Diploma in Law

Lecture 13: The Court of Voluntary Jurisdiction (Part 2)

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Diploma in Law (Malta)

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ADVOCATES

Today's lecture:

- Competence of the COVJ (Part 2)
- Procedures

Nature of the COVJ

Voluntary: this Court only has jurisdiction if the applicant voluntarily submits themselves to this Court (*vs other courts where, if a person is called in, they must submit themselves*)

Non-contentious: proceedings before this Court are not made against another person (*so not A v. B*), but are simply requests for authorisations.

Therefore the COVJ gives **decrees, not judgments**. Decrees are generally speaking valid for six months and may be extended (by what we call a request for a *proroga*).

Competence of the COVJ

S.L. 12.19

Competence of the COVJ

The COVJ shall be competent to hear applications on matters regulated by:

- Title III - *Adoption*
- Title V - *Minority and tutorship*
- Title VI - *Majority, Guardianship, Interdiction, Incapacitation*
- Title VII - *Absentees*

Of Book First of the Civil Code

- Part II

Of Book Second of the COCP:

- *Disentail*
- *Disencumberment of Immovables*
- *Tutors, Curators, and Administrators*
- *Guardianship*
- *Interdiction & Incapacitation*
- *Secret Wills*
- *Declaration and opening of a succession*
- *Inventory*

Book II COCP - Disencumberment of immovable property

The COVJ has the power to issue **edicts** to liberate immovable property from any hypothec, easement, or other burden. This is done by means of an application as follows:

- the application lists the history of the property over the last 10 years
- the application shall include any hypothecary debts and to whom they are owed, or any other burdens and creditors, **on oath**
- the application shall include a certificate from the Public registry confirming any liabilities
- the first edict is posted
- the second edict is posted at the entrance of the Court building
- interested parties may protest the edicts within 2 months
- if no such protest is made, the property is freed from any burden

Book II COCP - Tutors, Curators, Administrators

Any person may request the COVJ to appoint:

- tutors / curators for a minor
- curators for a vacant inheritance
- curators for an absent person
- any other administrator according to law

Persons so appointed may be exempted from continuing such role, or may be temporarily suspended, substituted, or removed.

Book II COCP - Secret Wills

Secret wills are presented by the testator or their notary to the Court Registrar, in the presence of a judge. Receipt thereof is given.

The registrar takes note of the date of presentation of the will, the details of the testator, who presented the will, and a declaration that the paper so presented is in fact the testator's will, and that a judge was in fact present. These notes are signed by the registrar, testator, or notary.

Only the testator or his special attorney may withdraw such secret will.

Book II COCP - Secret Wills

When the testator dies and the will is to be opened, the Court by decree appoints the day, time, and place for the opening and publication of the will, and orders that all interested parties are summoned by application / banns in the Court building and Government Gazette.

The will is opened by the registrar in front of the judge, and then published by the notary who had presented it, or by a notary selected by the applicant.

Secret wills older than 150 years that have never been withdrawn, opened, or published are listed in the Gazette, and the court shall establish a day and time to open these wills in public.

They are then sent to the archivist of the Notarial Acts.

Book II COCP - Declaration of the Opening of a Succession

If unopposed, a succession may be opened by request by means of an application to the COVJ.

On filing, the court then issues banns to be published in the Gazette & a daily newspaper, and at the Court entrance. The banns informs the public that the succession is to be opened, and calls on parties interested to enter their opposition by means of a note within a fixed time.

If unopposed, the court then examines the applicant's claim, and if justified, it declares the succession opened in their favour. It may also call any other person to the inheritance.

Book II COCP - The Benefit of Inventory

An inheritance (testamentary or not) may be refused; accepted; or accepted with the benefit of inventory. The latter is done by means of a note in the COVJ.

The inventory must contain a description of the estate, detailing all:

- wearing apparel & household goods
- gold and silver articles
- jewellery
- money
- movable property & its value (valued by experts)
- debts due to the deceased
- rights of action
- immovable property
- debts / liabilities of the estate

Book II COCP - The Benefit of Inventory

The Court establishes a time for the publication of the inventory by a notary of the applicant's choosing, and all interested parties are summoned to attend (if known, by application; if unknown, by banns & Gazette).

The inventory as published may be challenged by any interested party.

Procedure before the COVJ

S.L. 12.19, COCP

Procedure

- General rule: proceedings before the COVJ may be held behind closed doors (and must be so held in cases determining adoptions). In the latter case even the records of the case shall be secret.
- COVJ gives **decrees**, not judgments, and they cannot be appealed from.
- But a decree may be challenged by bringing an action before the First Hall, Civil Court.
- Actions are brought by means of an application and the judge is empowered to:-
  - order the production of documents
  - order the application to be served on any interested third party, who shall be given time to answer
  - examine the applicant / any other person
  - appoint one or more experts to collect information on the subject-matter
  - appoint judicial assistant/s
  - order the plaintiff to produce reasoned opinions

Procedure

- Where the third party files an opposition to the plaintiff's demand, the court examines that opposition and may choose to refer the parties to the court of contentious jurisdiction - *the COVJ is not contentious in nature.*
- A decree issued by the COVJ shall include in detail the authorisation so given, including where relevant, any time constraints, before whom any acts may be made and published, etc.

Book II COCP - The execution of acts in pursuance of COVJ decrees

Some COVJ decrees require no further action - they are **executive** and must be followed. Others require follow-up acts to execute them - e.g. those decrees authorising some status dependent on a subsequent act.

Emancipation of minors: normally effected by virtue of the very decree, but in some cases the decree may order that it be effected by means of a notarial deed.

Agreements requiring court authorisation: shall be null unless they are made by means of a notarial deed. Any such authorisation is only valid for 6 months from the date of the decree.

Appointing tutors, curators, administrators

The appointment, supervision, and where necessary suspension or revocation of tutors, curators, and administrators is a vital function of the COVJ.

Persons who cannot serve as tutors:

- Minors
- Persons who cannot administer their own property freely / are known as incompetent to do so
- Persons who are / are about to be involved in a lawsuit with the minor
- Undischarged bankrupts
- Persons sentenced to imprisonment for more than 1 year / found guilty of family related offences / fraud
- Persons with a notoriously bad character / untrustworthy / negligent
- Trustees of property for the benefit of the minor
- Judges / magistrates unless they are related by consanguinity

Appointing tutors, curators, administrators

Any person may file an **application** before the COVJ demanding the appointment of a tutor for any reason permissible at law (i.e. for minors, absentees, vacant inheritances, substitution of persons who refuse, are unable to serve that office, or die, or any other administrator role at law).

For minors:

- Regard shall be had to any testamentary disposition in this regard.
- If there are blood relatives that are competent and willing to act as tutors, they shall be given preference.
- Before appointing a tutor, an inventory of the minor's property is made, and the tutor-to-be shall hypothecate their own property (to a fixed sum) to bind themselves to administer that property properly, and may also be asked to give security on that property.

Appointing tutors, curators, administrators

Once an application is accepted and a person is appointed, the Court:

- has the power to oblige the tutor to present an account of their administration on a regular basis (e.g. yearly).
- These accounts are examined by a pool of lawyers / accountants of the court, who report to the court on the accounts as presented.
- may also grant the tutor a moderate remuneration.
- may suspend / remove a tutor if circumstances change and they become unable to hold that office, or if they fail in their role, or on good cause being shown.
- may revoke previous roles / suspensions.

Guardianship

Art. 519A et seq COCP

The COCP establishes a Guardianship Board composed of a judge / magistrate, retired or not, a member appointed by the CRPD, and a member appointed by the Mental Health Commission.

The Board is empowered to decide on applications concerning Guardianship requests under the following procedure:

- an application is filed before the Board, containing a statement of the facts
- the case is heard within 30 days
- the Board may summon any person before it to testify / produce evidence
- the Board may appoint experts to assist it
- the person to be placed under guardianship is also heard

Guardianship

Art. 519A et seq COCP

Where the Board decides that a guardian is to be appointed, then a Guardianship Order is so issued and the Registry of the COVJ is informed.

The Order is to be reviewed at least once every two years.

Where a person submits themselves to be placed under guardianship, the Board may nominate a guardian from a pool of guardians created for this purpose, which shall consist of lawyers ,legal procurators, social workers, and other experts.

Guardians may seek the advice of the Board on any matter concerning the Guardianship Order.

Guardianship

Art. 519A et seq COCP

Where the guardian is authorised to administer monies / properties, they must:

- submit to the Board a list of assets and liabilities within 2 months
- keep a separate account and record of such monies / property
- seek the Board's prior approval for any transfer / imposition of burden on the person's property **on pain of nullity**
- submit to the Board an income and expenditure account confirmed on oath annually and upon termination of the guardianship
- in case of the person's demise, submit a detailed report of the administration of the assets, including any assets and any funeral expenses.

Guardianship

Art. 519A et seq COCP

A guardianship may be revoked if:

- the cause giving rise to its need ceases to exist; or
- there is sufficient reason to revoke it.

The Board is empowered to investigate any allegations of damage, ill-treatment, abuse, or neglect of the person under guardianship by appointing a person to investigate and report within 4 days.

Interdiction and Incapacitation

Art. 520 et seq COCP

A demand for interdiction / incapacitation is made by an application before the COVJ. The application must contain:

- a statement of the facts and an indication of any witnesses; and
- any documents in support of the demand

It may be demanded:

- by the spouse
- by any blood relative
- by any relative by affinity who may be called to supply maintenance to that person
- by the State Advocate

Interdiction and Incapacitation

Art. 520 et seq COCP

The COVJ may summon the person to be interdicted / incapacitated to appear before it or be examined by experts.

If **interdiction** is accepted, a curator is appointed to administer the property of the person. The curator is appointed for a maximum period of 3 years which can be renewed.

If interdiction is deemed excessive, **incapacitation** may be ordered, rendering the person unable to sue or be sued, to borrow any money or receive any capital, to transfer any property, or perform any act other than that of mere administration, without the assistance of a curator.

Interdiction and Incapacitation

Art. 520 et seq COCP

Interdiction / incapacitation takes effect from the day of the decree. Any act performed after that day shall be null, and any act performed before may be annulled.

The decree shall be published in the Gazette and the Archivist of Notarial Acts is also notified. A register of interdicted / incapacitated persons is also maintained online and is accessible to the CRPD, lawyers, notaries, and legal procurators.

Interdiction and Incapacitation

Art. 520 et seq COCP

This element of publicity & record keeping is important as interdiction / incapacitation can directly impact third parties who have made any civil act with the person so interdicted / incapacitated.

Interdiction / incapacitation may be revoked if the cause for it ceases to exist.

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