

ACT NO. 9 OF 2006

Legal Capacity of Married Persons Act 2006

An Act to provide for the removal of minority status of married women and to provide for incidental matters.

Enacted by the Parliament of Lesotho

Part I – Preliminary

Short title and commencement

1. This Act may be cited as the Legal Capacity of Married Persons Act 2006 and shall come into operation on the date of its publication in the Gazette.

Interpretation

2. In this Act, unless the context otherwise requires –

“bank” means any financial institution whose functions include receiving deposits, honouring instruments drawn against them, and paying interest on them as permitted by law;

“child” means any person under the age of 18 years;

“court” ascribes the meaning given to it under section 24(1) of the Constitution;

“joint estate” means the estate of a husband and wife married in community of property or by customary law;

“marriage” means any marriage solemnized or recognised under the Marriage Act 1974¹;

“parents” includes the adoptive parents of a child, and the parents of a child who are not married to each other.

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Repeal of marital power

3. (1) Subject to the administration of a joint other marriage rules in power over the person ar

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Part II – Repeal of Marital Power

Repeal of marital power

3. (1) Subject to the provisions of this Act with regard to the administration of a joint estate, the common law, customary law and any other marriage rules in terms of which a husband acquires the marital power over the person and property of his wife are repealed.

(2) The marital power which a husband has over the person and property of his wife before the commencement of this Act is repealed.

(3) The following restrictions which the marital power places on the legal capacity of a wife are removed:

- (a) entering into a contract;
- (b) suing or being sued;
- (c) registering immovable property in her name;
- (d) acting as an executrix of a deceased's estate;
- (e) acting as a trustee of an estate;
- (f) acting as a director of a company;
- (g) binding herself as surety; and
- (h) performing any other act which was restricted by any law due to the marital power before the commencement of this Act.

(4) The repeal of the marital power under subsection (2) shall not affect the legal consequences of any act or omission made, or fact which existed before the commencement of this Act.

Part III – Marriage in Community of Property

Marriage in community of property

4. The provisions of this Part shall apply to a marriage in community of property, irrespective of the date on which the marriage was entered into.

Equal powers of spouses

5. Spouses married in community of property have equal capacity to do the following in consultation with one another –

- (a) dispose of the assets of the joint estate;
- (b) contract debts for which the joint estate is liable; and
- (c) administer the joint estate.

Spouse's juristic acts

6. Subject to section 7, a spouse married in community of property may perform any act which arises by virtue of operation of law with regard to the joint estate without the consent of the other spouse.

Acts requiring other spouse's consent

7. (1) Notwithstanding subsections (4) and (5) and subject to sections 11 and 12, a spouse married in community of property shall not, without the consent of the other spouse –

- (a) alienate, mortgage, burden with a servitude or confer other real right in any immovable property forming part of the joint estate;
- (b) enter into any contract for the alienation, mortgaging, burdening with servitude or conferring of any other real right in immovable property forming part of the joint estate;

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- (c) alienate, cede, or pledge any shares, stocks, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;
- (d) alienate or pledge any jewellery, coins, stamps, painting, livestock, or any other assets forming part of the joint estate and held mainly as investments;
- (e) alienate, pledge, or otherwise burden any furniture or other effects of the common household forming part of the joint estate;
- (f) as a credit receiver, enter into a credit agreement which binds the joint estate;
- (g) as purchaser, enter into a hire purchase agreement as defined in the Hire Purchase Act 1974² which binds the joint estate;
- (h) bind himself or herself as surety;
- (i) receive any money due or accruing to the other spouse or the joint estate by way of –
 - (i) remuneration, bonus, allowances, royalty, pension or gratuity by virtue of the other spouse's employment, profession, business, or services rendered by him or her;
 - (ii) compensation for loss of any income contemplated in subparagraph (i);
 - (iii) inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse;
 - (iv) income derived from the separate property of the other spouse;

- (v) dividends or interest on or the proceeds of shares or investments in the name of the other spouse;
- (vi) the proceeds of any insurance policy or annuity in favour of the other spouse; or
- (j) donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not contrary to any of the provisions of paragraphs (a), (b), (c), (d), and (e).

(2) The consent required under subsection (1) may be given orally or in writing.

(3) Notwithstanding subsection (1), the consent required for -

- (a) any act which entails the registration, execution or attestation of a deed, or other document;
- (b) an act contemplated under subsection (1) (h),

shall be given in writing.

(4) The consent required in subsection (1) (b) to (j), except where it is required under subsection (3) (a), may be given by way of ratification within a reasonable time after the performance of the act.

(5) Notwithstanding subsection (1) (c), a spouse married in community of property may, without the consent of the other spouse -

- (a) sell listed securities on a stock exchange, cede or pledge listed securities in order to buy other listed securities; or
- (b) alienate, cede, or pledge -

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- (i) a deposit held in his or her name in an insurance company or bank; or
- (ii) insurance company shares or shares in any other company registered in his or her name.

(6) A spouse married in community of property may, in the ordinary course of his or her employment, profession or business, perform any of the acts referred to in subsection (1) (b), (c), (f) and (g) without the consent of the other spouse.

(7) In determining whether a donation or alienation contemplated in subsection (1) (j) unreasonably prejudices the interest of the other spouse in the joint estate, the court shall have regard to –

- (a) the value of the property donated or alienated;
- (b) the reason for the donation or alienation;
- (c) the financial and social standing of the spouse;
- (d) their standard of living; and
- (e) any other factor which in the opinion of the court is reasonable to take into account.

Consequences of act performed without required consent

8. (1) If a spouse married in community of property enters into a contract with another person without the consent required under section 7, or without leave granted by court under section 11, or contrary to an order of court under section 12, and –

- (a) that other person does not know or could not have reasonably known that the contract is entered into without such consent or leave or in contravention of the court order, the contract shall be deemed to have been entered into with the required consent or leave or while the power of the concerned spouse has not been suspended;

- (b) that spouse knows or ought reasonably to have known that he or she will not obtain such consent or leave or that the power concerned has been suspended,

and the joint estate suffers a loss as a result of that contract, an adjustment shall be effected in favour of the other spouse –

- (i) upon division of the joint estate; or
(ii) upon demand of the other spouse at any time during the subsistence of the marriage.

(2) In determining whether or not a joint estate has suffered any loss as a result of the alienation of any property under subsection (1) (b), the court shall have regard to the economic value of the property and any sentimental replacement value which, at the time of alienation of that property, that property had to the spouse without whose consent the property was alienated.

(3) Where the amount of loss determined under subsection (1)(b) consists of or includes an amount representing –

- (a) the sentimental replacement value of any property as contemplated in subsection (2); or
(b) the value of any asset being a personal effect of the spouse without whose consent the asset was alienated,

the amount representing that value shall upon the making of an adjustment be allocated in full for the benefit of the spouse without whose consent the property was alienated, and no deduction shall be allowed in respect of the other spouse by virtue of his or her interest in the joint estate.

(4) Where pursuant to a demand of a spouse under subsection (1) (b) (ii) for adjustment, an amount or asset payable to the spouse in settlement of the adjustment is recovered from the separate property, of the other spouse, if any, and if the other spouse has no separate property from the joint estate, the amount or asset shall be allocated to the spouse to

whom the payment was made.

(5) Any amount of the joint estate representing the subsistence of the marriage of the spouse under subsection (1) (b), shall be

(6) Upon settlement of the joint estate and proceeds under subsection (1) (b) shall be adjusted as if the adjustment were made at the time of the adjustment.

(7) For the purposes of any civil proceedings that are required under section 10, it shall be presumed, unless the contrary is shown, that the spouse would not obtain the property if the adjustment were made at the time of the adjustment.

Bequest of property

9. (1) Where the testator is survived by both spouses, the spouses may bequeath the property of the testator as follows:

(2) Where the testator is survived by one spouse, the court shall, in the absence of any contrary intention, direct that the property of the testator be divided equally between the surviving spouse and the beneficiaries of the testator's will, subject to the rights of any of the beneficiaries of the will.

Litigation by or against a spouse

10. (1) A spouse who is a party to any legal proceedings in which the joint estate is a party, shall be entitled to be represented in those proceedings by a solicitor appointed by the court, if the spouse is unable to do so.

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whom the payment was made, upon a subsequent division of the joint estate.

(5) Any amount paid or asset transferred to a spouse during subsistence of the marriage in settlement of an adjustment demanded by the spouse under subsection (1)(b)(ii) and any proceeds derived from the amount or asset, shall be the separate property of the spouse.

(6) Upon sequestration of the joint estate the separate property and proceeds under subsection (5) shall vest in the trustee of the insolvent estate as if the adjustment has not been effected.

(7) For the purpose of subsection (1) (b), if it is proved in any civil proceedings that a spouse entered into a contract without the consent required under section 8 (1), or leave granted under section 12, it shall be presumed, unless the contrary is proved, that the spouse knew that he or she would not obtain the consent or leave.

Bequest of property

9. (1) Where the spouses are married in community of property, the spouses may bequeath the property in the joint estate by a joint will.

(2) Where the spouses disagree in bequeathing the property in the joint estate, the court shall decide how the property is to be bequeathed to the beneficiaries of the joint estate if such bequest is not in conflict with the rights of any of the spouses in respect of the property.

Litigation by or against spouses

10. (1) A spouse married in community of property shall not without the consent of the other spouse institute legal proceedings against any person or defend legal proceedings instituted by any person, unless the legal proceedings are –

- (a) for the recovery of damages, other than damages for patrimonial loss, by reason of the commission of a delict against his or her person;
- (b) in respect of a matter or property connected with his or her employment, profession, or business.

(2) A party to legal proceedings instituted or defended by a spouse shall not challenge the validity of the proceedings on the ground of want of consent required under subsection (1).

(3) If costs are awarded against a spouse in legal proceedings instituted or defended by the spouse without the consent required under subsection (1), the court may, with due regard to the interest of the other spouse in the joint estate and the reason for the want of consent, order that the costs be recovered from the separate property, if any, of the spouse who is a party to the legal proceedings and, if the costs cannot be recovered from the separate property, from the joint estate.

(4) Where the costs under subsection (3) are paid from the joint estate, the court may order that upon division of the joint estate an adjustment be made in favour of the spouse whose consent ought to have been required.

(5) An application for the surrender of a joint estate shall be made by both spouses.

(6) An application for the sequestration of a joint estate shall be made against both spouses but no application for the sequestration of the estate of a debtor shall be dismissed on the ground that the debtor's estate is a joint estate if –

- (a) the applicant satisfies the court that reasonable steps were taken by the applicant;
- (b) the applicant was unable to establish whether the debtor is married in community of property or find the name and address of the spouse of the debtor.

(7) Where a debt is recoverable from a joint estate –

- (a) a spouse who incurred the debt or both spouses may be sued jointly for the debt; and
- (b) the debt has been incurred for necessities for the joint household, the spouses may be sued jointly or severally for the debt.

Power of court to disp

11. If a spouse married in community of property is required under section 11 to give the other spouse leave to sue if the court is satisfied there is good reason to

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12. A court may, on application, suspend for a definite period under this Part, in general or specify in its order.

Part IV – Domicile of Married Persons

Domicile of married person

13. Domicile of a married person shall be determined by the same factors as applied to the domicile of choice of a single person entered into.

Domicile of minor child

14. (1) The domicile of a minor child at the commencement of the proceedings shall be the domicile of the parent most closely connected and

(2) If, in the proceedings, it is shown that one of them, it shall be the domicile of the child's domicile is with

Power of court to dispense with spouse's consent

11. If a spouse married in community of property withholds the consent required under section 7 or 10, or if that consent cannot for any other reason be obtained, a court may, on the application of the other spouse, give the other spouse leave to perform the act without the required consent if the court is satisfied that withholding of consent is unreasonable or there is good reason to dispense with the consent.

Power of court to suspend powers of spouse

12. A court may, on the application of a spouse, if it is satisfied that it is essential for the protection of the interest of the spouse in the joint estate, suspend for a definite period any power that the other spouse may exercise under this Part, in general or in relation to a particular act, as the court may specify in its order.

Part IV – Domicile of Married Women and Domicile and Guardianship of Minor Children

Domicile of married women

13. Domicile of a married woman shall be that of her husband, but where circumstances warrant it shall be ascertained by reference to the same factors as applied in the case of any other person capable of acquiring domicile of choice irrespective of the date on which the marriage was entered into.

Domicile of minor children

14. (1) The domicile of a child who is born before or after the commencement of this Act shall be the place at which that child is most closely connected and where his or her interests are safeguarded.

(2) If, in the normal course of events, a child who is born before or after the commencement of this Act resides with both parents or with one of them, it shall be presumed, unless the contrary is proved, that the child's domicile is where the child resides.

Guardianship of minor children

15. (1) Notwithstanding anything to the contrary in any law, but subject to any order of a court with regard to sole guardianship of a minor child or to any right, power, or duty which any other person has or does not have in respect of a minor child, the parents shall have equal guardianship over a minor child of their marriage, including an adopted child.

(2) The guardianship referred to under subsection (1) shall, subject to subsection (3), with respect to rights, powers and duties be equal to the guardianship which a guardian had under the common law or customary law in respect of his or her minor child immediately before the commencement of this Act.

(3) Subject to subsection (4), where the parents have guardianship of a minor child, any of the parents is competent, unless there is an order of a court to the contrary, to exercise independently and without the necessity of the consent of the other parent any duty arising from such guardianship including the application for the inclusion of the name of the minor child in a passport issued or to be issued to any of the parents.

(4) Subject to section 15(1), the consent of both parents shall be necessary in respect of –

- (a) the contracting of a marriage by the minor child;
- (b) the adoption of the minor child;
- (c) the removal of the minor child from Lesotho by any of the parents or any other person; and
- (d) the alienation or encumbrance of immovable property or any right to immovable property vesting in the minor child,

unless the court in the best interests of the minor child orders otherwise.

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Part V – Marriage Out of Community of Property

Liability of spouses married out of community of property

16. (1) A spouse married out of community of property before or after the commencement of this Act is liable to contribute to necessaries for the joint household proportionally according to his or her financial means, unless the parties agree otherwise.

(2) Spouses married out of community of property are jointly and severally liable to third parties for debts incurred by any of the spouses in respect of necessaries for the joint household.

(3) A spouse married out of community of property has a right of recourse against the other spouse in so far as the spouse has contributed more in respect of necessaries for the joint household than for which the spouse is liable under subsection (2).

Part VI - Amendment of Certain Laws

Amendment of Administration of Estates Proclamation

17. The Administration of Estates Proclamation, 1935³ is amended by –

- (a) deleting in section 71 paragraphs (a), (b), and (c) and substituting the following –

“71. It shall not be lawful for any person except –

- (a) the parents of a minor;
- (b) a surviving parent of a minor, where the other parents is dead;
- (c) a parent of a minor who has not abandoned the minor;

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(d) a parent of a minor to whom custody of the minor has been given by an order of court,”; (i)

(b) deleting sections 31 (3) and 83(2). (ii)

Amendment of Deeds Registry Act

18. The Deeds Registry Act, 1967⁴ is amended in section 14 by -- (iii)

(a) deleting subsections (1), (2), and (3) and substituting the following - (iv)

“Special provisions relating to women”

14. (1) All deeds executed or attested by the registrar, or a notary public and required to be registered in the deeds registry, shall disclose the full name and status of the person, whether unmarried, married, widowed or divorced. (d) delet
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(2) Where a person is married, the full name of the other spouse shall be disclosed, and it shall be stated whether the marriage was contracted in or out of community of property.

(3) Where the marriage is governed by the law of any other country it shall be stated that the marriage is governed by the law of that country.”;

(b) deleting in subsection (4) “Subject to the provisions of subsection (6), if” and inserting “If” at the beginning of the subsection; (a) wher court minc contr the d

(c) deleting, in subsection (5) - (b) wher of th requi

Amendment of Marriage

19. The Marriage Act, section 25 (2) and substitut

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- (i) “Subject to the provisions of subsection (6),
when” in the opening words and inserting
“When” at the beginning of the subsection;
- (ii) “woman” wherever it appears, and
substituting “person”;
- (iii) “(assisted where necessary by her husband)”
in the closing paragraph;
- (iv) “his satisfaction of the change in her status”
and substituting “the registrar’s satisfaction
of the change in the persons’ status”;

(d) deleting subsection (6) and substituting –

“(6) The registrar shall refuse, except under an
order of court, to attest, execute or register all deeds
and documents in respect of immovable
property in favour of any spouse if such
registration is in conflict with the rights of
others in respect of that property.”

Amendment of Marriage Act

19. The Marriage Act, 1974 is amended by deleting the *proviso* in
section 25 (2) and substituting the following –

“Provided that –

- (a) where one of the parents of a minor disagrees, the
court shall, having regard to the best interests of the
minor, decide whether or not the minor is capable of
contracting a valid marriage without the consent of
the disagreeing parent;
- (b) where a minor child has a single parent, the consent
of the parent or other lawful guardian only shall be
required;

the person of the minor, the consent shall be given by both parents:

Provided further that, where both parents disagree the court shall, having regard to the best interests of the minor, decide whether or not the minor is capable of contracting a valid marriage without their consent.”.

NOTE

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1. Act No.10 of 1974
 2. Act No.27 of 1974
 3. Proclamation No.19 of 1935
 4. Act No.12 of 1967