

A 728

I assent.

(L.S.)

GEORGE ABELA
President

7th December, 2012

ACT No. XXIV of 2012

AN ACT to amend the Code of Organization and Civil Procedure and the Civil Code for the purpose of providing for Guardianship

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same, as follows:-

Short title.

1. The short title of this Act is the Code of Organization and Civil Procedure and the Civil Code (Amendment) Act, 2012 and this Act shall be read and construed as one with the Civil Code, hereinafter referred to as "the Code".

Amends Title VI of Book First of the Code.

2. The title "OF MAJORITY, INTERDICTION AND INCAPACITATION" of Title VI of Book First of the Code shall be substituted by the title "OF MAJORITY, GUARDIANSHIP, INTERDICTION AND INCAPACITATION".

Amends article 188 of the Code.

3. Immediately after article 188 of the Code and immediately before Sub-title II there shall be added the following new Sub-title and articles:

"Sub-title IA OF GUARDIANSHIP

Persons
subject
to
guardianship. 188A. (1) Notwithstanding the provisions of Sub-title II on Interdiction and Incapacitation, 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.

(2) The same shall apply in regard to a minor referred to in article 156.

(3) The demand for the appointment of a guardian or of joint guardians may be made by any person who voluntarily wishes to be made subject to guardianship or by any person mentioned in article 189(3) of this Code or in article 521 of the Code of Organization and Civil Procedure.

Cap. 12.

(4) If in any civil proceedings the Court considers that a party may need to be subject to guardianship, the Court shall refer the matter to the Guardianship Board established under Title IIIA of Part II of Book Second of the Code of Organization and Civil Procedure for its determination.

Cap. 12.

(5) For the purposes of this Sub-title unless the context otherwise requires, the terms "mental disorder" and "other condition" shall have the same meaning as assigned to them in article 189 (4) of the Civil Code:

Cap. 16.

"disability" shall have the same meaning as assigned to it in the Equal Opportunities (Persons with Disability) Act;

Cap. 413

"mental disorder" shall have the same meaning as assigned to it in the Mental Health Act:

Cap. 262

Provided that any reference in such definitions to "disability of mind" or to "arrested or incomplete development of mind" shall not be construed as a reference to a mental disorder for the purposes of this Sub-title.

Functions
of Guardian.

188B. 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 any one 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 under Title IIIA of Part II of Book Second of the Code of Organization and Civil Procedure or by the Court of Voluntary Jurisdiction or as may be prescribed by regulations made under this Sub-title.

Obligations
in
respect
of
acts
of
guardianship.

188C. (1) The provisions of this Sub-title shall be construed and interpreted and every function, power, authority, discretion, duty or right conferred by this Sub-title or by any regulations made thereunder shall be exercised in such manner that:

(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.

(2) In the exercise of his obligations 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; and

(e) protect the person subject to guardianship from neglect, abuse or exploitation.

(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 provided in this sub-article.

(3) Subject to the limits imposed in the Guardianship Order or by any other decision which the Guardianship Board may give from time to time, a guardian may on behalf of a person subject to guardianship sign and do all such things as are necessary to give effect to any functions or obligations vested in the guardian.

Power to
make
regulations.

188D. The Minister responsible for Justice, in conjunction with the Minister responsible for Social Policy and the Minister responsible for Health may make regulations for the better implementation of the provisions of this Sub-title.

4. Article 191 of the Code shall be substituted by the following:

Substitution of
article 191 of
the Code.

"Interdiction
of minor.

191. (1) A minor under tutorship may be placed under the guardianship or interdicted or incapacitated in the last year of his minority, and in any such case the Guardianship Board or the Court, as the case may be, may appoint as guardian or curator either the tutor or any other person.

(2) The said guardian or curator shall only commence to administer the property as from the day of the termination of the tutorship."

A 732

Consequential
amendments to
the Code of
Organization
and Civil
Procedure.
Cap. 12.

5. Immediately after Title III of Part II of Book Second of the Code of Organization and Civil Procedure there shall be added the following new Title:

**"Title IIIA
OF GUARDIANSHIP**

Guardianship
Board.

519A. (1) There shall be a Guardianship Board (hereinafter in this Title referred to as the 'Board') which shall be appointed by the President of Malta acting on the advice of the Prime Minister given after consultation with the Social Affairs Committee of the House of Representatives.

(2) The Guardianship Board shall be composed of three members as follows:

(a) a Judge or Magistrate or a person who has acted as a Judge or Magistrate who shall also be the President of the Board;

(b) one member appointed after consultation with the National Commission Persons with Disability after this has consulted organizations working in the field of persons with disability;

(c) one member appointed after consultation with the relevant authority responsible for safeguarding the rights of persons with mental disorder after this has consulted organizations working in the field of persons with mental disorder:

Provided that persons who satisfy the requirements of paragraphs (a), (b) or (c) above may be appointed as substitute members to act on the Board in cases where any of the persons appointed under the respective paragraph cannot hear a specific application.

(3) The President and the other members of the Board shall hold office for a period of three years and shall be eligible for re-appointment for further terms of office:

Provided that if a member of the Board is appointed at any time after the other members, the term of office of such member shall end on the same date as that of the other members.

(4) A person shall not be qualified to hold office as member of the Board if that person:-

(a) is a Minister, a Parliamentary Secretary or a member of the House of Representatives or a Mayor or a Councillor in a Local Council; or

(b) is legally incapacitated or interdicted; or

(c) is subject to guardianship; or

(d) has been declared bankrupt; or

(e) has been convicted of a crime affecting public trust or of theft or fraud, or of knowingly receiving property obtained by theft or fraud, or of a crime affecting the good order of families.

(5) The office of a member of the Board shall become vacant:-

(a) at the expiration of the term of office; or

(b) if any circumstances arise that, if that person were not a member of the Board, would cause that person not to qualify for appointment; or

(c) on the resignation of that member.

(6) The appointment of any person as a member of the Board and the termination of office or resignation of any such person shall be notified in the Gazette:

Provided that the failure to publish any such appointment, termination or resignation as the case may be, shall not prejudice the validity of such appointment, termination or resignation.

Cap. 16 (7) The Board shall perform such functions as are assigned to it in this Title and in Sub-title IA of Title VI of Book First of the Civil Code and in any regulations as the Minister responsible for Social Policy, in conjunction with the Minister responsible for Justice and the Minister responsible for Health may from time to time make.

(8) Where in the course of the exercise of its functions the Board becomes aware of any fact which raises a reasonable suspicion of a breach of professional conduct it shall refer such fact to the appropriate authorities.

(9) Where in the course of the exercise of its functions the Board becomes aware of any fact which raises a reasonable suspicion of the commission of a criminal offence it shall report such fact to the appropriate authorities.

(10) In the exercise of its functions the Board shall not be subject to the direction or control of any other person or authority.

(11) The Minister shall appoint a public officer to act as Registrar to the Board.

(12) Unless the Board otherwise determines the Board shall proceed with closed doors.

Procedures.

519B. (1) The Board, in the exercise of its functions, shall act within a reasonable time and shall observe the rules of natural justice. Every case shall be heard not later than 30 days commencing on the day it is filed before the Board.

(2) Without prejudice to what is stated in sub-article (1), the Board shall regulate its own procedure:

Provided that all members of the Board shall be present at the Board's sittings.

(3) Evidence before the Board may be given orally or in writing or partly orally and partly in writing or by any other suitable means of communication.

(4) The President of the Board may administer an oath, or take an affirmation.

(5) The Board may of its own motion, or on the application of any party to the proceedings before it, direct the Registrar of the Board to serve through an executive officer of the Courts or of the Board upon any person a summons to appear before it to give evidence and or to produce the documents specified in the summons.

(6) It shall also be lawful for the Board, by means of a warrant of escort, to compel such witnesses to attend for the purpose of giving evidence. The Board may request that its officers be assisted by the executive officers of the Courts or by Police in the execution of a warrant of escort.

(7) If any person duly summoned fails to appear when called, such person shall be guilty of an offence and shall upon conviction by the competent court of criminal jurisdiction be liable to a punishment of a fine (*multa*) of two hundred and fifty euro (€250) or to imprisonment for a period of three months or to both such fine and imprisonment.

(8) The provisions of this Code relating to contempt of court shall, *mutatis mutandis*, apply to the Board.

(9) Where the Board is of the opinion in a particular case that there are circumstances which justify it in doing so, the Board may make such orders as to the payment of costs in respect of proceedings before it as the Board sees fit.

(10) When in any proceedings the Board makes an order or a decision such order or decision shall include reasons and shall be served on any person as may be specified by the Board.

Appointment of
experts and request
for information.

519C. (1) The Board may appoint any person with appropriate expertise to assist it in the course of any proceedings before it.

(2) The Board may, in the course of any proceedings, require any government department, agency or entity, local council, guardian, other entity or other person, to report to the Board on any matter relating to the said proceedings and it may also order that such report be submitted to the Board within a period of time as may be specified.

Application for the
appointment of a
guardian.
Cap. 16.

519D. (1) A demand for the appointment of a guardian shall be made by application to the Guardianship Board in accordance with article 188A of the Civil Code.

(2) The application shall contain a statement of the facts on which the demand is founded and an indication of the witnesses, if any to such facts.

(3) Any documents in support of the demand shall be filed together with the application.

Examination of
persons in respect
of whom
guardianship is
demanded and
appointment of
temporary
guardian.

519E. (1) The Guardianship Board shall cause the person in respect of whom guardianship is demanded to appear before it, to question such person and, or to cause him to be examined by one or more independent experts; and the Board may, in all cases, subject to such conditions as it considers appropriate, appoint a temporary guardian to act as a guardian to such person whilst proceedings before it are pending:

Provided that the appointment of a temporary guardian shall not in any case exceed the duration of twenty-six weeks during which period the Board shall determine whether a Guardianship Order should be made.

(2) For the purpose of conducting the examination referred to in sub-article (1), the Board shall, where exceptional circumstances so require, hold sittings or inspections *in faciem loci* at such places as it may determine.

(3) Where the Board considers that the interests of justice so require, it shall appoint an advocate for legal aid to assist the person in respect of whom an application for guardianship has been made.

Appointment of
guardian.

519F. (1) If the Guardianship Board finds that there is just cause for the appointment of a guardian it shall proceed to make such appointment and the person so appointed as guardian shall exercise all the functions, obligations and duties provided in respect of guardians under Sub-title IA of Title VI of Book First of the Civil Code and under this Title.

Cap. 16.

(2) In determining whether or not a person is in need of a guardian, the Board must consider whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of will and action.

(3) Where the Board makes an order appointing a guardian in respect of a person, the order must be as least restrictive of that person's freedom of decision and action as possible in the circumstances.

(4) Where the Board makes an order appointing a guardian it shall also order that a hearing for the review of the order shall be held within a specified period, not being longer than two years, as may be stipulated in the order:

Cap. 16. Provided that the Board may at any time of its own motion or on the application of any person mentioned in article 188A(3) of the Civil Code hold a hearing to review the Guardianship Order.

(5) The Board shall through its Registrar notify the Registrar of the Court of Voluntary Jurisdiction of all Guardianship Orders approved or revoked.

(6) The Registrar of the Board shall keep an updated register of all Guardianship Orders approved or revoked and of the terms thereof.

(7) No information taken from the register mentioned in sub-article (6) may be given by the Registrar, unless the Board would not have ascertained itself of the legitimate interest of the person requesting the said information.

Persons eligible as guardians. 519G. (1) The Board may appoint as a guardian any person who has attained the age of 18 years, is ordinarily resident in Malta and consents to act as such if the Board is satisfied that such person:

Cap. 16. (a) is in a position to be able to perform all the functions, obligations and duties provided in respect of guardians under Sub-title IA of Title VI of Book First of the Civil Code and under this Title; and

(b) will act in the best interests of the person subject to guardianship; and

(c) is not in a position where his interests conflict or may conflict with the interests of the person subject to guardianship, in that, such interest shall be communicated to the Board as soon as it is known or is suspected that it exists; and

(d) is not a Minister, a Parliamentary Secretary or a member of the House of Representatives or Mayor or Councillor in a Local Council; and

(e) is not legally incapacitated or interdicted; and

(f) is not subject to guardianship; and

(g) has not been declared bankrupt; and

(h) has not been convicted of a crime affecting public trust or of theft or fraud or misappropriation, or of knowingly receiving property obtained by theft or fraud, or of a crime affecting the good order of families;

Provided that the Board may appoint joint guardians of the person subject to guardianship each of whom shall perform such functions, obligations and duties as the Board may determine.

(2) In determining whether a person is suitable to act as the guardian of a person subject to guardianship, the Board shall take into account the wishes of the person in relation to whom an application for guardianship has been filed, the desirability of preserving existing family and social relationships and the compatibility of the person proposed as guardian with the person subject to guardianship.

(3) A guardian is not entitled to receive any fee, remuneration or other reward for acting as such unless the Board otherwise specifies in the order appointing the guardian.

(4) Where it appears to the Board that a proposed guardian, even if temporary, or a person appointed to act as a guardian does not fulfil the requirements of sub-article (1) for appointment as guardian, it may appoint any other person suitable to act as guardian.

(5) The Board may also order the substitution of a guardian at any time during the term of a Guardianship Order for good and sufficient cause.

When
Guardianship
Order
includes
administration
of property.

519H. (1) A guardian who is authorised in a Guardianship Order to administer monies or other property of a person subject to guardianship shall within two months of his appointment submit to the Board a list of assets and liabilities, that result, of the person subject to guardianship as at the date of issue of the Guardianship Order.

(2) A guardian who receives monies or other property due to the person subject to guardianship shall keep a separate account and record of such monies or other property.

(3) A guardian shall notify and seek the prior approval of the Board in respect of any transfer of or imposition of a burden upon property belonging to a person subject to guardianship:

Provided that any transfer of or imposition of a burden on any property belonging to the person subject to guardianship made in contravention of the provisions of this sub-article shall be null and void:

Provided further that nothing in this sub-article shall be construed as limiting the powers of the guardian to provide for the ordinary personal needs of the person subject to guardianship.

(4) A guardian shall also submit to the Board, an income and expenditure account confirmed on oath in respect of the guardianship:

- (a) every year; and
- (b) upon revocation or other termination of the guardianship; or
- (c) upon the termination of a temporary Guardianship Order.

(5) Within thirteen weeks from the death of the person subject to guardianship, the guardian shall provide the Board with a detailed report of his administration of the assets of the person subject to guardianship including, income, expenditure and administration of property and, where relevant, funeral and burial expenses.

(6) Any person interested as a creditor, beneficiary, family member, or otherwise in any monies or other property administered by a guardian may apply to the Board to intervene and give its advice or any order appropriate in the circumstances regarding any matter arising out of the administration of the said monies or property by the guardian and the Board, after having heard the guardian, may make such order in relation to such application as the circumstances of the case may require.

Guardian
may
seek advice.

519I. (1) A guardian may request the advice of the Board regarding any matter relating to the Guardianship Order or the exercise of any of the functions, obligations and duties of the guardian under the Guardianship Order.

A 740

(2) The Board shall order that notice of a request under sub-article (1) be served on any person that it directs.

(3) The Board may:-

(a) approve or disapprove of any act proposed to be done by the guardian;

(b) give such advice as it considers appropriate;

(c) make any order or decision as it considers necessary or amend or revoke the Guardianship Order.

(4) No legal proceedings shall be instituted against a guardian on account of an act or thing done or omitted by the guardian under any order or decision or on the advice of the Board made or given under this article unless in representing the facts to the Board the guardian shall have acted fraudulently, or shall have wilfully concealed or misrepresented facts.

Revocation of
Guardianship.
Cap. 16.

519J. (1) Any person mentioned in article 188A(3) of the Civil Code may, by application, request the Board to revoke a Guardianship Order and the Board, after due consideration, may revoke guardianship in respect of any person if the Board determines that:

(a) the cause which gave rise to the guardianship has ceased to exist; or

(b) there is good and sufficient cause to revoke such guardianship.

(2) When a person subject to guardianship dies the guardian shall report the death to the Board within a period that shall not exceed a maximum of one week from the demise of the person who was under his guardianship.

Special Powers of
the Board.

519K. (1) If the Board receives information that a person with disability or other condition is suffering serious damage to his physical, emotional or mental health or well-being as a consequence of ill-treatment, abuse or neglect, the Board may appoint a person or more than one person to visit the person with disability or mental disorder for the purpose of investigating the case and preparing a report to the Board on the situation of the said person with disability or mental disorder. Such a report is to be made to the Board within four days or any other time limit as may be stipulated in the order:

Provided that the Board, if and when it deems it appropriate, may demand that such information be confirmed on oath.

(2) Where any person appointed by the Board in terms of sub-article (1) to investigate the case informs the Board that he was unable to carry out this function due to obstruction by any person, the Board may request the assistance of the police and such police assistance shall be provided for the purpose of the execution of the said function.

(3) On receipt of the report, the Board may, after granting any person concerned a right to be heard, request any appropriate authority to take such measures as the said authority may deem necessary for the purpose of addressing any ill-treatment, abuse or neglect or the consequences thereof.

(4) For the purpose of providing such assistance as may be required in terms of sub-article (2) the police shall have the power to enter any premises and to use such force as is reasonably necessary to enable the person or persons appointed by the Board to visit the person with disability or mental disorder in accordance with the provisions of sub-article (1).

(5) No matter or thing done by any member of the Board, the Registrar or any other person acting under the direction of the Board in good faith in the exercise or purported exercise of any power or duty conferred or imposed upon the Board or upon any member of the Board, the Registrar or any said other person by or under this Title or under in Sub-title IA of Title VI of Book First of the Civil Code, shall make any member of the Board, the Registrar, or any said other person personally subject to any action, liability, claim or demand.

Cap. 16.

Appeal from
decisions of the
Board.

519L. (1) Any person who feels aggrieved by a decision of the Board may by application appeal therefrom to the Court of Voluntary Jurisdiction.

(2) An appeal under sub-article (1) shall be filed not later than twenty days from the date of the decision of the Board.

(3) An appeal filed under this article shall not stay the execution of the decision taken by the Board unless the Court of Voluntary Jurisdiction, upon an application of the appellant, decides otherwise.

Persons subject to
interdiction or
incapacitation.
Cap. 16.

519M. (1) Any person mentioned in sub-article (3) of article 189 of the Civil Code or in article 521 of this Code may request the Court of Voluntary Jurisdiction to convert an interdiction or an incapacitation into a Guardianship Order and the said Court may consult the Guardianship Board.

(2) Where the Court considers that there are sufficient grounds for the conversion referred to in sub-article (1) to be made, it shall issue a Guardianship Order and notify the Guardianship Board of this fact.

Power to make
regulations.

519N. The Minister responsible for Justice, in conjunction with the Minister responsible for Social Policy and the Minister responsible for Health may make regulations for the better implementation of the provisions of this Sub-title and without prejudice to the generality of the foregoing such regulations may:

(a) prescribe matters in relation to the practice and procedures of the Board;

(b) establish the procedure for entry and removal of registrations of Guardianship Orders and access, including electronic access, to such registrations and prescribe the format of the register to be kept by the Registrar under this Title;

(c) prescribe forms to be used for the purposes of this Title;

(d) establish offences against regulations made under this Title and establish a range of fines which shall not exceed a maximum of a fine (*multa*) of three thousand euro (€3000) for any contravention of any provision of regulations made under this Title, or for non-compliance with any provision thereof or with any requirement imposed under such provision;

(e) prescribe the fees to be paid in respect of the administration of monies or other property which are the subject of Guardianship Orders;

(f) prescribe the fees due to the registry, as well as other fees including fees to be paid to the experts nominated by the Board under this Title."

6. Article 22 of the Equal Opportunities (Persons with Disability) Act, shall be amended as follows:

Consequential amendment to article 22 of the Equal Opportunities (Persons with Disability) Act. Cap. 413.

(a) in paragraph (r) thereof, for the words "disabilities; and", there shall be substituted the words "disabilities;"

(b) in paragraph (s) thereof, for the words, "by Malta.", there shall be substituted the words "by Malta; and"; and

(c) immediately after paragraph (s) thereof, there shall be added the following new paragraph:

"(t) to monitor Guardianship Orders."

A 744

Passed by the House of Representatives at Sitting No. 531 of the
3rd December, 2012.

MICHAEL FRENDU

Speaker

RAYMOND SCICLUNA

Clerk to the House of Representatives
