

Consent on behalf of a minor to alienation or encumbrance of immovable property

Section 80 of the *Administration of Estates Act 66 of 1965* provides:

“

80. Restriction on alienation or mortgage of immovably property by natural guardian, tutor or curator.-

- (1) No natural guardian shall alienate or mortgage any immovably property belonging to his minor child, and no tutor or curator shall alienate or mortgage any immovable property which he has been appointed to administer, unless he is authorized thereto by the Court or by the Master under this section or, in the case of a tutor or curator, by any will or written instrument by which he has been nominated.
- (2) The Master may at any time authorize -
 - (a) any alienation of immovable property belonging to a minor or to a person for the administration of whose property a tutor or curator has been appointed, if the value of the particular property to be alienated does not exceed the amount determined by the Minister from time to time by notice in the *Gazette* and the alienation would be in the interest of the minor or such person, as the case may be; and
 - (b) any mortgage of such immovably property to an amount not exceeding in the case of any one such minor or person, the amount determined by the Minister from time to time by notice in the *Gazette*, if the mortgage is necessary for the preservation or improvement of the property or for the maintenance, education or other benefit of such minor or person, as the case may be.”

The amount is determined by Government Notice R.1318 in Government Gazette 25456 of 19th September 2003 as **R100,000.00**.

In terms of Section 1, Court means the **High Court** having jurisdiction of any judge thereof.

Now, along comes the Children's Act, in particular Section 18.

The relevant parts of Section 18 of the *Childrens' Act 38 of 2005* which came into operation on 01st July 2007 read as follows:

“

CHAPTER 3

PARENTAL RESPONSIBILITIES AND RIGHTS
(ss 18-41)

Part 1

Acquisition and loss of parental responsibilities and rights

18. **Parental responsibilities and rights**

(1) . .

(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must -

(a) administer and safeguard the child's property and property interests;

(b) assist or represent the child in administrative, contractual and any other legal matters; or

(c) give or refuse any consent required by law in respect of the child, including -

..
(v) **consent to the alienation or encumbrance of any immovable property of the child.**

(4) . .

(5) Unless a competent court order otherwise, the consent of **all** the persons that have guardianship of a child is necessary in respect of matters set out in subsection 3(c).

[My underlining.]

Note that **all guardians** must consent to the alienation of a minor's property or the encumbrance (i.e. the registration of a mortgage bond or other encumbrance such as a servitude) by the minor over the minor's property.

Section 313 of the Children's Act provides that the laws referred in **Schedule 4** of the Act are amended as indicated in the said Schedule 4. Schedule 4 sets out that legislation that is repealed, for example, the entire Children's Act 33 of 1960 is repealed.

Nothing is mentioned in Schedule 4 of Section 80 of the Administration of Estates Act 66 of 1965.

I am therefore of the opinion that with regard to the alienation of a minor's property or the registration of a mortgage bond over the property of a minor, both Section 80 of the Administration of Estates Act 66 of 1965 and Section 18 of the Children's Act 32 of 2005 would apply and would have to be complied with.

To summarize:

If the property of a minor is alienated or a mortgage bond is to be registered over the minor's property, then:

1. **All guardians** would need to consent. Consent by one guardian alone, is not sufficient. *Vide* Sections 18(3)(c)(v) and 18(5) of the *Children's Act*. (The one exception is where a Court has ordered otherwise.);
2. In addition to the consent of all the guardians, the **Master would also need to consent** if the value of the property or the bond is **less than R100,000.00**. If the value of the property or the amount of the bond is **more than R100,000.00**, then the **High Court would need to consent**. Section 80 of the *Administration of Estates Act 66 of 1965*.

Chief Registrar's Circular 1 of 2008 may give the impression to Conveyancers that only section 18 of the Children's Act needs to be applied when dealing with the alienation or encumbrance of a minor's property. One must not lose sight of the provisions of Section 80 of the *Administration of Estates Act* which has not been amended or repealed.

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