
Law of Succession

Capacity of the Testator to Make a Will

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This article will shed light on the capacity to make a will under the Maltese Law of Succession. The author shall be delving into the salient principles of the law, along with an understanding of its interpretation by the courts.

The starting point, when discussing the notion of capacity to make a will under the Law of Succession, is that capacity is the rule whilst incapacity is the exception. There is a “*praesumptio iuris tantum*” that every person has the capacity to make a will². The implication is that one can dispose of one’s estate or patrimony in any manner, provided that he or she acts within the limitations which are prescribed by Law³.

The Italian Civil Code⁴ gives somehow quasi-similar disposition; it holds that “*Possono disporre per testamento tutti coloro che non sono dichiarati incapaci dalla legge*”. The French Civil Code⁵, gives a general provision regulating both inter vivos acts as well as for making of a will, where it explains “*Toutes personnes peuvent disposer et recevoir soit par donation entre vifs, soit par testament, excepté celles que la*

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2 Chapter 16 Laws Of Malta - Civil Code - Article 596 (1) *Any person not subject to incapacity under the provisions of this Code, may dispose of, or receive property by will.*

3 These limitations include the stipulation by Law on the testator not to dispose of the reserved portion.

4 Il codice Civile Italiano, Libro Secondo, Della Successione Capo II, Della Capacità di disporre per testamento, Article. 591 *Casi d’incapacità - Possono disporre per testamento tutti coloro che non sono dichiarati incapaci dalla legge. Sono incapaci di testare: (1) coloro che non hanno compiuto la maggiore età; (2) gli interdetti per infermità di mente (414); (3) quelli che, sebbene non interdetti, si provi essere stati, per qualsiasi causa, anche transitoria, incapaci di intendere e di volere nel momento in cui fecero testamento. Nei casi d’incapacità preveduti dal presente articolo il testamento può essere impugnato da chiunque vi ha interesse. L’azione si prescrive nel termine di cinque anni dal giorno in cui è stata data esecuzione alle disposizioni testamentarie (590, 620, 621, 623).*

5 French Civil Code – Article 901 –Dernier texte modificateur: Ordonnance no 2004-164 du 20 Feb. 2004

*loi en déclare incapables*⁶ that is all persons may dispose and receive, either by inter vivos gift, or by will, except those whom legislation declares to be incapable.

The Maltese Honourable Courts have also confirmed this *praesumptio iuris tantum*, and this very issue, was delved into in *Schembri et. vs. Galea et.*⁷ where the court held “[.....] *l’uomo nello stato suo normale si presume ragionevole e sano di mente, fino a concludente prova in contrario. La prova contraria incombe all’opponente lo stato di sanita*”. This line of thought was reconfirmed in *Vassallo et. vs. Sammut et.*⁸, where the court made reference to *Formosa vs. Axiaq*⁹, held “[.....] *kapacita` l-wiehed jaghmel testment hija rregola u l-inkapacita` hija l-eccezzjoni. Ghalhekk il-prezunzjoni “juris tantum” hija illi min jaghmel testament huwa kapaci biex jiddisponi mill – beni tieghu, salva l-prova kuntrarja, li trid issir minn min jagixxi ghall- impunjazzjoni tat-testment.*”

Therefore the parameters with regards to capacity of the testator, which are set under the general principals of the Law of Obligations can be argued to apply *mutatis mutandis* to the Law of Succession. Nonetheless one can opine that these parameters are applied by our Civil Code in a less ridged manner. One should start by making reference to general principal under Law of Obligations that ¹⁰ “*All persons not being under a legal disability are capable of contracting*”. Furthermore the Law continues that “*The following persons are incapable of contracting, in the cases specified by law (a) minors [.....]*¹¹”. Article 188¹² states that the age of majority to be fixed at the completion of the eighteenth year of age. A major is capable of performing all the acts of civil life, including the assumption

6 *ibid*

7 *Vide Paolo Schembri et vs. Maria Galea et*, First Hall Civil Court, 16th October, 1883.

8 *Vide Joseph Vassallo et. vs. Avv. Dr. Victor R. Sammut Et. Ne.*, Court of Appeal, 24th April 1950.

9 *Vide Guseppe Formosa et vs. Guseppe Axiaq et.*, Court of Appeal, 22nd June 1938

10 Chapter 16 Laws Of Malta - Civil Code.

11 *Ibid*.

12 Chapter 16 Laws Of Malta - Civil Code - Article 188 (1) *Majority is fixed at the completion of the eighteenth year of age.*

of obligation and liabilities, and consequently, such shall also include testamentary dispositions. The Civil Code¹³ provides that “*Those who have not completed the eighteenth year of their age cannot make by will [.....].*” Therefore, prima facie the legal implication is that no wills can be made if the person has not attained the age of majority prescribe by Law.

However the Law of Succession seems to soften this age requirement¹⁴. This derives from the wording of the Law itself, where in article 597¹⁵ which states that “*those who have not completed the sixteenth year of their age*” are incapable of making a will.

A less rigid óptica, nonetheless, is merely confirmed by the Law in the same provision namely Article 598 (1)¹⁶, which explains that in certain limited situations a person under the age of majority as stipulated under Article 188, can provide for one`s succession by means of a will, the dispositions of which shall not be “[.....] *other than remuneratory dispositions*”¹⁷. Sub-article (2) for Article 598¹⁸ leaves the discretion in the hand of the Courts to assess whether the aforesaid remuneratory dispositions exceed a reasonable amount, regards being had to the reasons behind the testator`s intention. In cases where the Courts hold that it does exceed the reasonable amount it may order the reduction thereof. Hence, a will can be made by a minor who has completed the sixteenth

13 Chapter 16 Laws Of Malta - Civil Code - Article 598. (1) *Those who have not completed the eighteenth year of their age cannot make by will other than remuneratory dispositions.*

14 Dr Paul Debono, ‘The Law of Succession In Malta’ Id-Dritt Volume XIX (2006)

15 Chapter 16 Laws Of Malta - Civil Code – Article 579 *The following persons are incapable of making wills: (a) those who have not completed the sixteenth year of their age; (b) those, who, even if not interdicted, are not capable of understanding and volition, or who, because of some defect or injury, are incapable even through interpreters of expressing their will: Provided that a will can only be made through an interpreter if it is a public will and the notary receiving the will is satisfied after giving an oath to the interpreter that such interpreter can interpret the wishes of the testator correctly; (c) those who are interdicted on the ground of insanity or of mental disorder; (d) those who, not being interdicted, are persons with a mental disorder or other condition, which renders them incapable of managing their own affairs at the time of the will; (e) those who are interdicted on the ground of prodigality unless they have been authorized to dispose of their property by the court which had ordered their interdiction: Provided that a person interdicted on the ground of prodigality may, even without the authority of the court, revoke any will made by him prior to his interdiction.*

16 Chapter 16 Laws Of Malta - Civil Code – Article 578 (1) *Those who have not completed the eighteenth year of their age cannot make by will other than remuneratory dispositions*

17 *ibid*

18 Chapter 16 Laws Of Malta - Civil Code – Article 578 (2) *Nevertheless, where any such disposition, regard being had to the means of the testator and to the services in reward of which it is made, is found to exceed a reasonable amount, it may be reduced by the court to such amount.*

year of age, which will, shall merely be of a remuneratory value.

Article 597¹⁹ gives a list when a person is considered as not having the capacity to make a will and thus incapable to dispose of their patrimony. This article deals with persons who are either interdicted, or who not interdicted, are not capable of understanding and volition.²⁰

Another ground of incapacity to make a will is insanity found in sub-section (c) of Article 597²¹ which explains that persons who are interdicted on the ground of insanity are also incapable of making wills. In such a situation, the person who would have been subject to a civil interdiction²² has no civil rights, that is, the person cannot enter into any obligation, thereby also includes the setting-up of a will. If the person made a will before the decree of interdiction was delivered, that testamentary declaration²³ shall be valid.

In *Dingli noe vs. Mifsud Bonnici*,²⁴ the court confirmed that *“L-effetti tal-interdizzjoni jibdew mill-gurnata tad-digriet li jordna l-interdizzjoni anki ghat-terzi indipendentement mix-xjenza jew injoranza taghhom”*. Nevertheless, if the will is made after the decree of interdiction, even if the notary public was not informed of such interdiction, the will is invalid. In *Mallia et vs. Mallia et*,²⁵ *“[.....] il-ligi hi tassativa f’dan il-kaz ta’ inkapacita legali u tipprovdi ghal nulita assoluta mhux relattiva. Minn dakinhar tad-digriet ‘l quddiem l-atti li jaghmel l-interdett huma nulli.”*

In the *Mallia* case supra, the court did not even enter into the intrinsic merits of the mental state of the testatrix. In this case, the decree of interdiction was

19 Chapter 16 Laws Of Malta (n15)

20 ibid

21 ibid

22 Chapter 12 Laws Of Malta – Code of Organisational and Civil Procedure - Article 525(1) *Interdiction or incapacitation shall take effect from the day of the relative decree; and any act performed by the person interdicted or incapacitated, subsequently to such decree, or even subsequently to the appointment of the temporary curator, shall be null.*

23 There are two kind of wills, they may be either public or they are secret wills. A public will must be received by a notary public in the presence of two witnesses, furthermore it is also to be enrolled in the Public Registry. On the other hand the testator may also choose to draw up a will himself, this is what is called a secret will. The latter is deposited in the Court Registry (Court of Voluntary Jurisdiction).

24 Vide *Benedict Hadrian Dingli noe vs. Joseph Mifsud Bonnici*, First Hall Civil Court - 21st May 1953

25 Vide *Mallia Rosario K/a Louis Et Vs. Mallia John Et*, First Hall Civil Court – 2nd May 2011

pronounced eight days before the testatrix made the will and this brought about the absolute nullity of the will, ergo quod nullum est, nullum producit effectum.

In a utopian ideal legal environment, all persons suffering from mental infirmity will be interdicted automatically upon such occurrence, nonetheless a person suffering from mental infirmity can deceive the general public considering that there are no visible *prima facie*, signs or other indicators to the naked eye. In fact, Article 597(d)²⁶ provides for a situation where “[.....] those who, not being interdicted, are persons with a mental disorder or other condition, which renders them incapable of managing their own affairs at the time of the will.” This incapacity is also found in the Italian counterpart to our Civil Code. The Italian Civil Code²⁷ explains “*quelli che, sebbene non interdetti, si provi essere stati, per qualsiasi causa, anche transitoria, incapaci di intendere e di volere nel momento in cui fecero testamento.*” Perhaps, it can be argued that this provision in the Italian Code might have been influential to the Maltese Civil Code drafter, as one can opine that it is merely a mirror image of our provisions found in the Civil Code²⁸. Article 597 provides for two situations which contrast with each other; subsection 597(c) and 597(d). The latter reveals that the legislator is stressing on the state of mind of the testator at the time of the will, whilst in the former the predicament is on whether the testator was interdicted or not. It is noteworthy that the legislator used the words “*incapable of managing their own affairs at the time of the will.*”²⁹

In the landmark case of *Vassallo et. vs. Sammut et.*³⁰ the court amplified that “*Li*

26 Chapter 16 Laws Of Malta (n15)

27 Il codice Civile Italiano, Libro Secondo, Della Successione Capo II, Della Capacita` di disporre per testament, Article. 591 *Casi d'incapacità - Possono disporre per testamento tutti coloro che non sono dichiarati incapaci dalla legge. Sono incapaci di testare: (1) coloro che non hanno compiuto la maggiore età; (2) gli interdetti per infermità di mente (414); (3) quelli che, sebbene non interdetti, si provi essere stati, per qualsiasi causa, anche transitoria, incapaci di intendere e di volere nel momento in cui fecero testamento. Nei casi d'incapacità preveduti dal presente articolo il testamento può essere impugnato da chiunque vi ha interesse. L'azione si prescrive nel termine di cinque anni dal giorno in cui è stata data esecuzione alle disposizioni testamentarie (590, 620, 621, 623).*

28 Chapter 16 Laws Of Malta (n15)

29 *ibid*

30 *Vide Joseph Vassallo et. vs. Avv. Dr. Victor R. Sammut Et. Ne.*, Court of Appeal, 24th April 1950.

l-Qrati taghna dejjem kienu renitenti li jammettu d-domandi biex jigi annullat testament minhabba insanita mentali tat-testatur, jekk din l-inkapacita ma tkunx irrizultat b'mod cert minn fatti precizi u univoci, u ma jkunx gie pruvat li kienet tezisti fil-mument li t-testatur kien qieghed jaghmel it-testment." Therefore, a contrario sensu this means that if the testator is lucid at the time of the will the testamentary disposition will be considered valid.

In *Farrugia et. vs. Farrugia et.*³¹ that court, quoting Laurent, held that for a person to dispose of his estate by will there is no need "[.....] *una mente perfettamente e rigorosamente sana, ma basta quel limitato uso della ragione che permette la coscienza di cio` che si fa... basta che chi dispone per testamento sia fornito di sufficient percezione, raziocinio o memoria ondesia capace di determinazione e di volonta` ragionata, e sappia che cosa voglia eleggere ed operare circa le persone e le cose.*"³² The same conclusion was considered in *Harmsworth et. vs. Bezzina et.*³³ where the court held that "[.....] *biex it-testatur ikun kapaci jaghmel testment ma hemmx bzonn li jkun perfettamente u rigorozament san minn mohhu, imma huwa bizzejjed li jkollu l-uzu tar-raguni fi grad tali li jippermettilu jkun jaf x'inhu jaghmel."*

Furthermore, case-law also implies that the testator must be one who is insane, and not merely suffering from some nervous breakdown or self-conscious behaviour. In *Danastas vs. Danastas*³⁴ the court held "[.....] *i nostri tribunali, basandosi sulla dottrina u la giurisprudenza in materia, sono stati sempre renitenti a pronunziare la nullita` di un testamento per insanita mentale del testatore, ammenocche tale incapacita` consti positivamente da fatti precisi e univoci e non si verificchi al momento in cui egli dettasse la sua ultima volonta`."*

Moreover, on several occasions, the Court also held that he who alleges mental

31 Vide *Farrugia Pawlu et vs. Farrugia Carmelo et*, First Hall Civil Court - 5th October 2004.

32 Laurant: *Prineipii di Diritto Civile*; Vol. XI. para 139 pg.144

33 Vide *Joseph Harmsworth et. vs. Geatana Bezzina et.*, First Hall Civil Court – 16th December 2002.

34 Vide *Francesco Danastas vs. Salvatore Danastas*, Court of Appeal - 28th May, 1926.

insanity must prove such allegation “*onus probanti incumbit ei qui dicit non ei qui negat.*”³⁵”

Therefore, the courts are confirming that capacity is a *juris tantum* presumption and that the burden of proof does not shift on the defendant, rather he who attacks the will on the grounds of incapacity is to provide the proof which sustain his or her plea, by found evidence to this effect. Such a proof can be therefore rigorous; however the court is not bound in any way by the definition of mental insanity given by physicians³⁶. In the case of *Xuereb vs. Refalo et.*³⁷ the court held “*Kif lanqas ma tista’ tingibed ebda konkluzjoni mill-fatt illi t-testment in kwistjoni tad-decujus ma kienx akkumpanjat minn ċertifikat mediku, bħal ma donnha qed tippretendi l-attriċi. Huwa minnu illi l-eżistenza ta’ ċertifikat bħala dan jista’ jsaħħaħ il-prova favur il-kapacità` mentali tat-testatur, imma n-nuqqas tiegħu ma jfissirx illi ma kienx hemm dik il-kapacità.*” Nonetheless, the court does give considerable weighting to the disposition of medical experts, as confirmed in *Galea pro. et. noe. vs. Camilleri*³⁸ where the court held that “ [.....] *Għandhom ukoll rilevanza qawwija d-depożizzjonijiet ta’ nies professjonali bħal tabib kuranti tat-testatrici [.....] li jikkonfezzjona t-testment dwar l-istat u l-komportament tat-testatrici fiż-żmien rilevanti*”

Furthermore, the court generally also delves into the reasonableness or soundness of the testamentary disposition in determining the mental sanity according to contents of the will. The latter can be argued, considering that the court in such situation will be trying to enter into the shoes or rather the intention, of the testator to understand if there was the mental legally capacity prescribed.

35 Vide *Anthony Camilleri vs. Maurice Cauchi et*, Court of appeal inf. – 22nd November 2002

36 Vide *Lorenza Bonnici noe. vs. Maria Dolores Mifsud pro et noe*, First Hall Civil Court - 26th September 2013.

37 Vide *Victoria Xuereb vs. Joseph Refalo et.* Court of Appeal - 2nd March 2010

38 Vide *Joseph Galea pro et noe. vs. Maria Camilleri*, Court of Appeal - 1st July 2002,

In the case of *Vassallo et. vs. Sammut et.*³⁹ the court held that *“Illi bies tigi stabbilita l- insenita mentali tat-testatur hemm bzonn jirrizultaw indizzji gravi,”*. Furthermore, the court in this case is, once again, evidently in line with the test of *“ir-ragonevolezza tad-disposizzjoni.”* In the case of *Galea pro. et. noe. vs. Camilleri*⁴⁰ the court held that *“Fattur determinanti sabiex tigi stabilita s-sanita` mentali hija r-ragonevolezza tad-dispozizzjonijiet kontenuti fit-testment.”*

Interdiction on the ground of prodigality is another ground for incapacity to make a will. The Civil Code⁴¹ explains that the court shall have the discretion to allow such person who was so interdicted to dispose of his or her estate. The reason behind this discretion is merely because the person interdicted on such grounds does not have the aptitude to make a will, because the interdiction is merely made to protect the patrimony of the heirs and not because he or she is incapable of managing their own affairs. Professor Caruana Galizia opines that this is not a disability in the sense of mental incapacity, nor it is a disability, but rather a restriction on the capability to bequeath one`s own property.⁴²

Prima facie, one can hold that these are the restrictions dealt with capacity. Nonetheless, Article 611⁴³ establishes yet another ground. It explains that *“The members of monastic orders or of religious corporations of regulars cannot, after taking the vows in the religious order or corporation, dispose by will.”* Thus, it can be argued that this disability is not absolute, but merely takes place upon one who takes such religious vows or joins a religious corporation. This incapacity subsists

39 Vide *Joseph Vassallo et. vs. Avv. Dr. Victor R. Sammut Et. Ne.*, Court of Appeal, 24th April 1950.

40 Vide *Joseph Galea pro et noe. vs. Maria Camilleri*, Court of Appeal - 1st July 2002,

41 Chapter 16 Laws Of Malta (n15)

42 Law of Succession by Professor Dr Victor Caruana Galizia

43 Chapter 16 Laws Of Malta - Civil Code – Article 611 (1) *Where the evidence of any person as provided in article 606 is required before the Court of Magistrates (Malta), or before the Court of Magistrates (Gozo) in its inferior jurisdiction, the witness shall be examined by the magistrate himself, but in the latter case the magistrate shall reduce the evidence to writing and shall cause it to be signed or marked by the witness. (2) Whenever the Magistrate of the Court of Magistrates (Gozo) is temporarily absent from Gozo with the permission of the Minister responsible for justice, or is, through a lawful impediment, precluded from performing his duties, the registrar of the said court may be authorized by the Attorney General to take the evidence of any person as provided in article 606 and to administer the necessary oath. (3) Nevertheless, the provisions of article 606(3) shall be applicable to any of the courts mentioned in sub-article (1) where the person to be examined is not in the Island or Islands where the court, before which the evidence is required, sits.*

until that person divests himself or herself from those vows.

To conclude one should make reference to Article 599⁴⁴ which expounds and provides that *“any will made by a person subject to incapacity is null, even though the incapacity of the testator may have ceased before his death.”* The drafter of the Civil Code clearly keeps persevering the concept illustrated, namely, that capacity or incapacity is to be considered at the time of the making of the will. Thus it is the author’s opinion that the Civil Code provides the cogs to keep the workings going and the tools to our Courts in deciphering whether a will can be subject to an action of nullity on the grounds of incapacity to make a will.

44 Chapter 16 Laws Of Malta - Civil Code – Article 599 *Any will made by a person subject to incapacity is null, even though the incapacity of the testator may have ceased before his death.*