

Principles of Civil Law

Lecture Title: Filiation and Parental Authority; Minority and Guardianship, Interdiction and Incapacitation

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Date: 24th October 2023



Diploma in Law (Malta)



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Filiation

A child conceived in wedlock is held to be the child of the spouses.

This presumption can be challenged:

1. Either through a procedure to be made before the child is registered
2. Either through a court case, following the registration of the Child at Public Registry



Presumptions at Law:

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.

What options there are to challenge such presumptions?



A spouse, except for the spouse who gave birth to the child, may bring an action to repudiate a child born in wedlock:

- (a) if such spouse proves that during the time from the three hundredth day to the one-hundred-and-eightieth day before the birth of the child, such spouse was in the physical impossibility of cohabiting with the spouse who gave birth on account of being away from the said spouse, or some other accident;
- (b) if such spouse proves that during the said time such spouse was de facto or legally separated from the spouse who gave birth:

Provided that such spouse may not repudiate the child if there has been, during that time, a reunion, even if temporary between the spouses; or

- (c) if such spouse proves that during the said time such spouse was afflicted by impotency, even if such impotency was only an impotency to generate; or
- (d) if such spouse proves that during the said time the spouse who gave birth had committed adultery or that, that spouse had concealed the pregnancy and the birth of the child; or
- (e) if such spouse produces evidence of any other fact which may also be genetic and scientific tests and data that tends to exclude such parenthood



DNA Testing

The Civil Court (Family Section) may require any of the spouses, the child, and the alleged natural parent, as appropriate, to consent to a genetic test of parentage, and to acquiesce to the taking of a genetic sample appropriate for the test, which sample must be taken according to the current provisions of the law:

Provided that where the said consent is not given by the parties, the Civil Court (Family Section) must substitute that consent that has not been given and order acquiescence in the taking of a sample.

In the absence of genetic and scientific evidence, the Civil Court (Family Section) may consider any other evidence presented which it deems to be relevant, including the drawing of inferences from the fact that a person did not provide a genetic sample, despite being ordered to do so.



Appell Numru 130/2013 AL in the names Victor Buttigieg vs Direttur tar-Registru Pubbliku Et (decided 12th May 2022)

Facts of the Case:

“Jirrizulta f’dan il-każ li l-att tat-twelid tal-attur, li twieled fid-9 ta’ Settembru fl-1972 juri li hu iben Anthony Buttigieg, ir-raġel ta’ Emanuela Buttigieg neé Zammit. Jingħad ukoll li ġie mrobbi mill-ġenituri tiegħu bħala l-wild naturali tagħhom. Maż-żmien beda jkollu suspetti dwar li missieru seta’ kien Tumas Fenech u talab li hu u ħuh jagħmlu testijiet ġenetiċi dwar il-missier. Minn dan it-test, maħruġ fit-8 ta’ Ottubru, 2012, irrizulta li l-attur u ħuh “ma għandhomx l-istess missier”. L-attur baqa’ bis- suspett sakemm, fl-aħħar, fuq is-sodda tal-mewt tagħha, ommu qaltli li missieru hu Tumas Fenech.”



Il-Prim' Awla tal-Qorti Ċivili fit-8 ta' Ġunju, 2021 li in forza tagħha ordnat is-segwenti:

i. Tilqa' t-talba tal-attur fis-sens illi tordna l-eżumazzjoni tal-gisem ta' Tumas Fenech bl-intiża li jittieġed minn fuqu kampjun ġenetiku;

ii. Tinnomina lil Dr. Mario Scerri bħala espert forensiku sabiex jissorvelja u jidderigi l-eżumazzjoni in kwistjoni, kif ukoll għandu jkollu l-inkarigu illi skont il-protokol neċessarju jieħu l-fdalijiet eżumati fil-kamra mortwarja tal-Isptar Mater Dei;

iii. Tinnomina lil Dr. Marisa Cassar, bħala espert sabiex teżamina l-fdalijiet eżumati u televa kampjun ġenetiku minn fuq l-imsemmija fdalijiet tal-mejjet Tumas Fenech, u kif ukoll televa kampjun ġenetiku minn fuq Victor Buttigieg, sabiex konsegwentament tagħmel it-testijiet neċessarji u kif ukoll tirreleta dwar ir-riżultanzi b'komparazzjoni mad-DNA tal-imsemmi Victor Buttigieg, filwaqt illi l-istess espert qed jiġi awtorizzata sabiex tagħmel kull osservazzjoni rilevanti u opportuna fiċ-ċirkostanzi;

iv. Tawtorizza lill-partijiet jew nies inkarigati minnhom sabiex ikunu preżenti bħala osservaturi biss waqt l-eżumazzjoni tal-fdalijiet tal-mejjet Tumas Fenech;

v. Tordna li l-ordni tal-eżumazzjoni li għandha ssir mill-esperti surreferiti tiġi komunikata lill-awtoritajiet kompetenti u ċjoe' lid-Direttur Ġenerali tad-Dipartiment tas-Saħħa”



The respondents filed an appeal, contesting the said orders, and the Court of Appeal ordered that the court case be transferred back to the Family Court before the exhumation of the deceased Tumas Fenech be carried out:

Isegwi li l-ewwel Qorti kellha tiddeciedi dik it-tielet eċċezzjoni qabel ma tordna l-eżumazzjoni tal-ġisem ta' Tumas Fenech, għax jekk jirrizulta l-fatt ta' pussess ta' stat li jaqbel mal-att ta' twelid, il-każ ikollu jieqaf hemm. Mhux f'lokha dikjarazzjoni tal-paternita` tal-attur in vacuo u mhux marbuta ma' bidla fl-att ta' twelid. L-attur ma jistax jiġi dikjarat li missieru hu Tumas Fenech, iżda fuq l-att ta' twelid jibqa' jidher li hu iben Anthony Buttigieg. Ir-riċerka tal-paternita` jrid ikollha utilita` aħħarija, u biex dan iseħħ trid tintlaqa' wkoll bidla fl-att ta' twelid. Jekk dan tal-aħħar ma jistax isir, tkun vessatorja dikjarazzjoni ta' paternita` fl-arja.

Għaldaqstant, għar-raġunijiet premessi, tiddisponi mill-appell tal-konvenuti Fenech billi tilqa' l-istess, tħassar u tikkancella l-provvediment / digriet li tat il-Prim' Awla tal-Qorti Ċivili fit-8 ta' Gunju, 2021, u tibgħat l-atti lura lill-ewwel Qorti sabiex, f'dan l-istadju, tisma' l-provi u tiddeciedi fuq it-tielet eċċezzjoni tal-konvenuti Fenech qabel ma tkun ikkonsidrata t-talba tal-attur għall-eżumazzjoni tal-ġisem ta' Tumas Fenech.

Action to Disown a Child

An action to disown a child, must be brought forward:

- (a) within 6 months from the day of birth, if the spouse was then in Malta;
- (b) within 6 months of his return to Malta, if the spouse was absent at the time of the birth;
- (c) within 6 months of the discovery of the fraud, if the birth was concealed

Provided that, without prejudice to the provisions of article 70(4), the Family Court may, upon an application of any one of the spouses and, if possible, after having heard all the parties interested, and after having considered the rights of the applicant and of the child, at any time authorise the applicant to institute an action to disown a child born in wedlock to the other spouse

Rights of a Natural Parent

Any person claiming to be the natural parent of a child born in wedlock, or that person's heirs if the person was deceased before the child is born, may proceed by sworn application before the competent court against the spouses and child, or their respective heirs if anyone of them is deceased, in order to be declared as the natural parent of the child, and only if that person produces evidence that during the time from the three-hundredth day to the one-hundred-and-eightieth day before the birth of the child, the spouse who gave birth had committed adultery with that person and furthermore produces evidence of any other fact which may also be genetic and scientific tests and data that tends to exclude one of the spouses as the natural parent of the child.



There are no time limits for such actions

- An action for filiation may also be brought forward by a child, when he or is of age (i.e. 18 years of age).
- No prescription shall run for an action for a child to establish his proper filiation
- Nevertheless, where the child failed to bring such action, it may not be brought by his heirs or descendants, unless he died in the period of non age, or within five years after attaining his majority.
- Where the child has brought the action and dies during its pendency, his heirs or descendants may continue the proceeding.



Children Born Out of Wedlock

- A child conceived or born out of wedlock may be acknowledged by the parents, either jointly or separately
- In the case of a child having an Unknown Father listed on his/her birth certificate:

The Father or the Mother may file an official letter expressing his or her intention to register the child as the son or daughter of the other. If there is agreement, the other party files a note, and the Public Registry makes the relative amendments. If there is no agreement, or the judicial letter is not answered, one needs to proceed with a court case.



Effects of such acknowledgement

An acknowledgment shall only operate in regard to the parent making it, and it shall not confer on the child so acknowledged any right against the other parent.

A child conceived and born out of wedlock born to a spouse before or during marriage, and acknowledged during a marriage may not be brought into the matrimonial home, except with the consent of the other spouse, unless such other spouse has already given his or her consent to the acknowledgement.



Continued

The parent who has acknowledged a child conceived and born out of wedlock shall have in regard to him all the rights of parental authority other than the legal usufruct.

If a child conceived and born out of wedlock has been acknowledged by the parent who did not give birth, that child shall assume the surname of any of the parents, or the surname of both parents, in the order they choose.

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



Adoption

Adoption may only take place with the authority of the Civil Court (Voluntary Jurisdiction) granted by decree following a recommendation made by the Adoption Board, made on the application of a person of either sex.

Who can proceed for an adoption?

1. Two spouses,
2. Civil union partners or
3. Cohabitants whose cohabitation is regulated by means of a contract in accordance with the Cohabitation Act, or of cohabitants whose cohabitation is enrolled by means of a public deed under the Cohabitation Act, 2020, authorizing them jointly to adopt a person and may not be made on the application of only one of such spouse, civil union partner or cohabitant



A spouse/cohabitant/civil union partner may adopt the the natural child of the other spouse/ cohabitant/civil union partner:

Provided that, where the person to be adopted is the natural offspring of either of the spouses, a civil union partner or a cohabitant in a cohabitation registered under the Cohabitation Act or enrolled by means of a public deed under the Cohabitation Act, 2020, in that eventuality, the adoption decree may be made notwithstanding that the application is filed only by the natural parent of the person to be adopted and the Court shall not be bound to request or review the recommendation of the Adoption Board.



Restrictions on Adoption:

An adoption decree shall not be made unless:

The applicant or, in the case of a joint application, one of the applicants (a) has attained the age of twenty-eight years and is at least twenty one years older but not more than forty-eight years than the person to be adopted:

Provided that if the applicant or applicants request the court for authorisation to adopt siblings, the restriction mentioned in this paragraph shall be deemed to be satisfied if there is the required age difference at least with regards to one of the children, and if the adoption will be in the best interests of all the siblings involved; or

(b) is the natural parent of the person to be adopted and has attained majority



Further Restrictions

An adoption decree shall not be made –

in respect of a person who has attained the age of eighteen years except:

(i) in favour of a sole applicant who is the natural parent of the person to be adopted or

(ii) in favour of the parent and the spouse, the civil union partner or the cohabitant whose cohabitation is registered under the Cohabitation Act, or the cohabitant whose cohabitation is enrolled by means of a public deed under the Cohabitation Act, 2020, if the person to be adopted has lived with the said applicants for at least five (5) consecutive years and consents to the adoption;

(iii) in favour of a foster carer who has fostered the person to be adopted for at least the previous five consecutive years, if the person to be adopted consents to the adoption;

(b) in favour of a person who is in holy orders or bound by solemn religious vows;

or (c) in favour of a tutor in respect of the person who is or was under his tutorship, except after having rendered an account of his administration or given adequate guarantee of the rendering of such account



Powers of the Civil Court (Voluntary Jurisdiction)

Before an adoption decree is made the court shall

- (a) hear any person who has been entrusted with the care and custody of the child to be adopted;
- (b) in the case of a person conceived and born out of wedlock, hear the parent who has not given birth to the child if such person has acknowledged the person to be adopted as his child and if the court is satisfied that he has contributed towards his maintenance and has shown a genuine and continuing interest in him;
- (c) where the person to be adopted is under tutorship or is living with a person who is not his parent but who has his care and custody in fact, hear the tutor or the person who has such care and custody in fact, as the case may be;
- (d) hear the child's advocate and, or social worker appointed by the court to protect the best interests of the child and to secure his representation



Forced Adoption (amendments made to the Civil Code in 2018)

The court may dispense with any consent or with any hearing mentioned before, if it is satisfied that:

- (i) the person who is required to give his consent is incapable of giving such consent; or
- (ii) the parent cannot be found or has abandoned, neglected or persistently ill-treated, or has persistently either neglected or refused to contribute to the maintenance of the person to be adopted or had demanded or attempted to obtain any payment or other reward for or inconsideration of the grant of the consent required in connection with the adoption; or
- (iii) either of the parents are unreasonably withholding their consent; or
- (iv) either of the parents may be deprived of parental authority over the child to be adopted; or
- (v) the child to be adopted is not in the care and custody of either of the parents and the Adoption Board declares that there is no reasonable hope that the child may be reunited with his mother and, or father; or
- (vi) the parent or parents have unjustifiably, not had contact with the child to be adopted for at least eighteen months; or
- (vii) is in the best interests of the child to be adopted for such consent to be dispensed with; or



Safeguards of Children:

- i. Appointment of Curator and
- ii. Appointment of Children's Advocate

Upon an application for an adoption decree of a person to be adopted, the court shall appoint such person as may be prescribed to act as special curator of the person to be adopted with the duty of safeguarding the interests of the person to be adopted before the court.

Upon an application for an adoption decree of a person to be adopted, the court may on its own motion or on the application of an interested person, including the child to be adopted, appoint a child's advocate and, or a social worker to ensure that the child is adequately represented and his best interests safeguarded.



Effects of Adoption

- the person in respect of whom the adoption decree is made shall be considered with regard to the rights and obligations of relatives in relation to each other, as the child of the adopter or adopters born to him, her or them in lawful wedlock and as the child of no other person or persons, relationship being traced through the adopter or adopters;
- the relatives of the person in respect of whom the adoption decree is made shall lose all rights and be freed from all obligations with respect to such person;
- the tutor, if the person in respect of whom the adoption decree is made is placed under tutorship, shall terminate his administration and, within three months from the date of the adoption decree, render an account thereof to the adopter;(d) the parents shall, in the case of an open adoption, retain the right to maintain contact with the person in respect of whom the adoption decree is made;
- the court shall inform the competent authorities that the adoption decree has terminated the care order if an adoption decree has been made in favour of a child who is under a care order



Surname

Upon an adoption decree being made, the person in respect of whom the adoption decree is made shall assume the surname of the adopter:

Provided that where the adoption decree is made in favour of two spouses, the person in respect of whom the adoption decree is made shall assume the surname of any of the adoptive parents, or the surname of both adoptive parents in the order of their choice.

How can one find out who were his biological parents?

Case Study



How can one find out who were his biological parents?

Case Study

An adopter or an adopted person who has attained eighteen years of age may apply to the court for a copy of the relevant adoption decree and, or details of the adopted person's natural family and, or adoption placement.

An adopted person who has attained eighteen years of age shall have the right to apply to the court for authorisation to obtain a copy of his original birth certificate from the Public Registry.

Prior to giving an order related to sub-articles (1) and (2), the court shall hear the applicant and any other person it deems fit in the circumstances





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Parental Authority

- A child shall be subject to the authority of his parents for all effects as by law established.
- This authority is exercised by the common accord of both parents. After the death of one parent, it is exercised by the surviving parent.
- In case of disagreement between the parents on matters of particular importance, either parent may apply to such court as maybe prescribed by or under any law in force from time to time indicating those directions which he or she considers appropriate in the circumstances.



In case of continued disagreement:

The court, after hearing the parents and the child if the latter has reached the age of fourteen years, shall make those suggestions which it deems best in the interest of the child and the unity of the family. If the disagreement between the parents persists, the court shall authorise the parent whom it considers more suitable to protect the interest of the child in the particular case, to decide upon the issue.

In the case of an imminent danger of serious prejudice to the child either parent may take such measures which are urgent and cannot be postponed



Effects of Parental Authority over Minors

- A child shall obey his parents in all that is permitted by law
- It shall not be lawful for a child, without the consent of the parents, to leave the parental house, or such house as his parents may have appointed for him.
- Where the child leaves the house without such consent, the parents shall have the right to recall him, and, if necessary, demand the assistance of the Police.
- Nevertheless, it shall be lawful for the competent court as may be prescribed by or under any law in force from time to time, for just cause, and without disclosing the same, to authorize the child to leave the parental house



- It shall be lawful for the parents, if they are unable to control the child, to remove him from the family, assigning to him, according to the means of the parents, such maintenance as is strictly necessary
- The parents may also, where necessary and upon obtaining the authority of such court as may be prescribed by or under any law in force from time to time, place the child, for such time as is stated in the decree, in some alternative form of care, which the court will according to circumstances consider suitable, to be, at the expense of the parents, cared for and treated in such manner as the court may deem conducive to the discipline and education of the child



- The parents jointly represent their children, whether born or to be born, in all civil matters.

Special Mechanisms how to effect this

- The parents jointly administer the property of their children, whether born or to be born, except such as has devolved on such children on condition that it shall be administered solely by one of the parents or by third parties.
- Acts of ordinary administration may however be performed by either of the parents without the intervention of the other.



What are acts of extraordinary administration which must be performed by the parents jointly?

- The alienation of movables by nature, including motor vehicles for the object of profitably investing the proceeds thereof
- The collection of capitals that may become due
- The granting of personal rights of enjoyment over immovable property
- The acceptance of an inheritance, legacy or donation in the name of the child
- The partition of movables by nature



Accepting inheritance on behalf of the children

Any inheritance devolving on the children, shall be accepted by the parents with the benefit of inventory, unless such inventory is dispensed with by the court.

If one of the parents is unable or unwilling to accept such inheritance, the inheritance may be accepted by the other parent with the authority of the court. If both parents are unable or unwilling to accept such inheritance the court may, upon the demand of the child or of any of his relatives, authorise the acceptance thereof either by the child himself, if he has attained the age of fourteen years, or otherwise by a special curator to be appointed by the court



The parents are bound to render to the child, on the latter attaining majority, an account of the property and the fruits of those things of which they have not the usufruct; and of the property only and of the administration thereof in regard to things of which they have the legal usufruct.

Notwithstanding any other provision found in the Civil Code, the court may, upon good cause being shown, give such directions as regards the person or the property of a minor as it may deem appropriate in the best interests of the child.



Cessation of Parental Authority:

- Upon the death of both parents or of the child;
- when the child attains the age of eighteen years;
- on the marriage of the child;
- if the child, with the consent of the parents, has left the parental home and set up a separate domestic establishment;
- if the surviving parent remarries or, in the case of an adoptive parent, if after the adoption he marries or remarries, without having first made an inventory of the property of the child and obtained from the court the requisite leave to continue in the exercise of the rights of parental authority

The Court may re-instate parental authority, upon the demand of such parent, provided the best interest of the child is safeguarded.



A parent may be deprived of parental authority:

- If the parent, exceeding the bounds of reasonable chastisement, ill-treats the child, or neglects his education,
- if the conduct of the parent is such as to endanger the education of the child,
- if the parent is interdicted, or under a disability as to certain acts,
- if the parent mismanages the property of the child,
- if the parent fails to look after, maintain, instruct and educate the child.



OF MINORITY AND OF TUTORSHIP

Who is a Minor?

A minor is a person of either sex who has not yet attained the age of eighteen year.

Who is a tutor?

Any minor, whose parents have died or have forfeited parental authority and who has not married, is subject to be placed under tutorship until he becomes of age or until he marries.



How are tutors appointed?

A tutor is appointed by the court on the demand of any person.

In appointing a tutor the court shall take into account any disposition contained in the will of either of the parents of the child relating to the appointment of a tutor.

Where among the relatives of the minor there are competent persons, the court shall appoint one of such persons, preference being given, subject always to the best interests of the child, to the nearest relative by consanguinity.

It shall be lawful for the court to appoint more than one tutor, and in such event the Court may specify the different roles granted to tutors.



Who cannot be a tutor?

- (a) persons who have not attained majority;
- (b) persons who are not vested with the free administration of their property or who are notoriously incompetent to administer property;
- (c) persons who are or are about to be, or whose spouse or relatives by consanguinity or affinity up to the degree of uncle and nephew, are, or are about to be involved in a lawsuit with the minor, in which the status of such minor, or a considerable part of his property is at stake;
- (d) undischarged bankrupts;
- (e) persons who have been sentenced to the punishment of imprisonment for a term exceeding one year, or to any punishment for an offence affecting the good order of families, or for fraud;
- (f) persons who are of a notoriously bad character, or manifestly untrustworthy or negligent;
- (g) persons who are trustees of property for the benefit of the minor



Who is excused from being a tutor?

The judges and the magistrates are not eligible for the office of tutor, except in the case of their own relative by consanguinity in any degree in the direct line, or up to the degree of cousin in the collateral line. Tutorship already assumed in regard to persons other than the aforesaid relatives shall cease on the appointment of the tutor to the office of judge or magistrate.

- members of the House of Representatives;
- heads of public departments, and any other public officer having the direction of any particular branch of the public service;
- persons belonging to the armed forces of Malta,
- persons who have attained the age of sixty years, or are suffering from a habitual infirmity, which incapacitates serious inconvenience;
- any person who is a father or a mother of five living children;
- persons who are already discharging a tutorial office



Obligations

The court shall, before appointing a person to the office of tutor, direct such person to make an inventory of the property of the minor or, according to circumstances, a description of such property, verified on oath by such person, and to bind himself with hypothecation of his own property limited to a fixed sum, well and truly to administer the property of the minor, and to render on the termination of the office a true and faithful account of his administration.

It shall be lawful for the court, when it deems it expedient, in the decree of appointment, to impose on the tutor the obligation of presenting in the registry of the court, yearly or at such other intervals as the court shall direct, an account of his administration.

The court may also direct the person who offers to assume the office of a tutor, to give security, and, in any such case, the obligation of the surety as well as that of the tutor must precede the appointment of the tutor.



Power of the Court

The court may suspend or remove any tutor or curator from his office on grounds of:

1. Incompetence
2. In the event that the tutor or his spouse or relatives are about to be involved in a lawsuit against the Minor
3. Becomes bankrupt
4. Is sentenced to the punishment of imprisonment for a term exceeding one year
5. Persons who are of a notoriously bad character, or manifestly untrustworthy or negligent
6. for failure to render an account in due time,
7. for unfaithfulness in the account rendered, or for any other just cause

In all cases the Court shall mainly consider the rights and interests of the Minor.



Tutor's administration

The tutor shall have the care of the person of the minor; he shall represent him in all civil matters, and administer his property as a bonus paterfamilias.

The court shall, as appropriate, prescribe the place in which the minor is to be brought up, the education which it is proper to give him, and the expense to be incurred for his maintenance and education.

Minor's obligation

The minor shall obey the tutor in all that is permitted by the law.

Where the tutor abuses his authority, or neglects his duties, the minor himself or any other person on his behalf, may make a complaint to the competent court; and the court shall caution the tutor or give any other expedient direction.



Limitation of the Power's of the Tutor

It shall not be lawful for the tutor, without the authority of the court, to collect or transfer any capital belonging to the minor, take money on loan except in case of urgency, accept or renounce any inheritance, accept any donation or legacy subject to any burden, refer any matter to arbitration or effect any compromise, or alienate, hypothecate, or make any emphyteutical grant of immovable property, or let out property for a time exceeding eight years, in the case of rural property, or four years, in the case of urban property, or the ordinary time according to usage, in the case of movables.

The court may, in the decree appointing a tutor or by a subsequent decree, grant such tutor a general authority in respect of all, or any of the said acts



What is expected of a Tutor?

1. Keeping a book of receipts

The tutor shall keep at least a book of receipts and expenditure.

The said book, if verified on oath by the tutor, shall be sufficient to prove small expenses. The tutor shall only be credited with such expenses as are considered useful or, having regard to the position and the means of the minor.

2. Rendering of Accounts

The tutor shall render his account to his successor in the office of tutor. If the minor dies during the tutorship, the account shall be rendered to his heirs.



MAJORITY, GUARDIANSHIP, INTERDICTION AND INCAPACITATION

Majority is fixed at the completion of the eighteenth year of age. A major is capable of performing all the acts of civil life, subject to the restrictions contained in other special provisions of law.

Guardianship is a relatively new insertion in the Civil Code, in fact the provisions relating to Guardianship have been inserted in the Civil Code in 2012. This was in line with a more progressive thinking as far as persons with disability are concerned. This is due to the fact that Guardianship is a softer, and less draconian measure to interdiction and incapacitation.



Guardianship is defined as follows:

A major who has a mental disorder or other condition, which renders him incapable of taking care of his own affairs may be subject to guardianship; and notwithstanding the provisions of Sub-title II on Interdiction and Incapacitation, to the extent possible, the parents of a person of age, with disability, with a mental disorder and with another condition, which makes such person incapable of taking care of his or her affairs, shall first seek to place the person with disability under guardianship before seeking the interdiction or incapacitation of that person.



Functions of Guardian

A guardian shall:

- (a) be responsible to safeguard the personal and proprietary well being of the person to whose guardianship he is appointed;
- (b) act instead of the person to whose guardianship he has been appointed in matters of a personal or of a proprietary nature during such time when the said person is considered as not being capable of doing anyone or more acts of civil life as specified in the Guardianship Order;
- (c) to do any other thing for or on behalf of the person to whose guardianship he is appointed as he may be ordered or authorised to do by the Guardianship Board established or by the Court of Voluntary Jurisdiction or as may be prescribed by regulations made under this Sub-title.



The powers and functions of the guardian shall be performed subject to the:

- (a) the will of the person subject to guardianship is respected and given effect to the maximum extent possible;
- (b) the welfare of the person subject to guardianship is promoted and fostered;
- (c) the means used for the purpose of guardianship shall be proportionate to the aims which they are intended to achieve;
- and(d) the freedom of choice and action of the person subject to guardianship shall only be restricted when necessary and only to an extent that is proportionate to the aim pursued



The guardian shall act in the best interests of the person subject to guardianship and shall:

- (a) take appropriate measures to provide the support that the person subject to guardianship may require in exercising his legal capacity himself insofar as this is possible;
- (b) consult with the person subject to guardianship and take into account and respect the rights, will and preferences of the person insofar as this is possible;
- (c) encourage the person subject to guardianship to participate as far as possible in the life of the community;
- (d) encourage and assist the person subject to guardianship to become capable of caring for himself and for his property and of making responsible judgements in respect of matters relating to his person and property;
- (e) protect the person subject to guardianship from neglect, abuse or exploitation; and
- (f) provide to the person subject to guardianship, as far as possible, any assistive means as may be required for the proper fulfilment of the obligations set in law.



INTERDICTION AND INCAPACITATION

A major who is a person with a mental disorder or other condition, which renders him incapable of managing his own affairs, or who is insane or prodigal, may be interdicted or incapacitated from doing certain acts established in law.

A demand for the interdiction or incapacitation of persons who have a mental disorder or other condition, which renders them incapable of managing their own affairs, or who are insane or prodigal, is made by an application to the Court of voluntary jurisdiction.



Who may demand interdiction or incapacitation?

- a) by any one of the spouses against the other spouse;
- b) by any person against another related to him by consanguinity;
- c) by any person who is related by affinity to the person whose interdiction or incapacitation is demanded and who may be called upon to supply maintenance to such person;
- d) in case of a mental disorder or other condition, which renders a person incapable of managing his own affairs, by the State Advocate; unless the demand shall have been made by any other person



It shall be lawful for the court to cause the person whose interdiction or incapacitation is demanded to appear before it, to question such person and cause him to be examined by one or more experts; and the court may, in all cases, appoint a temporary curator to take charge of his person and property.

Interdiction

If the court finds that there is just cause for the interdiction, it shall appoint a curator to administer the property of the person interdicted. A curator shall be appointed for a period not exceeding three years. Such appointment can be renewed, where the court considers it so appropriate, after evaluating the reports submitted by the curator in accordance with sub-article. All the rights and obligations of tutors apply to the curators of an interdicted individual.



Incapacitation:

If no sufficient cause for the interdiction is made to appear, it shall be lawful for the court by a decree to order, if the circumstances of the case so require, that the person whose interdiction is demanded be incapacitated from suing or being sued, from effecting any compromise, borrowing any money, receiving any capital, giving a discharge, transferring or hypothecating his property, or performing any act other than an act of mere administration, without the aid of a curator to be appointed in the same decree.

Interdiction or incapacitation shall be revoked, when the cause of the interdiction or incapacitation shall cease to exist.

The court shall, in the decree of interdiction or incapacitation, direct that a notice thereof, specifying the terms of the inhibition, be published in the Gazette:

Provided that the court shall order that the decree be transmitted to the Archivist of Notarial Acts who shall enter a note of such interdiction or incapacitation in a book to be kept for the purpose.





Diploma in Law (Malta)



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