit against the other based on one of a few types of grounds (Article 1650). During both types of divorce, **spousal reconciliation** must always be attempted (Article 1651). Spousal reconciliation means that the judge will try to convince the spouses not to get divorced and to resolve their differences. If reconciliation is impossible, the suit will continue. In the case of litigious divorce, if reconciliation fails, the judge will still try to get the spouses to agree to divorce by mutual consent instead of a litigious divorce.

Divorce by Mutual Consent

In divorce by mutual consent, the spouses can petition the court for divorce at any time. They do not have to reveal the reason for the divorce, but they do have to agree to terms of alimony, child custody, and what will happen to the family home in their petition (Article 1652). They can also agree to the Martial Property Regime that will be used for the duration of the divorce proceedings. This can help decide questions such as what alimony do they owe each

other? Who has parental authority? Who has the right to live in the family home etc.? (Article 1652). The spouses decide these questions together.

The procedure for divorce by mutual consent is typically managed by the judge and involves two conferences. Once the judge receives the request for the divorce, he will call the spouses for the first conference, where she will attempt to get them to reconcile (Article 1653). Failing this, the judge examines the agreements the spouses have come to regarding alimony, child custody, and the family home for the duration of the proceeding. The judge also allows the spouses to alter the agreements if she thinks that the arrangements are not in the best interests of the spouses or the child. Once she is satisfied, the judge will endorse the temporary agreement for the duration of the divorce proceedings. This means that the proceedings will go into effect.

After this conference, the obligation of cohabitation is suspended, so the couple no longer has a legal duty to live together. Either party can also request an inventory of individual and communal property. Next, there is a second conference with the judge (Article 1654). If there is no reconciliation at this time, the spouse's agreements for alimony, child custody, what to do with the family home etc. are the bases for a divorce decree. As long as the agreements sufficiently safeguard the interests of the children and spouses, the judge's divorce order remains endorsed the agreement and it goes into effect. If the agreements do not safeguard these interests, the endorsement is withdrawn and the divorce petition dismissed (Article 1655). The judge can also set a period during which the spouses can change the agreements (Article 1654).

Litigious Divorce

If the spouses cannot easily agree to a divorce or its terms, then either spouse can sue for divorce. There must be appropriate reasons (also called “**grounds**”) for divorce. Without grounds, a person may not seek a divorce. For a person to have grounds for divorce, the other spouse must be responsible for violating the obligations of marriage in such a way that the possibility of communal life is compromised (Article 1656). Grounds for divorce include failing to help run the home or raise the children or continual disrespect or infidelity, as long as they are serious or often enough that it is impossible for the couple to continue to live together as a unit. Divorce cannot go forward if the petitioning spouse has explicitly or implicitly forgiven the act that formed the grounds for divorce and makes clear that it is not an impediment to communal life (Article 1657).

In addition, there are a few other acceptable **grounds for divorce** (Article 1658):

1. *De facto* Separation for three consecutive years. *De facto* Separation is when the spouses do not live together and one or both spouses do not intend to return to living together (Article 1659).
2. *De facto* Separation of one year, if the divorce was petitioned by one spouse without opposition from the other.
3. Serious alteration in the mental faculties of the other spouse that lasts for more than three years, such that the possibility of communal life is compromised.
4. Abandoning or deserting the marriage and the spouse has heard no news from the absent party for two years or more (Article 1660).

In a litigious divorce, only the aggrieved spouse can sue for divorce based on violation of conjugal obligations (Article 1661). Only the spouse who is stating that the other partner has deserted or has altered mental faculties can sue. (Article 1661). This means that a husband cannot desert his wife and then sue her for divorce based on desertion. Either spouse can sue if the grounds are separation. The right to sue for desertion lapses two years after the spouse learns of the fact that is grounds for divorce (1662). In most litigious divorce cases, it is important to know which spouse is solely or primarily culpable for violating the obligations of marriage. Culpability affects partitioning the assets. The divorce sentence must state which spouse is principally or more culpable, even if both spouses are culpable to some degree (Article 1663).

2. The Effects of Divorce

A divorce dissolves the marriage (Article 1664). This means that the couple no longer owes any duties to each other. Another effect of divorce is that the assets and property of the spouses are partitioned. The spouse who is the sole or principal culpable individual may not receive more from partitioning than they would have received under the Community of Property Regime (Article 1666). Additionally, the spouse declared to be solely or principally culpable gives up all benefits or gifts received from the other spouse or a third party as a result of the marriage whether or not the gift was made before or after the marriage (Article 1667).

In terms of the family home, the court may determine that the family home must be given in lease to either of the spouses, whether it is owned jointly or individually. To make this decision, the court considers the needs of the spouse and the interests of the couple's children

(Article 1669). This means that the judge has a lot of discretion to take the facts of each family’s case into account when making this decision.

3. Judicial Separation of Persons and Assets

For couples looking to end or seriously lessen their obligations and commitments to each other, **Judicial Separation of Persons and Assets** is an alternative to divorce. It is a milder step than divorce because it does not dissolve the marriage. Judicial Separation extinguishes the obligations of cohabitation and assistance (Article 1670). It does not end the right to alimony. There is still a legal relationship between the spouses. A Judicial Separation has the same effect as divorce on the couple’s assets (Article 1672). Judicial Separation terminates if the couple reconciles or if the marriage is dissolved (1673).

To get a Judicial **Separation of Persons and Assets**, a spouse petitions the court. The Judicial Separation process works similarly to divorce in that it can be by mutual consent or litigious. If the Judicial Separation is litigious, there must be grounds and the judge decides culpability. Unlike divorce, however, it is not necessarily a final decision. The spouses can reconcile at any time by re-establishing their life together and ending the separation proceedings. The couple can also get a public deed, confirmed by the court that ends the judicial separation (Article 1674).

Table 3: Ending A Marriage

Type	Brief Definition	Grounds	Process	Effects
Divorce by Mutual Consent	Spouses bring divorce petition together, with agreed-upon terms	Not required	Two conferences; Judges reviews the terms and attempts reconciliation	<ul style="list-style-type: none"> • Divorce decreed; marriage and all obligations to each other are dissolved (except those that remain in the terms of the agreement). • Assets and property partitioned
Litigious Divorce	One spouse sues the other spouse based on some specific fault	<ul style="list-style-type: none"> • Culpable violation of conjugal obligations that compromises the possibility of communal life 	One spouse sues the other based on one of the acceptable grounds within two years; the judge determines	<ul style="list-style-type: none"> • Divorce decreed and all obligations to each other are dissolved except

Judicial Separation	("grounds")	<ul style="list-style-type: none"> • <i>De facto</i> separation for three consecutive years • <i>De facto</i> separation for one year, where the divorce is not contested • Alteration of mental faculties • Desertion for two years 	culpability and includes this in the divorce decree	for, in some cases, alimony. <ul style="list-style-type: none"> • Assets and property partitioned.
	Separates assets and obligations but retains the conjugal bond; technically still married	Same as above (if litigious; no grounds necessary for separation by mutual consent)	One or both spouses petition the court. Can be brought separately or as a counterclaim to divorce by either party. Judge determines culpability. Can be converted to divorce after two years.	<ul style="list-style-type: none"> • The couple is technically still married but there is no obligation of cohabitation or of assistance, although there still may be an obligation to pay alimony. • Assets are partitioned as if marriage was dissolved.

4. Domestic Violence and Divorce in Timor-Leste

In 2010, Timor-Leste's parliament passed a law against Domestic Violence. Domestic violence is a major problem in Timor-Leste: some studies have found that gender-based violence cases make up more than half of the cases brought to the police and approximately one third of court cases.¹⁰ The new law “confirms that domestic violence is a public crime and reflects the commitment of the National Parliament to eradicate acts of domestic violence in Timor-Leste.”¹¹ Under this law, police are required to investigate domestic violence crimes, and victims must have access to emergency medical services and shelter. According to Armando da Costa, a member of the Secretary of State for the Promotion of Equality (SEPI) (the organization which drafted the law), the law will ensure that victims receive money from perpetrators and

¹⁰ Gender-based Violence in Timor-Leste, UNFPA, October 2005. Available at http://www.unfpa.org/women/docs/gbv_timorleste.pdf

¹¹ JSMP Proposal for the Draft Civil Code to Reflect the Real Situation in Timor-Leste: Proposal for Committee A of the National Parliament. 23 September 2010. Available at http://www.jsmp.minihub.org/English/webpage/pwp/Submisaun%20Kodigu%20Sivil%202023%20Setembru_e.pdf

emergency government funds when necessary, as well as mandate public awareness campaigns and inclusion of domestic violence education into school curricula.¹²

It might not be easy to change attitudes about domestic violence in the country, since “[f]ifty-one percent of women surveyed by the International Rescue Committee in 2003 strongly agreed that 'a man has good reason to hit his wife if she disobeys him'.”¹³ Men sometimes also believe that domestic violence is acceptable. According to Flora Soriano Menezes of the Judicial System Monitoring Programme, “In Timor-Leste, it’s very common for men to pay a bride price, and sometimes they think that paying the price means they own their wives like they own animals.”¹⁴

JSMP also believes that some parts of the Civil Code do not provide adequate protection to victims of domestic violence.¹⁵ In Article 1657(b), the law states that although disrespect and infidelity are grounds for divorce, a spouse cannot seek a divorce if she stays with her husband following a problem. This means that “Article 1657 reduces [a woman's] capacity to distance herself from her violent husband. [A woman] must stay with her husband, not because she has forgiven him, but because she is very concerned that if she leaves her husband she will not get custody of her children, and [a woman may be] afraid because of various threats made by her husband.”¹⁶ If a woman does not leave her husband after he beats her, the law may not let her obtain a divorce even if it is because she is afraid to leave or wants to stay to protect her children.

Other parts of the law may also make it harder for an abused woman to leave her husband. Article 1651(1) requires that spousal reconciliation must always be attempted during divorce proceedings. However, JSMP believes that if a woman “is subjected to domestic violence the state should not pressure her to stay with her husband. If she has to follow a formal reconciliation process JSMP believes that she will be deeply afraid and will be pressured by other parties to not pursue a divorce.”¹⁷

¹² New law aims to fight domestic violence. IRIN: humanitarian news and analysis. 12 May 2010. *Available at* <http://www.irinnews.org/report.aspx?reportid=89101>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ JSMP Proposal for the Draft Civil Code to Reflect the Real Situation in Timor-Leste: Proposal for Committee A of the National Parliament. 23 September 2010. *Available at*

http://www.jsmp.minihub.org/English/webpage/pwp/Submisaun%20Kodigu%20Sivil%2023%20Setembru_e.pdf

¹⁶ *Id.*

¹⁷ *Id.*

Questions

1. Mario and Ana agree that their marriage isn't going well and decide they will get divorced by mutual consent. What do they have to do?
2. Tomas wants a divorce from his wife Nina, because he doesn't love her anymore. Can he sue for her divorce?
3. Roberto is married to Emelia but had an affair with another woman. Emelia learns of this in April 2010 and kicks Roberto out of the house. She sues him for divorce based on violation of the duty of fidelity. In June 2010, while the divorce proceeding is pending, Roberto apologizes and says the affair is over. Emelia allows him to move back into their home and resume some parts of their domestic life, like taking care of their child. Emelia is still very angry with him. Can the divorce proceed?

Answers

1. They must petition the court with an agreement that specifies terms of alimony, child custody, and what will happen to the family house. Then they have to have two conferences with the judge to discuss the terms and alter them if necessary. During the first conference, they also have to come up with the regime that will govern their relationship for the duration of the proceedings. After the second conference, the judge decrees divorce based on the agreed upon terms, sometimes giving the couple a set period of time during which they can alter the agreement.
2. No. If Nina has not violated the conjugal obligations or deserted him, and they have not been *de facto* separated, then Tomas has no grounds for divorce. He could try to get Nina to agree to a divorce by mutual consent instead, or move out of the house as a way to achieve *de facto* separation.
3. Maybe, but the divorce probably could not happen. The breach of fidelity does not appear to be an impediment to communal life, because it appears that Emelia implicitly forgave Roberto by allowing him to move back home. It also appears that their communal life is still taking place. Emelia's anger is probably not enough to be an impediment to communal life, unless it is extreme enough that they cannot go about their daily business.

VIII. REVIEW

SECTION OBJECTIVES

- To review the formalities and requirements of marriage and divorce in Timor-Leste.

In this chapter, we covered all the requirements necessary to become legally married in Timor-Leste. We also discussed the different property regimes in marriage and introduced different types of divorce. There are three types of marriages in Timor-Leste: civil, Catholic, and Customary Monogamous. People may only get married if there are no impediments to marriage, like youth or mental handicaps. Impediments to marriage also include close kinship between the spouses and attempting to marry more than one spouse at the same time. The law also requires that widows, widowers and divorcees wait a certain amount of time (the internuptial period) after their previous marriage has ended before re-marrying. To assess matrimonial capacity, the law requires a couple to publish banns with the civil registrar and requires any person who knows of an impediment to marriage to declare it. The civil registrar then assesses the capacity of the couple to marry and issues a marriage certificate. No one may marry without a marriage certificate.

After the certificate is issued, the couple celebrates their marriage in a ceremony where they consent to the marriage. Finally, the marriage must be registered in order to be official. Some organizations have pointed out that the registration requirement is not well-known and people married in non-civil marriages may not be officially “married” because they are unaware of the registration requirement. Sometimes, marriages are declared invalid or annulled because a formal requirement has been omitted, one party did not give appropriate consent, or there was an impediment to the marriage discovered after the marriage occurred.

Once a marriage is successfully entered into, it changes the relationship between the parties. It gives each party rights and duties, including the duties of respect, fidelity, cooperation, and assistance. Spouses may also have the right to manage the property of the other spouse. Spouses can specify certain types of gifts and property arrangements, as well as declare heirs, in prenuptial agreements. One final effect of marriage is that it affects the way couples own and share property. Couples can choose from three different types of property regimes that govern

what property belongs to each individual: (1) Community of Property Acquired After Marriage, (2) Community of Property, and (3) Separation of Property. Marriage also impacts the debts of the couple and makes some debts communal, depending on the type of debt, consent of the other spouse, and property regime of the couple.

The law also regulates the ways in which a marriage may be ended. Besides invalidity (where the marriage never legally existed) and annulment, couples can get divorced or obtain a judicial separation of persons and assets. For divorce and judicial separation, the process may be by mutual consent or litigious (where one spouse sues the other to end the marriage). Both proceedings must take place in court with the supervision of a judge. In a divorce, all legal obligations are ended (except sometimes alimony). In a judicial separation, the obligations of cohabitation and assistance are ended but the couple is still legally married.

More information on this subject can be found in Book IV of the Civil Code of Timor-Leste.

Questions

1. Roberto and Emelia are engaged to be married and Roberto's family has agreed to pay Emelia's family *barlake*. After gifts have been given but before the wedding ceremony, Emelia changes her mind and backs out of the wedding. Can Roberto's family demand the return of the *barlake* that they paid to Emelia's family?
2. Martino and Rosalia plan to get married. Must they create a prenuptial agreement?
3. Francisco sues his wife Madalena for divorce (litigious divorce). Who gets custody of their children?

Answers

1. The Civil Code does not address this situation. Unless the Civil Code changes to regulate *barlake*, customary law and tradition would regulate the return of the *barlake*.
2. No. A prenuptial agreement is optional (Article 1591).
3. This is up to the discretion of the court and depends on the specific facts of the case. If Francisco has grounds to sue Madalena for divorce, it is possible that whatever provided these grounds (infidelity, failing to provide assistance, desertion, etc) might also make the court lean towards giving Francisco custody. But there is no pre-determined answer; the court decides what is best for the children in each case.

GLOSSARY OF SELECTED TERMS

Alimony: The financial support paid to provide for a spouse after the couple separates or is divorced.

Banns: A published announcement of the marriage through the registrar's office or the parish priest.

Divorce: A legal action to end an existing marriage. After divorce, the couple no longer owes any duties to one another and their assets and property are partitioned. Divorce can be by mutual consent or litigious.

Duty of Assistance: The obligation on a married couple to provide food and contribute to the responsibility of family life.

Duty of Cohabitation: The obligation the married couple has to agree on a mutual family home that safeguards the unity of family life.

Duty of Cooperation: The obligation on a married couple to help each other and have joint responsibility for the needs of family life (for example, sharing chores, maintaining the home, raising children).

Marital Property Regime: A system for deciding which property belongs to each spouse individually and which property is owned by the couple. The regime can be chosen by the couple and declared in a prenuptial agreement. If the couples do not pick a regime or do not make a prenuptial agreement, the default is to use the Community of Property Acquired After Marriage Regime.

Marriage: A contract between two people of different genders to create a family according to the provisions of the Civil Code of Timor-Leste. There are three types of marriage: Civil Marriage, Catholic Marriage, and Monogamous Customary Marriage.

Matrimonial Capacity: The ability to become legally married by law. Each party must have Matrimonial Capacity in order to enter into any of the three types of marriage.

Judicial Separation of Persons and Assets: An alternative to getting a divorce which does not dissolve the marriage or end the legal relationship between the spouses. The couple will no longer have the obligations of cohabitation and assistance. Judicial Separation does not end the right to alimony. Judicial Separation ends if the couple reconciles or the ultimately get a divorce.