

# **South African Law Commission**



## ***Discussion Paper 105***

**Project 122**

# **ASSISTED DECISION-MAKING: ADULTS WITH IMPAIRED DECISION- MAKING CAPACITY**

**Closing date for comment 31 March 2004**

**ISBN: 0-621-35014-1**

**January 2004**

# Contents

Summary	v
Sources with mode of citation	xv
Table of cases	xxvi
<b>1 INTRODUCTION</b>	<b>1</b>
Origin and purpose of the investigation	2
Limited scope of the investigation	3
Structure of the paper	5
<b>2 DEFINING THE PROBLEM</b>	<b>6</b>
<b>3 THE NEED FOR REFORM</b>	<b>12</b>
The wider context	12
International guidelines	13
Trends in comparable jurisdictions	16
Increase in number of persons with decision-making incapacity	20
Constitutional considerations	21
Related law and policy developments in South Africa	27
The anthropological position regarding mental illness in African societies	29
The demographics of South African society	30
Previous relevant recommendations of the Commission	32
The response on Issue Paper 18	34
General pointers for reform emerging from the comments	38
Other issues	39
Premise: A need for change	42
<b>4 THE CONCEPT OF CAPACITY</b>	<b>45</b>
Introduction	45
Assessing capacity in the medical context	46
The legal principles	48
Introduction	48
The influence of mental illness on legal capacity	51
The influence of mental incapacity on the ability to take specific decisions	53
Need for the law to clearly reflect “capacity” as a function-based concept	67
A definition of “capacity” or “incapacity” in the context of new measures	70
<b>5 GENERAL PRINCIPLES GOVERNING INTERVENTION IN THE AFFAIRS OF PERSONS WITH INCAPACITY</b>	<b>83</b>
Typical principles	83
Examples of recent trends in other jurisdictions	89
Recent trends in related South African legislation	93
Finding a suitable approach	94

<b>6</b>	<b>DEALING WITH EXISTING INCAPACITY: CURRENT MEASURES, CRITICISM AND POSSIBLE OPTIONS FOR REFORM</b>	<b>100</b>
	Introduction	100
	Current measures	100
	Common law measures	101
	Statutory measures	113
	Relevance of current measures in respect of lack of decision-making capacity in specific areas	120
	Criticism of the current position	121
	Comment on Issue Paper 18	123
	Need for alternatives	126
	Possible options for reform	127
	Guidelines emerging from comments on Issue Paper 18	128
	Examples from other jurisdictions	129
	Suggestions for the development of an alternative system	136
<b>7</b>	<b>REPRESENTATION THROUGH POWER OF ATTORNEY</b>	<b>141</b>
	Introduction	141
	Current South African law	143
	Introduction	143
	Requirements	145
	Requisite capacity of the parties	145
	Types of powers of attorney	148
	Formalities	148
	Scope and extent of agent's authority	149
	Legal effect of representation through power of attorney: position vis-à-vis third parties	150
	Termination of authority	152
	The concept of the enduring power of attorney	157
	Introduction	157
	Advantages and disadvantages	158
	The need to introduce the enduring power in South African law	163
	Time from which the enduring power is effective	165
	Safeguards	169
	Portability of an enduring power of attorney	235
	Provision for alternatives where no enduring power has been executed	238
	Extending the concept to personal welfare and health care	238
	Terminology	253
<b>8</b>	<b>PROPOSED DRAFT BILL</b>	<b>258</b>
	<b>ANNEXURE</b>	<b>347</b>
	Respondents to Issue Paper 18 in order of receipt of submissions	

# Introduction

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are –

Madam Justice Y Mokgoro (Chairperson)

Advocate JJ Gauntlett SC

Prof CE Hoexter

Mr Justice CT Howie

Madam Justice L Mailula

Professor IP Maithufi (Full-time member)

Ms Z Seedat

Dr W Seriti

The Secretary is Mr W Henegan. The Commission's offices are on the 12th Floor, Sanlam Centre, corner of Andries and Schoeman Streets, Pretoria.

Correspondence should be addressed to:

The Secretary

Telephone: (012) 322-6440

South African Law Commission

Fax : (012) 320-0936

Private Bag X668

E-mail : [ahavenga@salawcom.org.za](mailto:ahavenga@salawcom.org.za)

PRETORIA 0001

Internet: [www.law.wits.ac.za/salc/salc.html](http://www.law.wits.ac.za/salc/salc.html)

The members of the Project Committee for this investigation are:

Mr Justice Ben Du Plessis

Prof Jan Bekker

Ms Thuli Mahlangu

Ms Zubeda Seedat

Dr Salumu Selemani

Mr Lage Vitus

The project leader is Mr Justice Ben Du Plessis. The researcher responsible for the investigation is Ms Anna-Marie Havenga. The Commission is indebted to Ms Margaret Meyer (Senior Lecturer, Justice College and representative of the Office of the Master of the High Court) who assisted the researcher and the Project Committee in compiling the proposed draft legislation included in this Paper.

# Summary

**This Summary should be read in conjunction with the Commission's proposed draft Bill contained in Chapter 8 of this Paper. The Bill reflects the detail of the Commission's preliminary recommendations. A copy of the Bill will also be distributed separately together with the Summary for purposes of gathering comment.**

**The Commission invites comment on all the provisions in the proposed draft Bill.**

**References to paragraph numbers and clauses in the Summary refer to the correspondingly numbered paragraphs in the body of the Discussion Paper and to the clauses in the proposed draft Bill.**

## INTRODUCTION

The South African Law Reform Commission has been involved in an investigation into assisted decision-making for adults with impaired decision-making capacity since the end of 2001. The investigation was undertaken as a result of attention being drawn to the declining decision-making ability of persons with Alzheimer's disease, in particular, and the outdated and inappropriate ways in which the South African law currently deals with this situation. The Commission's work however has a broader focus: It attempts to deal with the shared problems faced by persons with diminished decision-making capacity – however this was caused.

Investigating the issue is in line with the increase in the number of persons suffering from diminished capacity and with extensive reform in this area of the law over the past two decades in other jurisdictions. It moreover follows on an attempt by the Commission to have the concept of the enduring power of attorney introduced in the South African legal system as far back as 1988.

This Discussion Paper follows on the publication for comment, in December 2001, of an Issue Paper (Issue Paper 18: Incapable Adults). The Discussion Paper takes the investigation further. It defines more clearly the need for reform, submits for public comment preliminary conclusions reached by the Commission and tests public opinion on solutions identified by the Commission which are embodied in the proposed draft legislation.

## DEFINING THE PROBLEM

Making decisions is an important part of human life. Although we take it for granted that adults can make decisions about their personal welfare, financial affairs and medical treatment, some adults cannot make such decisions for themselves because of diminished capacity as a result of mental illness, intellectual disability, physical disability or an incapacity related to ageing in general.

A legitimate expectation of the law is that it should establish a structure within which appropriate autonomy and self-determination is recognised and protected. Such a structure should provide appropriate substitute decision-making devices and the necessary protection from abuse, neglect and exploitation.

At present the law deals with decision-making incapacity by way of curatorships. The curatorship system has been criticised on the ground that it suffers from a number of serious and frustrating difficulties mainly relating to its high cost, prolonged procedure, paternalistic nature and potential for abuse. An individual can also allow another to act on his or her behalf through a power of attorney. A power of attorney however terminates on the incapacity of the person who granted the power. The latter is a major cause for concern: Frequently care givers are under the impression that the power granted by a person in their care will be effective until that person dies, even in cases where the person had severely diminished mental capacity and is therefore incompetent in the eyes of the law. This is an unsatisfactory position as care givers acting in good faith are putting themselves at risk of performing unauthorised acts for which they could be held personally liable.

The present state of affairs is complicated by the fact that South Africa has no specific statutory provisions dealing with adults with impaired decision-making capacity.

There is further no formal assisted decision-making device that clearly provides for mild, fluctuating or temporary impairment.

There is also no provision for some default arrangement to deal with situations where adults with incapacity have no family or carers to act on their behalf or where the existing formal measures have not been utilised.

These are the problems addressed in the Commission's preliminary recommendations listed below.

## THE COMMISSION'S IN PRINCIPLE RECOMMENDATIONS

Against the above background the Commission on a preliminary basis proposes the following:

1. **A change to the law is necessary to provide for an alternative to the curatorship system (without abolishing the latter) and to introduce the concept of the enduring power of attorney into our law. (Par 3.43)**
2. **The common law concept of "capacity" should be developed for purposes of new statutory substitute decision-making measures to deal with the grey areas of temporary and fluctuating incapacity and to clearly reflect the internationally accepted notion that decision-making is function-based. (Par 4.29; 4.38) (Clause 4)**
3. **Clear principles should govern any intervention in the affairs of an adult with incapacity. The central principle should be that intervention must be in the best interests of the adult with incapacity concerned. "Best interests"**

**must be defined in terms of relevant international and constitutional principles reflecting respect for human dignity. (Par 5.13) (Clause 5)**

4. **A multi-level system of substitute decision-making should be developed as alternative to the current curatorship system.** The proposed alternative system should contain the following elements: **(Par 6.49-6.53)**

**(a)** A default arrangement as a first tier of substitute decision-making enabling family, carers and others legally to make day to day decisions regarding personal welfare matters on behalf of adults with incapacity. This arrangement should also allow for a person who has signing powers in respect of a banking account of his or her spouse who becomes incapacitated to retain this power after the incapacity of the spouse. It should in addition clarify the position of parents as surrogate decision-makers for their minor children who become adults with incapacity. **(Clause 6-10)**

**(b)** The possibility to apply to the Master of the High Court for a “specific intervention order” in circumstances where one-off decisions have to be made in respect of adults with incapacity and where the longer term measures referred to in the following two sub-paragraphs are not necessary. We propose that the Master may appoint a person to make a specific decision or take specific action on behalf of an adult with incapacity under an intervention order, or that the Master may take the necessary decision him or herself. The appointment, powers and duties, restrictions and reimbursement of the person acting in terms of a specific intervention order are provided for in detail in the proposed draft legislation. **(Clause 11-21)**

**(c)** The possibility to apply to the Master of the High Court for the appointment of a “manager” to care for and manage the property of an adult with incapacity on a long term basis. The Master should however always have the discretion to refer the matter to a Court for the appointment of a *curator bonis*. The appointment **(Clause 22-28)**, powers and duties **(Clause 29-38)**, restrictions **(Clause 39-42)** and termination



**(Clause 43-48)** of the manager are provided for in detail in the proposed draft legislation.

- (d)** The possibility to apply to the Master for the appointment of a “mentor” to take care of the personal welfare of an adult with incapacity on a long term basis. The Master should however always have the discretion to refer the matter to a Court for the appointment of a *curator personae*. The appointment **(Clause 49-54)**, powers and duties **(Clause 55-60)**, restrictions **(Clause 61-63)** and termination **(Clause 64-69)** of the mentor are provided for in detail in the proposed draft legislation.

**5. The enduring power of attorney should be introduced into our law on the following basis:** (Note that “principal” refers to an adult who grants an enduring power of attorney; and “agent” refers to a person who is authorised to act for a principal under an enduring power of attorney.)

- (a)** Legislation should make it possible to grant an enduring power of attorney (i.e. a power that endures the subsequent incapacity of the principal) as well as a conditional power (i.e. a power that comes into operation only on the incapacity of the principal). **(Par 7.40; 7.47) (Clause 70)**
- (b)** It should be possible to grant a power in respect of property (i.e. financial affairs) as well as personal welfare **(Clause 71)**. A power relating to personal welfare should be expressly granted (as is the case with a power relating to property). Requirements regarding execution formalities for personal welfare powers should not differ from those required in respect of property. **(Par 7.40, 7.178, 7.183)**
- (c)** We propose that an agent appointed under an enduring power of attorney must be a mentally competent adult. If the power relates to the principal’s property the agent may also be a juristic person. We further propose that the subsequent dissolution of a marriage (or permanent same sex life partnership) between the principal and the agent should be one of the

grounds on which the Master may withdraw an enduring power of attorney. **(Par 7.156, 7.184) (Clause 75)**

- (d)** Proper safeguards should be built into the process to protect the interests of the principal. These should include execution safeguards; triggering event safeguards (i.e. safeguards conclusively establishing or indicating whether the agent can continue to validly act under an enduring power of attorney or start validly acting under a conditional power of attorney); and supervisory safeguards.
- (e)** Execution safeguards should include the following: **(Par 7.54-7.86)**
  - (i)** The power must be in writing and signed. **(Clause 72 and 73)**
  - (ii)** It must be witnessed as prescribed. **(Clause 72 and 73)**
  - (iii)** It must be in the prescribed form, or substantially in such form, and must contain the prescribed explanatory notes. **(Clause 72)**
  - (iv)** It must contain a certificate by a commissioner of oaths that the principal had the required mental capacity at the time he or she executed the power. **(Clause 72)**
- (f)** As a triggering event safeguard, legislation should require that after having gained knowledge of the principal's incapacity the agent may not continue to act upon an enduring power, or commence to act on a conditional power, if it has not been filed for registration with the Master of the High Court and been endorsed by the Master. Together with the power the agent must file an affidavit by a person named in the power, or a report by a medical practitioner, stating that the principal is in the opinion of such person or medical practitioner mentally incapacitated. **(Par 7.87-7.103) (Clause 76)**
- (g)** Supervisory safeguards should include the following: **(Par 7.104-7.153)**
  - (i)** The Master of the High Court should have the discretion in respect of enduring powers relating to property to require the agent to

furnish security – except where the principal has exempted the agent from furnishing security. **(Par 7.114) (Clause 77)**

(ii) The following restrictions should be placed on an agent's authority: **(Par 7.178; 7.183; 7.187; 7.192 7.196)**

- No agent should be allowed to use or threaten to use force to secure the doing of an act which the principal resists, or be able to restrict the principal's liberty of movement except to avert a substantial risk of significant harm to the principal. **(Clause 81)**
- In the case of an enduring power relating to personal welfare an agent should not be entitled to exercise any authority unless the principal is incapable of making any decision regarding the matter in question; the authority of the agent should not extend to giving any consent required in terms of the Mental Health Care Act, 2002; and the agent should be restricted to exercising any powers granted in respect of consent to medical treatment of the principal in accordance with the provisions of the National Health Bill, 2003. In the latter regard it should be made clear that that such powers do not extend to refusing consent to the carrying out or continuation of life-sustaining treatment. **(Clause 82)**

(iii) An agent appointed under an enduring power relating to property should be required to prepare and maintain a list of the property of the principal of which he or she takes control and to keep record of all transactions entered into on behalf of the principal. An agent appointed under an enduring power relating to personal welfare should be required to keep record of the exercise of his or her powers. Agents should be compelled, when called upon by the Master to do so, to account to the Master for the exercise of their powers. In addition to this, specified persons (including persons named in the power or persons with an interest in the property or

personal welfare of the principal) should be allowed to inspect any such list or record kept by an agent. **(Par 7.129) (Clause 79 and 80)**

(iv) Legislation should provide for the termination of an enduring power of attorney. The following is proposed in this regard: **(Par 7.130-7.153)**

- A principal must be able to revoke an enduring power at any time when he or she has the capacity to do so. We further recommend that no formalities should be required for such revocation. **(Par 7.137) (Clause 83)**
- Although it should be possible for an agent to resign, he or she should be required to give written notice of this intention to the Master in whose jurisdiction the power is registered, to the principal who granted the power and to the principal's primary carer. The resignation should become effective only 30 days after receipt of this notification by the Master. **(Par 7.150) (Clause 84)**
- The Court should be able to withdraw an enduring power of attorney at any time upon application by the Master or any interested person. **(Par 7.145) (Clause 85)**
- The Master should be able to withdraw an enduring power of attorney registered in his or her office under certain specified circumstances dealing mainly with a change in status of the agent or the agent not complying with the requirements of the Master in terms of the proposed legislation. **(Par 7.145) (Clause 85)**
- If a curator, manager or mentor is appointed for an adult with incapacity, any powers that an agent may have in terms of an enduring power should terminate in so far as such powers may be exercised by the curator, manager or mentor. **(Par 7.153) (Clause 85)**

- (h) The substitution of an agent by the Court or Master should not be allowed. Legislation should provide the Master with authority to initiate the appointment of a manager or mentor where a void is left by the withdrawal or termination of the appointment of an agent. **(Par 7.146) (Clause 91)**
  - (i) The variation of the terms of an enduring power of attorney by the Court or Master should not be allowed. **(Par 7.147)**
  - (j) As regards portability of an enduring power we propose that notwithstanding the formalities of execution recommended in paragraph 5(e) above, a document should be regarded as an enduring power of attorney if, according to the law of the place where it was executed, it is a valid power of attorney and the agent's authority thereunder is not terminated by the subsequent mental incapacity of the principal. **(Par 7.165) (Clause 87)**
6. **Finally, we recommend that any person who acts on behalf of an adult with incapacity in terms of the proposed legislation should perform his or her duties under the supervision of the Master of the High Court (and in the last instance of the Court).** Supervisory measures are provided for throughout the proposed legislation and are reflected in the recommendations above. Supplementary powers of the Master (including general powers of investigation and enquiry; powers to make interim rulings; and powers to review decisions taken on behalf of adults with incapacity in terms of the proposed legislation) are provided for in **clauses 88-94**. Access to Court is dealt with in **clause 95**.

## INVITATION TO COMMENT

The preliminary recommendations and draft legislation need to be debated thoroughly and the Commission invites comment from all parties who are interested in the issue under investigation. Respondents are requested to respond as comprehensively as possible. **The closing date for comments is 31 March 2004.**

# Sources with mode of citation

A “mode of citation”, as well as the full particulars of sources referred to in the Paper, are recorded in the list below

Alberta Law Reform Institute **Final Report No 88** 2003

Alberta Law Reform Institute “Enduring Powers of Attorney: Safeguards Against Abuse” **Final Report No 88** Edmonton: February 2003

Alberta Law Reform Institute **Issues Paper No 5** 2002

Alberta Law Reform Institute “Enduring Powers of Attorney” **Issues Paper No 5** Edmonton: February 2002

Alberta Law Reform Institute **Report for Discussion No 7** 1990

Alberta Law Reform Institute “Enduring Powers of Attorney” **Report for Discussion No 7** Edmonton: February 1990

Alberta Law Reform Institute **Report for Discussion No 11** 1991

Alberta Law Reform Institute “Advance Directives and Substitute Decision-making in Personal Health Care” **Report for Discussion No 11** Edmonton: November 1991

Alberta Law Reform Institute **Report No 59** 1990

Alberta Law Reform Institute “Enduring Powers of Attorney” **Report No 59** Edmonton: December 1990

Alberta Law Reform Institute **Report No 64** 1993

Alberta Law Reform Institute “Advance Directives and Substitute Decision-making in Personal Health Care” **Report No 64** Edmonton: March 1993

Alberta Law Reform Institute **Final Report No 88** 2003

Alberta Law Reform Institute “Enduring Powers of Attorney: Safeguards against Abuse” **Final Report No 88** Edmonton: February 2003

Alzheimer’s Disease International **Factsheet 3** April 1999

Alzheimer’s Disease International “The Prevalence of Dementia” **Factsheet 3** April 1999

Alzheimer’s Disease International **Factsheet 4** March 1999

Alzheimer’s Disease International “The Demography of Ageing around the World” **Factsheet 4** March 1999.

Alzheimer Europe **LAWNET Final Report**

Alzheimer Europe **LAWNET Final Report** (European comparison on current legislation) 1997-2000 (Internet [www.alzheimer-europe.org](http://www.alzheimer-europe.org) accessed on 3/12/02)

Alzheimer Europe **LAWNET National Report: The Netherlands**

Alzheimer Europe **LAWNET National Report: The Netherlands** (European comparison on current legislation) 1997-2000 (Internet [www.alzheimer-europe.org](http://www.alzheimer-europe.org) accessed on 3/12/02)

Ashton and Ward

Gordon Ashton and Adrian Ward **Mental Handicap and the Law** Sweet & Maxwell London: 1992

Atkin 1988 **New Zealand Law Journal**

WR Atkin “Enduring Powers of Attorney in New Zealand” **New Zealand Law Journal** October 1988 368-372

- Australian Law Reform Commission **Discussion Paper No 39** 1998  
 Australian Law Reform Commission **Discussion Paper No 39** "Guardianship and Management of Property" Sydney: 1998
- Barker **De Rebus** April 1996  
 Harry Barker "On General Powers of Attorney" **De Rebus** April 1996 259-260
- Barnard et al  
 AH Barnard, DSP Cronjé and PJJ Olivier **The South African Law of Persons and Family Law**  
 Third Edition by DSP Cronje Butterworths: Durban 1994
- Bezuidenhout (Unpublished)  
 PJS Bezuidenhout "The Social and Economic Impact of an Ageing South African Population"  
 (Unpublished article made available to the researcher by the author February 2002)
- Census in Brief**  
 Statistics South Africa "The People of South Africa Population Census, 1996" **Census in Brief**  
 Pretoria: Statistics South Africa 1998
- Cockrell in **Bill of Rights Compendium**  
 Alfred Cockrell "The Law of Persons and the Bill of Rights" in **Bill of Rights Compendium**  
 Butterworths Durban: 1996 (with loose-leaf updates)
- Cronjé and Heaton **South African Law of Persons**  
 DSP Cronjé and Jacqueline Heaton **The South African Law of Persons** Butterworths Durban:  
 1999
- Cronjé and Heaton **South African Family Law**  
 DSP Cronjé and Jacqueline Heaton **South African Family Law** Butterworths Durban: 1999
- Cronjé in **LAWSA Vol 20** Part 1  
 DSP Cronjé "Persons" in **The Law of South Africa (LAWSA) Vol 20** Part 1 (First Reissue)  
 Butterworths: Durban 1999
- Cooper and Vernon  
 Jeremy Cooper and Stewart Vernon **Disability and the Law** Jessica Kingsley Publishers London:  
 1996
- Christie  
 RH Christie **The Law of Contract in South Africa** Fourth Edition Butterworths: Durban 2001
- Creyke 1991 **Western Australian Law Review**  
 Robin Creyke "Enduring Powers of Attorney: Cinderella Story of the 80s" 1999 **Western Australian Law Review** Vol 21 122-148
- Carney 1999 **New Zealand Universities Law Review**  
 Terry Carney "Abuse of Enduring Powers of Attorney - Lessons from the Australian Tribunal Experiment?" 1999 **New Zealand Universities Law Review** 481-508
- Currie and Woolman in **Constitutional Law of South Africa**  
 Iain Currie and Stuart Woolman "Freedom and Security of the Person" in **Constitutional Law of South Africa** Juta & Co Ltd: 1996 (with loose leaf updates to 1999)
- Department of Social Development Report **Mothers and Fathers of the Nation** 2001 Vols 1 and 2  
 Department of Social Development **Mothers and Fathers of the Nation: The Forgotten People**  
 (Volumes 1 and 2) Report of the Ministerial Committee on Abuse, Neglect and Treatment of Older Persons 26 February 2001
- De Villiers and Macintosh  
 JE De Villiers and JC Macintosh **The Law of Agency in South Africa** Third Edition by JM Silke  
 Juta & Co Ltd: Cape Town 1981

- De Vos in **The Principle of Equality - A South African and a Belgian Perspective**  
 Pierre De Vos "The Role of Equality in the South African Legal System" in **The Principle of Equality - A South African and a Belgian Perspective** edited by Lanotte et al Maklu Antwerpen: 2001 139-155
- De Waal et al  
 Johan de Waal, Iain Currie and Gerhard Erasmus **The Bill of Rights Handbook** Third Edition Juta & Co Ltd: Kenwyn 2000
- De Waal in **Constitutional Law of South Africa**  
 Johan De Waal "Political Rights" in **Constitutional Law of South Africa** Juta & Co Ltd: 1996 (with loose leaf updates to 1999)
- De Wet in **LAWSA Vol 1**  
 JC De Wet "Agency and Representation" (revised by AG Du Plessis) in **The Law of South Africa (LAWSA) Vol 1** (First Reissue) Butterworths: Durban 1993
- Dicey & Morris  
 Dicey & Morris **The Conflict of Laws** Vol 2 Eleventh Edition by Lawrence Collins et al Stevens & Sons Limited: London 1987
- Dobson 2003 **BMJ**  
 Roger Dobson "Advances in Medical Technology Account for a Third of the Reduction in Road Traffic Deaths" **British Medical Journal** 10 May 2003 1004
- Edwards in **LAWSA Vol 2**  
 AB Edwards "Conflict of Laws" in **The Law of South Africa (LAWSA) Vol 2** First Reissue Butterworths: Durban 1993
- Elliot and Banwell  
 RC Elliot and E Banwell **The South African Notary** Fifth Edition revised by RC Elliot Juta & Co Ltd: Cape Town 1977
- English Law Commission **Consultation Paper 119** 1991  
 The Law Commission **Consultation Paper 119 Mentally Incapacitated Adults and Decision-making: An Overview** HMSO London: 1991
- English Law Commission **Consultation Paper 128** 1992  
 The Law Commission "Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction" **Consultation Paper 128** London: HMSO 1992
- English Law Commission **Report No 231** 1995  
 The Law Commission "Mental Incapacity" **Report No 231** London: HMSO 1995  
 (Summary available on the Internet at <http://www.lawcom.gov.uk/library/lc231/contents.htm> accessed on 30/10/2002)
- Erasmus et al  
 H J Erasmus et al **Superior Court Practice** (Formerly Nathan Barnett & Brink) Juta & Co: Cape Town (including Service 17, 2002)
- Fazel et al 1999 **BMJ**  
 Seena Fazet et al "Assessment of Competence to Complete Advance Directives: Validation of Patient Centred Approach" **British Medical Journal** 20 February 1999 493-497
- Forsyth  
 Forsyth **Private International Law** Third Edition Juta & Co Ltd Kenwyn: 1996



- Frolik and Kaplan  
Lawrence Frolik and Richard Kaplan **Elder Law in a Nutshell** West Publishing Co St Paul, Minn 1995
- Guilde 1997 **Illinois Bar Journal**  
Karen J Guilde "Revoking Durable Powers of Attorney for Property – Protecting Clients from Themselves" 1997 **Illinois Bar Journal** Vol 85 Nov 555-556
- Heaton in **Boberg's Law of Persons and the Family**  
Jacqueline Heaton "The Concepts of Status and Capacity: A Jurisprudential Excursus" and "Mental and Physical Disability: Prodigality" in **Boberg's Law of Person's and the Family** Second Edition edited by Belinda van Heerden et al Juta & Co Ltd Kenwyn: 1999 65-75 and 105-160
- Herbstein and Van Winsen  
L de Villiers van Winsen et al Herbstein and Van Winsen's **The Civil Practice of the Supreme Court of South Africa** Juta & Co Ltd: Cape Town 1997
- Hogg et al  
J Hogg et al **Health Ageing - Adults with Intellectual Disabilities: Ageing & Social Policy** Geneva: World Health Organisation 2000
- Hoggett  
B Hoggett **Mental Health Law** Sweet and Maxwell London: 1976
- Hosten et al  
WJ Hosten et al **Introduction to South African Law and Legal Theory** (Revised reprint) Butterworths Durban: 1998
- HPCSA Ethical Guidelines on Research and Clinical Trails Involving Human Subjects** July 2002  
Health Professions Council of South Africa **Ethical Guidelines on Research and Clinical Trails Involving Human Subjects** Booklet 9 Pretoria: July 2002
- HPCSA Guidelines on Seeking Patients' Consent** July 2002  
Health Professions Council of South Africa **Guidelines for Good Practice in Medicine, Dentistry and the Medical Sciences:** Booklet 15 (Seeking Patients' Consent: The Ethical Considerations) Pretoria: July 2002
- Hutchison in **Wille's Principles of South African Law**  
Dale Hutchison "Agency" in **Wille's Principles of South African Law** Eighth Edition Juta & Co Ltd Cape Town: 1991
- Ineichen 2000 **Social Science & Medicine** 1673-1677  
Bernard Ineichen "The Epidemiology of Dementia in Africa: A Review " 2000 **Social Science & Medicine** Vol 50 1673-1677
- Jansen 2000 **European Journal of Health Law**  
Sjaak Jansen "Recommendation No. R (99) 4 of the Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults, an Introduction in Particular to Part V Interventions in the Health Field" 2000 **European Journal of Health Law** Vol 7 333-347
- Josling  
JF Josling **Powers of Attorney** Fourth Edition Oyez Publishing: London 1976
- Joubert  
DJ Joubert **Die Suid-Afrikaanse Verteenwoordigingsreg** First Edition Juta & Co Ltd: Cape Town 1979
- Joubert and Van Zyl in **LAWSA Vol 17**  
DJ Joubert and DH Van Zyl "Mandate and Negotiorum Gestio" (Revised by DH Van Zyl) in **The Law of South Africa (LAWSA) Vol 17** First Reissue Butterworths: Durban 1999

Kapp in **Protecting Judgment Impaired Adults**

Marshall B Kapp "Evaluating Decision-making Capacity in the Elderly: A Review of Recent Literature" in **Protecting Judgment Impaired Adults: Issues, Interventions and Policies** edited by Edmund DeJowski Haworth Press New York: 1990 15-30

Kentridge in **Constitutional Law of South Africa**

Janet Kentridge "Equality" in **Constitutional Law of South Africa** Juta & Co Ltd: 1996 (with loose leaf updates to 1999)

Kerr

AJ Kerr **The Law of Agency** Third Edition Butterworths: Durban 1991

Khaw 1999 **BMJ**

Kay-Tee Khaw "How Many, How Old, How Soon?" **British Medical Journal** 20 November 1999 1350-1352

Kirkwood 2003 **BMJ**

Thomas BL Kirkwood "The Most Pressing Problem of Our Age" **British Medical Journal** 14 June 2003 1297-1299

Labuschagne 1994 **Journal of South African Law**

JMT Labuschagne "Negotiorum Gestio (Saakwaarneming) as Verweer in die Straf- en Deliktereg" 1994 **Journal of South African Law** Vol 4 811-814

Labuschagne et al 2003 **CILSA**

JMT Labuschagne, JC Bekker and CC Boonzaaier "Legal Capacity of Mentally Ill Persons in African Societies" **The Comparative and International Law Journal of Southern Africa** March 2003 106-120

Law Reform Commission of Victoria **Report No 35** 1990

Law Reform Commission of Victoria **Report No 35 Enduring Powers of Management** Victoria, Australia: 1990

Lee and Honoré

Lee and Honoré **The South African Law of Obligations** Second Edition by E Newman and DJ McQuoid-Mason Butterworths: Durban 1978

Loue 1995 **The Journal of Legal Medicine**

Sana Loue "Living Wills, Durable Powers of Attorney for Health Care, and HIV Infection" 1995 **The Journal of Legal Medicine** Vol 16 461-480

Lupton 1992 **SA Journal of Criminal Justice**

ML Lupton "*Clarke v Hurst NO, Brain NO & Attorney General, Natal* (unreported 1992 (N) A Living Will, Brain Death and the Best Interests of a Patient" 1992 **South African Journal of Criminal Justice** 342-348

Lush

Denzil Lush **Elderly Clients - a Precedent Manual** Jordans Bristol: 1996

Manitoba Law Reform Commission **Report No 83**

Manitoba Law Reform Commission **Report No 83 Enduring and Springing Powers of Attorney** Winnipeg: 1994

McQuoid-Mason and Strauss in **LAWSA Vol 17**

DJ McQuoid-Mason and SA Strauss "Medicine, Dentistry, Pharmacy and Other Health Professions" revised by McQuoid-Mason in **LAWSA Vol 17** 129- 230 First Reissue Butterworths: Durban 1999

- Meyers  
Teresa Schwab Meyers **How to Keep Control of Your Life After Sixty** Lexington Books  
Massachusetts 1998
- Munday 1989 **New Zealand Universities Law Review**  
Roderick Munday "The Capacity to Execute an Enduring Power of Attorney in New Zealand and  
England: A Case of Parliamentary Oversight?" 1989 **New Zealand Universities Law Review** Vol  
13 June 1998 253-270
- National Conference of Commissioners on Uniform State Laws (Internet)  
National Conference of Commissioners on Uniform State Laws "Summary" Uniform Durable Power  
of Attorney Act (1997 (1987))"  
(Internet <http://www.nccusl.org/nccusl/univoract-summaries> accessed on 14/5/03)
- Neethling et al  
J Neethling, JM Potgieter and PJ Visser **Neethling's Law of Personality** Durban: Butterworths  
1996
- Neethling, Potgieter and Visser  
J Neethling, JM Potgieter and PJ Visser **Law of Delict** Fourth Edition Durban: Butterworths 2001
- Neskora 1997 **Louisiana Bar Journal**  
Teanna West Neskora "Living Will and Health Care Powers of Attorney" 1997 **Louisiana Bar  
Journal** 512-515
- Neuman **De Rebus** June 1998  
C Neumann "Curatorship – a Test of Endurance" **De Rebus** June 1998 61-64
- Newfoundland Law Reform Commission **Discussion Paper** January 1992  
Newfoundland Law Reform Commission **Discussion Paper on Advance Health Care Directives  
and Attorneys for Health Care** (WP 6) January 1992 St John's: Newfoundland, Canada
- Newfoundland Law Reform Commission **Report on Enduring Powers of Attorney** 1988  
Newfoundland Law Reform Commission Report on Enduring Powers of Attorney (R2) December  
1988 St John's: Newfoundland, Canada
- New Zealand Law Commission **Preliminary Paper 40** 2000  
New Zealand Law Commission **Preliminary Paper 40 Misuse of Enduring Powers of Attorney**  
Wellington: New Zealand 2000
- Olivier et al  
NJJ Olivier, JC Bekker, NJJ Olivier (Jnr) and WH Olivier **Indigenous Law** Butterworths: Durban  
1995
- Oomens and Van Zutphen  
Dr HCDM Oomens and Mr YLL van Zutphen **Evaluatie Wet Mentorschap** Vrije Universiteit  
Amsterdam: 1998
- Pothier's Treatise on the Contract of Mandate** translated by Rogers and De Wet  
**Pothier's Treatise on the Contract of Mandate (Traité Du Contrat De Mandat)** Translated from  
the French of the Dupin edition by BG Rogers, the Latin passages being translated by BX De Wet  
Lex Patria: Johannesburg 1979
- Queensland Law Reform Commission **Draft Report** 1995  
Queensland Law Reform Commission **Draft Report Assisted and Substituted Decisions** The  
Print People: Brisbane 1995

- Queensland Law Reform Commission **Report No 49** 1996  
Queensland Law Reform Commission **Report No 49 Assisted and Substituted Decisions** The Print People: Brisbane June 1996
- Queensland Law Reform Commission **Discussion Paper 38** 1992  
Queensland Law Reform Commission **Discussion Paper No 38 Assisted and Substituted Decisions** The Print People: Brisbane July 1992
- Rautenbach in **Bill of Rights Compendium**  
IM Rautenbach "Introduction to the Bill of Rights" in **Bill of Rights Compendium** Butterworths Durban: 1996 (with loose leaf updates)
- Report of the Ministerial Committee on Abuse, Neglect and Ill-Treatment of Older Persons 2001**  
Department of Social Development "Mothers and Fathers of the Nation: The Forgotten People?" **Report of the Ministerial Committee on Abuse, Neglect and Ill-Treatment of Older Persons** Pretoria: February 2001
- Roca in **Aging and the Law**  
Robert Roca "Determining Decisional Capacity" A Medical Perspective" in **Aging and the Law** edited by Lawrence Frolik Temple University Press Philadelphia: 1999 216- 225
- SALRC **Discussion Paper 103: Review of the Child Care Act**  
South African Law Reform Commission Discussion Paper 103: Review of the Child Care Act (Project 110): Pretoria 2001
- SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988  
South African Law Reform Commission **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** South African Law Commission: Pretoria 1988
- SALRC **Report on Euthanasia and the Artificial Preservation of Life** 1998  
South African Law Reform Commission **Report on Euthanasia and the Artificial Preservation of Life** South African Law Commission: Pretoria 1998
- SALRC **Report on Review of the Child Care Act** 2002  
South African Law Reform Commission **Review of the Child Care Act** (Project 110): **Report** Pretoria: December 2002
- SALRC **Report on Sexual Offences** 2003  
South African Law Reform Commission Report on Sexual Offences (Project 107): Pretoria: January 2003
- Schlesinger and Scheiner 1992 **Trusts and Estates**  
Sanford J Schlesinger and Barbara J Scheiner "Estate Planning Using Powers of Attorney" **Trusts and Estates** July 1992 38-44
- Scottish Executive **Making the Right Moves** 1999  
Scottish Executive **Making the Right Moves** (Rights and Protection for Adults with Incapacity) Edinburgh: The Stationary Office SE/1999/24
- Scottish Law Commission **Report No 151** 1995  
Scottish Law Commission **Report No 151 1995 Report on Incapable Adults** Edinburgh: HMSO 1995
- Scottish Law Commission **Discussion Paper 94** 1991  
Scottish Law Commission **Discussion Paper Mentally Disabled Adults: Legal Arrangements for Managing their Welfare and Finances** Edinburgh: HMSO 1991

Sinclair in **Boberg's Law of Persons and the Family**

June Sinclair "Introduction" in **Boberg's Law of Person's and the Family** Second Edition edited by Belinda van Heerden et al Juta & Co Ltd Kenwyn: 1999 1-27

Strauss

SA Strauss **Doctor, Patient and the Law** Third edition JL Van Schaik : Pretoria 1991

The Lord Chancellor's Department **Report on Making Decisions** 1999 (Internet)

The Lord Chancellor's Department **Making Decisions** (A Report issued in the light of responses to the consultation paper "Who Decides?") October 1999 (Internet)

(Internet <http://www.lcd.gov.uk/family/mdecisions/indbod.htm> accessed on 31 October 2002)

**The Selective Voet** translated by Gane

**The Selective Voet Being the Commentary on the Pandectives** Translated with explanatory notes and notes of all South African reported cases by Percival Gane Vol Three Butterworth & Co (Africa) Ltd Beach Grove: 1956

**The State of South Africa's Population Report 2000**

The National Population Unit Department of Social Development **The State of South Africa's Population Report 2000**

Van Duijvendijk-Brand and Wortmann

J van Duijvendijk-Brand and SFM Wortman **Compendium van het Personen- en Familierecht** Zevende Druk Kluwer-Deventer: The Netherlands 1998

Van Dokkum 1997 **Southern African Journal of Gerontology**

N van Dokkum "A Durable Power of Attorney for Older South Africans" 1997 **Southern African Journal of Gerontology** Vol 6 Part 1 17-20

Van Oosten

Ferdinand FW van Oosten **The Doctrine of Informed Consent in Medical Law** (Thesis submitted in accordance with the requirements for the degree of Doctor Legum ) Pretoria: University of South Africa 1991

Van Oosten 1995 **De Jure**

FFW van Oosten "*Castell v De Greef* and the Doctrine of Informed Consent: Medical Paternalism Ousted in Favor of Patient Autonomy" 1995 **De Jure** 164-179

Van Oosten 2000 **Journal of Contemporary Roman Dutch Law**

VW van Oosten "The Law and Ethics of Information and Consent in Medical Research" 2000 **Journal of Contemporary Roman Dutch Law** 5-31

Van Wyk C "Guidelines on Medical Research Ethics, Medical 'Experimentation' and the Constitution" 2001

**Journal of Contemporary Roman-Dutch Law** 3-22

Van Zyl

DH Van Zyl **Negotiorum Gestio in South African Law** Durban: Butterworths 1985

Wasserberg 2002 **BMJ**

Johathan Wasserberg "Treating Head Injuries" **British Medical Journal** 31 August 2002 454-455

White **BMJ** 18 May 2002 1173

Caroline White "Life Expectancy is Consistently Underestimated, Say Researchers" **British Medical Journal** 18 May 2002 1173

Whitton

Linda S Whitton "Caring for the Incapacitated – A Case for Nonprofit Surrogate Decision Makers in the Twenty-First Century" 1996 **University of Cincinnati Law Review** 879-910

WHO **Report on Ageing and Intellectual Disabilities** 2000

World Health Organisation "Ageing and Intellectual Disabilities - Improving Longevity and Promoting Health Ageing: Summative Report" Geneva : WHO 2000

**Wille's Principles of South African Law**

**Wille's Principles of South African Law** 8<sup>th</sup> Edition by Hutchinson et al Juta & Co Ltd Cape Town: 1991

Wolff in **Aging and the Law**

Kevin Wolff "Determining Patient Competency in Treatment Refusal Cases" in **Aging and the Law** edited by Lawrence Frolik Temple University Press: Philadelphia: 1999 326- 336

Zimmerman

Reinhard Zimmermann **The Law of Obligations – Roman Foundations of the Civilian Tradition** Juta and Co Ltd Cape Town: 1990

## **LEGISLATION:**

### **AUSTRALIA**

Instruments (Enduring Powers of Attorney) Act, 1981 (Victoria)

Powers of Attorney Act, 1998 (Queensland)

### **CANADA**

Consent to Treatment Act, 1991 (Ontario)

Enduring Powers of Attorney Act, 1991 (Alberta)

Health Care Directives Act, 1992 (Manitoba)

Personal Directives Act, 1997 (Alberta)

Powers of Attorney Act, 1979 (Ontario)

Substitute Decisions Act, 1991 (Ontario)

### **ENGLAND**

Powers of Attorney Act, 1985

### **NEW ZEALAND**

Protection of Personal and Property Rights Act, 1988

### **NETHERLANDS**

BW Boek 1 Titel 16 (Curatele)

BW Boek 1 Titel 19 (Onderbewindstelling ter bescherming van meerderjarigen)

BW Boek 1 Titel 20 (Mentorschap ten behoeve van meerderjarigen)

Wet op Geneeskundige Behandelingsovereenkomst (WGBO) Civil Code Title 7

**SCOTLAND**

Adults with Incapacity (Scotland) Act, 2000

**SOUTH AFRICA**

Administration of Estates Act 66 of 1965

Age of Majority Act 57 of 1972

Criminal Procedure Act 51 of 1977

Constitution 108 of 1996

Deeds Registries Act 47 of 1937

Divorce Act 70 of 1979

Electoral Act 73 of 1998

Firearms Control Act 60 of 2000

Health Professions Act 56 of 1974

Justices of the Peace and Commissioners of Oath Act 16 of 1963

Marriage Act 25 of 1961

Mental Health Act 18 of 1973

Mental Health Care Act 17 of 2002

Mentally Ill Persons Legal Interests Amendment Act 108 of 1990

National Health Bill, 2003

National Road Traffic Act 93 of 1996

Promotion of Equality and Prevention of Discrimination Act 4 of 2000

Stamp Duties Act 77 of 1968

Sterilisation Act 44 of 1988

Taxation Laws Amendment Act 32 of 1999

Uniform Rules of Court

Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (*Government Notice* R48 of 12 January 1965 as amended)

Wills Act 7 of 1953

**UNITED STATES OF AMERICA**

Special Powers of Attorney for Small Property Interests Act, 1964

Uniform Health-Care Decisions Act, 1993

( available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uhcda93.pdf> accessed on 4/4/03)

Uniform Durable Power of Attorney Act, 1979 (Uniform Probate Code)

(available at [http://www.law.upenn.edu/library/ulc/dpoaa1997UPC\\_V.htm](http://www.law.upenn.edu/library/ulc/dpoaa1997UPC_V.htm) accessed on 14/5/03)

**INTERNATIONAL INSTRUMENTS:**

General Assembly **Resolution on Principles for the Protection of Persons with Mental Illness**, 1991

Committee of Ministers of the Council of Europe to Member States Recommendation No R (99) on  
**Principles concerning the Legal Protection of Incapable Adults**, 1999

United Nations **Declaration of General and Special Rights of the Mentally Handicapped**, 1971

United Nations **Declaration on the Rights of Disabled Persons**, 1975

United Nations **International Plan of Action on Ageing**, 1982

United Nations **International Plan of Action on Ageing**, 1998

United Nations **Principles for Older Persons**, 1991



# Table of cases

## South Africa

*Amond Salie v Ragoon* 1903 TS 100

*Blanchard, Krasner & French v Evans* 2002 (4) SA 144 (T)

*Bloom's Woollens (Pty)Ltd v Taylor* 1962 (2) SA 532 (A)

*Blower v Van Noorden* 1909 TS 890

*Brink v Kitshoff NO* 1996 (6) BCLR 752

*Bulawayo Market Co v Bulawayo Club* 1904 CTR 370

*Castell v De Greeff* 1994 (4) SA 408 (C)

*Clarke v Hurst* 1992 (4) SA 630 (D)

*Clover v Bothma* 1948 (1) SA 611(W)

*Crafford and Prinsloo* 1905 TS 669

*De Villiers v Espach* 1958 (3) SA 91 (T)

*Dhanabakium v Subramanian* 1943 AD 160

*Estate Watkins-Pitchford v Commissioner for Inland Revenue* 1955 (2) SA 437 (A)

*Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T)

*Ex parte AB* 1910 TPD 1332

*Ex parte Derksen* 1960 (1) SA 380 (N)

*Ex parte Dixie* 1950 (4) SA 748 (W)

*Ex parte Geldenhuys* 1941 CPD 243

*Ex parte Hulett* 1968 (4) SA 172 (D)

*Ex parte Klopper: in re Klopper* 1961 (3) SA 803 (T)

*Ex parte Powrie* 1963(1) SA 299 (W)

*Ex parte Spinazze* 1985 (3) SA 650 (A)

*Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC)

*Hamed v African Mutual Trust* 1930 AD 333

*Hansa v Dinbro Trust (Pty) Ltd* 1949 (2) SA 513 (T)

- Harksen v Lane NO and Others** 1997 (11) BCLR 1489 (CC)
- Hoffmann v South African Airways** 2000 (11) BCLR 1211 (CC)
- Improvair (Cape) (Pty) Ltd v Etablissements Neu** 1983 (2) SA 138 (C)
- Kinemas Ltd v Berman** 1932 AD 246
- Koch v Mair** 1894 11 SC 71
- Krige v van Dyk's Executors** 1918 AD 110
- Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd** 1986 (3) SA 509 (D)
- Lange v Lange** 1945 AD 332
- Mahomed v Padayachy** 1948 (1) SA 772 (AD)
- Measrock v Liquidator, New Scotland Land Co Ltd** 1922 AD 237
- Minister of the Interior v Cowley** 1955 (1) SA 307 (N)
- Mitchell v Mitchell** 1930 AD 217
- Molyneux v Natal Land & Colonization Co Ltd** [1905] AC 555 (PC)
- Natal Bank Ltd v Natorp and Registrar of Deeds** 1908 TS 1016
- Nel v SAR & H** 1924 AD 30
- Pakes v Thrupp & Co** 1906 TS 741
- Pheasant v Warne** 1922 AD 481
- Phil Morkel Bpk v Niemand** 1970(3) SA 455 (C)
- Pienaar v Pienaar's Curator** 1930 OPD 171
- President of the Republic of South Africa and Another v Hugo** 1997 (6) BCLR 708 (CC)
- Prinsloo v Van der Linde and Another** 1997 (6) BCLR 759 (CC)
- Prinsloo's Curators Bonis v Crafford and Prinsloo** 1905 TS 669
- Raulstone v Radebe** 1956 (2) PH F85 (N)
- S v Hartman** 1975 (3) SA 532 (C)
- S v Makwanyane and Another** 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (C)
- S v Manamela and Another (Director-General of Justice Intervening)** 2000 (3) SA 1 (CC)
- Sampson v Liquidators Union & Rhodesia Wholesale, Ltd** 1929 AD 468
- Standard Bank of SA Ltd v Efroiken and Newman** 1924 AD 171

**Stoffberg v Elliot** 1923 CPD 148

**The National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1998 (12) BCLR 1517 (CC)

**Theron v AA Life Assurance Association Ltd** 1995 (4) SA 361 (A)

**Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz** 1957(4) SA 354 (W)

**Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz** 1958(1) SA 505 (A)

**Vermaak v Vermaak** 1929 OPD 13

**Vermeulen v Oberholzer** 1965 (1) SA PH F14 (GW)

**Ward v Barrett** 1962 (4) SA 732 (N)

**Weber & Pretorius v Gavronsky Brothers** 1920 AD 48

**Williams' Estate v Molenschoot and Schep (Pty) Ltd** 1939 CPD 360

**Wright v Williams** (1891) 8 SC 166

## England

**Airedale NHS Trust** [1993] 1 All ER 821

**Re Farrell** 529 A 2d 404 (1987)

**Re K** [1988] 1 All ER 358

## European Court of Human Rights

**X v United Kingdom** (1982) 4 EHRR 188

## New South Wales

**Ranclaud v Cabban (1988) NSW ConvR**

## 1

# Introduction

- 1.1 The South African Law Reform Commission (the Commission) has been involved in an investigation into assisted decision-making for adults with impaired decision-making capacity since the end of 2001.<sup>1</sup>
- 1.2 This Discussion Paper follows on the publication for comment, in December 2001, of an Issue Paper (Issue Paper 18: Incapable Adults) which aimed at introducing the investigation to the public, initiating debate and defining the reform necessary. We take this opportunity to thank those who responded as well as those who supplied us with information in the course of drafting the Discussion Paper.
- 1.3 The Discussion Paper (which includes draft legislation), takes the investigation further. It defines more clearly the need for reform, submits for public comment preliminary conclusions reached by the Commission and tests public opinion on solutions identified by the Commission.
- 1.4 The Commission is committed to consulting with all relevant stakeholders. In addition to publishing this Discussion Paper for written comment we plan to engage in a consultation process with the Paper as basis. Consultation with and participation by persons with impaired decision-making capacity, their families and carers will play a crucial role. Hereafter the Commission will prepare a Report which will contain its final recommendations and refined legislation. The Report will be submitted to the Minister of Justice and Constitutional Development who may then implement the Commission's recommendations by introducing the proposed draft legislation in Parliament.

---

<sup>1</sup> The title of the investigation was changed from "Incapable Adults" to "Assisted decision-making: Adults with impaired decision-making capacity" by the Commission's project committee responsible for this investigation at its first meeting on 11 September 2002. The change was made to reflect the focus of the investigation and to do away with discriminatory terminology.

## ORIGIN AND PURPOSE OF THE INVESTIGATION

- 1.5 The investigation was included in the Commission's research programme in July 2000. It resulted from a submission by a member of the public concerning the diminishing legal capacity of the elderly with specific reference to the problems encountered by persons with Alzheimer's disease, and the outdated and inappropriate ways in which the South African law currently deals with this situation.<sup>2</sup> Exploratory research and discussions confirmed that a change to the law might be necessary - especially in view of previous recommendations by the Commission for the introduction of the enduring power of attorney which were not promoted by the government. It was also established that problems related to diminished or diminishing legal capacity are not experienced by the elderly with Alzheimer's disease only, but by most persons with impaired decision-making capacity - however the incapacity is caused. A researcher was allocated to the investigation in July 2001 and an expert project committee, under the leadership of Judge Ben du Plessis, was appointed by the Minister of Justice and Constitutional Development in August 2002 to assist the Commission with its investigation.
- 1.6 In a nutshell the investigation deals with the need for assisted decision-making devices for adults with impaired decision-making capacity as far as it relates to decisions about financial affairs and personal welfare. We examine the currently available law dealing with these issues and the need for supplementary or alternative measures.

---

<sup>2</sup> Submission by Prof Jan C Bekker to the Minister of Justice and Constitutional Development 23 February 2000.

## LIMITED SCOPE OF THE INVESTIGATION

- 1.7 We are not concerned in this investigation with public law matters (such as the ability to vote;<sup>3</sup> or the question whether incapacity should be publicly notifiable).<sup>4</sup> Nor with capacity in the fields of delict or crime<sup>5</sup> or with matters such as the capacity to give evidence in a court of law;<sup>6</sup> or behaviour of adults with incapacity - and their or others' possible liability - with regard to, for instance, driving a motor vehicle,<sup>7</sup> handling dangerous objects,<sup>8</sup> or practising specific professions<sup>9</sup>. We are also not concerned with issues of capacity relating to

---

<sup>3</sup> According to the Electoral Act 73 of 1998 a person who has been declared by the High Court to be of unsound mind or mentally disordered, or who is detained under the Mental Health Act, 1973 may not be registered as a voter and is not permitted to vote (sec 8(c)-(d)).

<sup>4</sup> Neither the Mental Health Act 18 of 1973 nor the new Mental Health Care Act 17 of 2002 (which has not come into operation yet) contains any provision in this regard. See par 3.37 below on the need to investigate making incapacity publicly notifiable.

<sup>5</sup> The capacity to commit a delict or crime is influenced by mental condition. Because fault (in the form of intent or negligence) is generally speaking a requirement for criminal and delictual liability, a person who is *doli* or *culpa* *incapax* because he or she is mentally incapacitated, cannot incur liability (Barnard et al 35).

<sup>6</sup> The capacity of persons with mental incapacity to give evidence in a court of law is regulated by the Criminal Procedure Act 51 of 1977 which states in sec 194 that no person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his or her reason, is competent to give evidence while so afflicted or disabled.

<sup>7</sup> According to sec 15(1)(f)(iii), (iv) and (vii) of the National Road Traffic Act 93 of 1996 a person is disqualified from obtaining *or holding* a driver's licence if he or she is suffering from any form of mental illness to such an extent that it is necessary that he or she be detained, supervised, controlled and treated as a patient in terms of the Mental Health Act 18 of 1973; from any condition causing muscular incoordination; or from any other disease or physical defect which is likely to render such person incapable of effectively driving and controlling a motor vehicle. According to section 16 any person who has a driving licence and becomes aware thereof that he or she is disqualified from holding such licence must submit the licence for cancellation to the traffic authorities of the province concerned. Under sec 25(1)(b) a licence can also be cancelled if the holder would constitute a source of danger to the public by driving a motor vehicle on a public road. For purposes of the cancellation of a licence the holder can be requested to submit him- or herself to an examination and a test to determine his or her competency to drive a motor vehicle (sec 25(2)(a)). If a person fails to comply with a request to submit to testing, his or her licence can be cancelled forthwith (sec 25(4)).

<sup>8</sup> The Firearms Control Act 60 of 2000 provides that a competency certificate to possess a firearm may only be issued to a person of stable mental condition (sec 9(2)(d)). A licence to possess a firearm terminates if it appears that because of the holder's mental condition the possession of a firearm is not in his or her interest or that of any other person (sec 28; 102(1)(c)).

<sup>9</sup> Usually practitioners of specific professions are bound by legal, ethical and disciplinary rules governing such professions (see eg the possibility of restricting medical practice by impaired persons through regulations made under sec 51 of the Health Professions Act 56 of 1974). Moreover, the common law rules regarding criminal and delictual liability could apply to behaviour by persons with mental incapacity endangering third parties.

marriage and divorce,<sup>10</sup> or making a will.<sup>11</sup> Nor with the capacity to consent to sexual intercourse and the limitations the law place on certain groups of people to give valid consent thereto in order to protect them.<sup>12</sup>

- 1.8 The above issues are covered by the common law or specific statutory measures that are not identified for review under this investigation. In some instances they are or have been dealt with by the Commission under other investigations. Because of concerns raised in connection with behaviour of persons with Alzheimer's disease in particular, questions were nevertheless included in Issue Paper 18 regarding the need for additional measures to deal with issues related to the individual autonomy and public safety of such persons. The response to these questions confirmed that there is no need for law reform in this area at this stage.<sup>13</sup>
- 1.9 Finally, the investigation does not deal with the care, treatment and rehabilitation of mentally ill persons. These matters are regulated by mental health legislation. The investigation is also not concerned with the rights of the elderly in general. Recent developments in these two areas are discussed in paragraphs 3.20 - 3.22 below.

---

<sup>10</sup> Under common law a "consenting mind" is a prerequisite for entering into a contract of marriage (*Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669). Substitute decision-making in respect of highly personal issues such as marriage and divorce is not allowed in our law (see par 6.3 and 7.19 below). Statutory measures that could apply to issues of divorce and incapacity are included in the Divorce Act 70 of 1979 (cf sec 3, 5 and 7). The Commission has recently included an investigation in its programme dealing with review of the law of divorce. This investigation will, amongst others, address specific concerns relating to divorce and incapacity as pointed out by some respondents to Issue Paper 18 (see par 3.38 below).

<sup>11</sup> Sec 4 of the Wills Act 7 of 1953 requires that a person making a will be capable of appreciating the nature and effect of such act. Consequently a will made by a mentally ill person is void. A will is valid if made during a lucid interval by a person who has been declared to be mentally ill. The Wills Act provides that the burden of proof that a testator was, at the time of making his or her will, mentally incapable of appreciating the nature and effect of the act rests on the person alleging the same (sec 7, and sec 4). This would appear to apply whether or not the testator had previously been declared by the Court to be mentally ill (*Wille's Principles of South African Law* 233; cf also the general position on onus of proof set out in par 4.11 below). Making a will is regarded as an act of too personal a nature to be entrusted to a legal representative. A curator and an agent appointed under a power of attorney can therefore not make a will on behalf of a person without capacity (cf Heaton in *Boberg's Law of Person's and the Family* 117-118; see par 7.19 below on the common law position regarding powers of attorney).

<sup>12</sup> This issue is covered by the Commission's recent investigation into sexual offences (SALRC *Report on Sexual Offences* 2003 par 3.5 et seq).

<sup>13</sup> See par 3.37 below.

## STRUCTURE OF THE PAPER

1.10 The rest of the Discussion Paper consists of seven chapters:

- ◆ Chapter 2 defines the legal problem investigated.
- ◆ Chapter 3 discusses the need for reform with reference to the wider context and the response on Issue Paper 18.
- ◆ Chapter 4 deals with the concept of capacity – the tests for and effects of incapacity with regard to decisions concerning personal welfare, financial affairs and health-related issues; and the need for new measures to reflect that capacity is a function-based concept.
- ◆ Chapter 5 explores the principles that should underpin intervention in the affairs of persons with incapacity.
- ◆ Chapter 6 deals with existing incapacity - the current legal measures and procedures available to deal with it, problems in this regard and possible solutions.
- ◆ Chapter 7 provides information on representation by power of attorney and debates the possibility of introducing the concept of the enduring power of attorney into our law.
- ◆ Chapter 8 contains proposed draft legislation embodying the Commission's preliminary recommendations.

1.11 Options for reform and the Commission's preliminary recommendations are set out throughout the Paper. The Commission's in principle recommendations with the corresponding clauses in the draft Bill are included in the SUMMARY on page v. Instructions on the submission of comment are supplied on page ii.



## 2

# Defining the problem

- 2.1 Making decisions is an important part of human life. The decisions that an individual makes impact upon his or her personal well-being and financial position. They can involve issues relating to, for instance, accommodation, health care, education, employment, social contacts and financial arrangements. The exercise of choice in such matters is one of the ways in which people express their individuality, and having decisions acknowledged and acted upon by others is one of the ways in which people exert control over their own lives.<sup>14</sup> As will be shown in Chapter 4, one of the major disabling consequences of mental incapacity is the inability or limited ability to make legally effective decisions.<sup>15</sup> Diminished decision-making capacity may in turn reduce a person's ability to control his or her life. It may unfairly lower the esteem in which a person is held by others and may also diminish such person's sense of self-respect and dignity.<sup>16</sup>
- 2.2 Although we take it for granted that "adults" (persons of 21 years and above)<sup>17</sup> can make decisions about their personal welfare, financial affairs and medical treatment, some adults cannot make such decisions for themselves. They may have diminished capacity as a result of mental illness<sup>18</sup> (including acquired

---

<sup>14</sup> Ashton and Ward 3-7; Queensland Law Reform Commission **Draft Report** 1995 1.

<sup>15</sup> Cf also Cooper and Vernon 213 et seq.

<sup>16</sup> Ibid.

<sup>17</sup> International law and the Constitution 108 of 1996 (the Constitution) define a "child" as a person below the age of 18 years (sec 28(3)). In law there is an 'instantaneous transformation' from childhood to adulthood at a specified age. In South Africa "majority" (i.e. when the law confers full capacity to act and to litigate on an individual) is attained at age 21 years (sec 1 of the Age of Majority Act 57 of 1972; SARLC **Discussion Paper 103: Review of the Child Care Act** 2001 52 et seq). The Commission under its investigation on the review of the Child Care Act addressed this discrepancy and recommended that the age of majority should, with certain exceptions, be lowered to 18 years (SALRC **Report on Review of the Child Care Act** 2002 29 et seq). These recommendations have been included in clause 17 of the Children's Bill, 2003 which states that "(A) child, whether male or female, reaches the age of majority and becomes a major upon reaching the age of 18 years".

<sup>18</sup> "Mental illness" can take many forms but can be distinguished from "mental handicap" (or "intellectual disability" - see footnote 20) in that treatment is appropriate and a cure may be possible

organic brain syndromes such as dementia of which the most common form is Alzheimer's disease)<sup>19</sup>; intellectual disability (sometimes also referred to as mental handicap or mental retardation);<sup>20</sup> physical disability; or their incapacity may be related to ageing in general.<sup>21</sup> Note that physical disability may or may not be associated with intellectual disability. The law is however concerned with *capacity* of an individual, and this may in practice depend upon *ability* (eg an

---

(although not in all circumstances). The term covers both neurosis (a functional derangement due to disorders of the nervous system eg depression and obsessive behaviour) and psychosis (a severe mental derangement involving the whole personality eg schizophrenia and bipolar disorder [also known as manic depression]). According to medical criteria "mental illness" is an acquired condition (i e the person has previously been normal), and the condition must satisfy the diagnostic criteria of one or more particular groups.

For purposes of the Mental Health Care Act, 2002 "mental illness" is defined as "a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis" (sec 1).

<sup>19</sup> Medically, people who acquired a normal ability and then subsequently lose it are classified as having *acquired organic brain syndrome* which constitutes a mental illness (even though treatment may not be possible). Dementia is an acquired organic brain syndrome. It has been described as a clinical syndrome characterised by generalised cognitive impairment where the primary deficits occur in the areas of orientation, memory, and reasoning. About 5% of persons over 65 and 20% of persons over 80 are affected by dementia. The single most common cause of dementia is Alzheimer's disease, a progressive degenerative disorder of multiple neuronal systems in the brain. Forgetfulness is usually the first symptom, followed by difficulty with language and difficulty carrying out complex motor behaviours such as dressing and eating with utensils. Currently the definitive cause of Alzheimer's is still unknown and there is no cure although certain drugs are modestly effective. Other causes of dementia include multiple strokes (known as multi-infarct dementia); other neurological conditions (eg multiple sclerosis and Huntington's disease); various systemic medical disorders; and drug toxicity. Severe depression may also cause a dementia syndrome. Most dementing conditions are not reversible (Ashton and Ward 13-15; Roca in **Aging and the Law** 216 et seq).

<sup>20</sup> "Intellectual disability" may have a biological, genetic, or environmental basis, and should be distinguished from mental illness. It is generally accepted that "intellectual disability" encompasses any set of conditions resulting from genetic, neurological, nutritional, social, traumatic or other factors occurring prior to birth, at birth or during childhood up to the age of brain maturity (normally taken as 18 years), that affect intellectual development. These conditions result in a lifetime of lower than average overall capability for self-determination and general independent functioning and performance in vocational, social and personal functions. In some instances these conditions may occur in conjunction with physical, sensory or psychiatric impairments of varying degree. Such conditions have variable impact on the individual, from minimal to severe. Persons with intellectual disabilities include for instance persons with Down's syndrome (WHO **Report on Aging and Intellectual Disabilities** 2000 1-2).

The Mental Health Care Act, 2002 defines "severe or profound intellectual disability" (in contradistinction with "mental illness" [see fn 18 above]) as "a range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care" (sec 1).

<sup>21</sup> Roca in **Aging and the Law** 216 et seq; Ashton and Ward 10-15.

individual who cannot communicate may not be permitted to open a bank account notwithstanding that his or her mental capacity is unaffected).<sup>22</sup>

2.3 In some cases incapacity is relatively short-term; in others mental capacity is lost and may never be recovered; some people have never had the capacity to make decisions about their own affairs because of congenital conditions or conditions which developed early in their lives.<sup>23</sup> In the case of older persons or persons with diseases such as Alzheimer's, incapacity develops gradually and unpredictably and depends not only on the specific patterns of cognitive impairment characteristic to the individual's condition, but also on the specific decisions he or she is facing.<sup>24</sup> Since incapacitation can result from unexpected acute illness or injury as well as long-term degenerative conditions, every competent individual is to some degree vulnerable to the possibility of becoming incapable. The probability of incapacitation however increases with age – while actual life expectancy has increased, the expectancy of life without disability has not. Furthermore, current medical science holds out little hope that the chronic, non-lethal degenerative diseases of old age can be significantly prevented or delayed.<sup>25</sup>

2.4 From a medical point of view the problems presented by the variety of conditions referred to above appear to differ. There may for instance be real differences between intellectual disability and the effects on a mature person of a head injury: The method of care, education, training and assistance adopted for the former person may be inappropriate for the latter and different services may be needed.<sup>26</sup> It may also be uncertain, for instance, whether “mental illness” as defined in traditional mental health care legislation covers persons suffering from

---

<sup>22</sup> Ashton and Ward 13.

<sup>23</sup> Whitton 1996 **University of Cincinnati Law Review** 881-882.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid; Khaw **BMJ** 1999 1350-1352; Kirkwood 2003 **BMJ** 1297.

<sup>26</sup> Brain damage, for instance, appears to fall rather uncomfortably between mental illness and mental handicap (Ashton and Ward 15-19).

incapacity related to organic diseases such as Alzheimer's disease.<sup>27</sup> Hoggett explains these difficulties thus:<sup>28</sup>

“Defining mental disorder is not a simple matter, either for doctors or for lawyers. With a physical disease or disability, the doctor can presuppose a state of perfect or ‘normal’ bodily health (however unusual that may be) and point to the ways in which the patient's condition falls short of that. A state of perfect mental health is probably unattainable and certainly cannot be defined. The doctor has instead to presuppose some average standard for normal intellectual, social, or emotional functions, and it is not enough that the patient deviates from this, for some deviations will be in the better-than-average direction; even if it is clear that the patient's capacities are below that supposed average, the problem still arises of how far below is sufficiently abnormal, among the vast range of possible variations, to be labeled a disorder”.

It is clear that it is problematic to find an all-encompassing definition for the individuals with conditions as described above. The law is however concerned with capacity<sup>29</sup> and from a legal point of view similarity may be found between these medically different disabilities in the common inability to make all necessary decisions.<sup>30</sup> In accordance with this, the Commission's investigation deals with decision-making incapacity however it was caused. What must be borne in mind however is that the person with intellectual disability will never have had a greater degree of understanding than that now displayed, whereas those who have developed normally and then suffered an illness or accident causing the disability will at an earlier stage have enjoyed a greater level of ability.<sup>31</sup> This difference is relevant when developing legal solutions that will cater for the needs of both these groups.

- 2.5 A legitimate expectation of the law is that it should establish a structure within which appropriate autonomy and self-determination is recognised and protected. Such a structure should provide appropriate substitute decision-making devices

---

<sup>27</sup> On doubt whether the Mental Health Act, 1973 applies to persons with dementia see SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 13, 22 and 24. The medical fraternity however seems to accept that dementia can be classified as a “mental illness” (see fn 19 above).

<sup>28</sup> Hoggett 59.

<sup>29</sup> Cf the discussion on capacity in Chapter 4 below.

<sup>30</sup> Ashton and Ward 15-19.

<sup>31</sup> Ibid. See also fn 20 and 18 above.

and the necessary protection from abuse, neglect and exploitation.<sup>32</sup> At present the legal solution to the problem of persons who cannot manage their own affairs takes the form of curatorships.<sup>33</sup> An individual can also allow another to act on his or her behalf through a power of attorney. A power of attorney however terminates on incapacity of the person who granted the power.<sup>34</sup> The existing system of curatorships has been criticised on the ground that it suffers from a number of serious and frustrating difficulties mainly relating to its high cost, prolonged procedure, paternalistic nature and potential for abuse.<sup>35</sup> The problem of a power of attorney ceasing on incapacity is also a major cause for concern: Frequently caregivers are under the impression that the power of attorney granted by a person in their care will be effective until that person dies, even in cases where the person had severely diminished mental capacity and is therefore incompetent in the eyes of the law.<sup>36</sup> This is an unsatisfactory position as caregivers acting in good faith are putting themselves at risk of performing unauthorised acts for which they could be held personally liable. Even if such caregivers are aware of the legal position, it can be very difficult to determine whether or not they may continue to act as loss of mental capacity may be gradual or erratic.<sup>37</sup> The present state of affairs is complicated by the fact that South Africa has no specific statutory provisions dealing with adults with impaired decision-making capacity. The law has to be found mainly in a combination of the Constitution, the common law as extended by the Courts, mental health legislation, legislation pertaining to the administration of estates, and the rules of the High Court. In many cases incapacitated persons are cared for by persons who are ignorant of the law and who appear to be unaware that their acts, done in kindness and good faith on behalf of such person, may have serious and adverse legal implications. There is further no formal assisted decision-making

---

<sup>32</sup> See the discussion on constitutional considerations in par 3.13 et seq below. Cf also Cooper and Vernon 213; Ashton and Ward 3-9.

<sup>33</sup> See the discussion in par 6.3 et seq below.

<sup>34</sup> See the discussion on the current legal position regarding powers of attorney in par 7.6 et seq below.

<sup>35</sup> See eg Neumann **De Rebus** June 1998 61-64; Barker **De Rebus** April 1996 259-260; Van Dokkum 1997 **Southern African Journal of Gerontology** 17-20.

<sup>36</sup> Van Dokkum 1997 **Southern African Journal of Gerontology** 18.

<sup>37</sup> Ibid.

device that clearly provides for mild, fluctuating or temporary impairment. There is also no provision for some default arrangement to deal with situations where incapacitated persons have no family or carers to act on their behalf or where the existing formal measures have not been utilised.

- 2.6 The above problems are discussed and solutions are suggested in the chapters which follow. This is done against the wider context which influences the need for reform and the public response on Issue Paper 18.

### 3

## The need for reform

- 3.1 The need for reform is discussed below with reference to the wider context against which the investigation has been undertaken and the response on Issue Paper 18. The wider context without doubt influences the general imperative for reform as well as the direction in which alternatives and changes should be developed. The comments on Issue Paper 18 confirmed the need for change. We discuss the broad response to the Issue Paper below. Respondents' views on specific issues are referred to throughout the Paper and are used to inform the preliminary conclusions reached.

### THE WIDER CONTEXT

- 3.2 In the past two decades there have generally been significant changes in values and attitudes relating to the mentally disabled as well as the elderly. Traditionally, mental disability and old age has been associated with dependence. More recently this has changed and it is accepted that measures that adhere to this out-dated paradigm do not reflect reality.<sup>38</sup> The new paradigm (that views older people and people with disabilities as active participants in an integrated society which allows them to optimise their potential for independence while providing them with adequate protection and care when they require assistance) calls for measures that support and acknowledge above all the principles of dignity and autonomy. It shifts the focus away from a "needs-based" approach to a "rights-based" approach that recognises the rights of such persons to equality of opportunity and treatment in all aspects of life.<sup>39</sup> The change in paradigm is evident from international guidelines and pronouncements that have

---

<sup>38</sup> Cf WHO **Health and Aging: A Discussion Paper 1999** 12; Kirkwood 2003 **BMJ** 1297 et seq.

<sup>39</sup> Hogg et al 15-18.

in turn been reflected in law reform in many jurisdictions. Coupled with this, certain developments within our society (including the growing numbers of persons with decision-making incapacity, constitutional considerations, certain related law and policy developments, the anthropological position regarding mental illness in African societies, and the growing change in the demographics of the South African society) have come to emphasise the need for positive initiatives in law reform to address the needs of persons with impaired decision-making capacity.<sup>40</sup> The investigation is moreover undertaken against the background of previous recommendations by the Commission regarding enduring powers of attorney. These recommendations have not been implemented by the government. They are relevant to the current investigation and will be referred to and taken into account in the discussions that follows.

- 3.3 Apart from the wider context referred to above which influences the need for reform, the response on the Commission's first round of public consultations confirmed that a change is necessary.

## International guidelines

- 3.4 The United Nations has recognised the need to protect the rights of persons with disabilities and declared the principle of normalisation (i.e. treating persons with disabilities as much like other people as possible) as a common basis for international action in this area. Its *Declaration of General and Special Rights of the Mentally Handicapped, 1971* states that persons with mental or intellectual disabilities have, to the maximum degree of feasibility, the same rights as other human beings;<sup>41</sup> that they should live in circumstances as close as possible to normal and participate in different forms of community life;<sup>42</sup> that they have a right to qualified guardians when this is required to protect their well-being and

---

<sup>40</sup> Ibid 3.

<sup>41</sup> Article 1.

<sup>42</sup> Article 4.



interests;<sup>43</sup> and that they have a right to protection from exploitation and abuse.<sup>44</sup> It has also stated in its *Declaration on the Rights of Disabled Persons, 1975* and in a *General Assembly Resolution on Principles for the Protection of Persons with Mental Illness, 1991* that all disabled persons have an inherent right to respect for their human dignity, to enjoy a decent life, as normal and full as possible and that they are entitled to measures designed to enable them to become as self-reliant as possible.<sup>45</sup> Moreover, both the *International Plan of Action on Ageing, 1982*<sup>46</sup> and the *United Nations Principles for Older Persons, 1991*<sup>47</sup> emphasise the principles of independence, participation, self-fulfillment and dignity.<sup>48</sup>

- 3.5 It is of particular interest (although not binding on South Africa in any way) to note the contents of *Recommendation No R (99) of the Committee of Ministers of the Council of Europe to Member States on Principles concerning the Legal Protection of Incapable Adults, 1999* and specifically with regard to the principles governing such protection.<sup>49</sup> One of the main reasons for the development of the Council of Europe instrument was to protect adults with incapacity who are living within the community (i.e. not in institutions) in accordance with more recent attitudes towards people with disabilities. The Recommendation confirms the United Nations' emphasis on respect for human dignity as the first and most fundamental principle governing protection of incapable adults<sup>50</sup> but also places emphasis on the following key principles:<sup>51</sup>

---

<sup>43</sup> Article 5.

<sup>44</sup> Article 6.

<sup>45</sup> Articles 3 and 5 of Resolution 3447 of 9 December 1975; and article 2 of Resolution 46/119 of 17 December 1991.

<sup>46</sup> National Assembly Resolution 37/51.

<sup>47</sup> National Assembly Resolution 46/91.

<sup>48</sup> Cf also WHO Report **on Ageing and Intellectual Disabilities** 2000.

<sup>49</sup> See the discussion of the Recommendation by Jansen 2000 **European Journal of Health Law** 333 et seq.

<sup>50</sup> Recommendation No R 99 Part II Principle 1.

<sup>51</sup> The Recommendation contains 10 governing principles of which the four mentioned here are regarded by experts as key principles. See par 5.2 and 5.7 below for information on the other principles.

- ◆ Adherence to the principles of necessity and subsidiarity.<sup>52</sup> These principles imply that no measure of protection should be established unless it is necessary, taking into account the circumstances of the particular case; and that in deciding whether a measure is necessary, account should be taken of any less formal arrangements which might be provided in particular by family members, public authorities or other means. The latter principle (subsidiarity) requires that a response by means of legal measures (eg curatorship) should be subsidiary to a response by means of the use of informal arrangements or the provision of assistance. It has been said that it goes without saying that any legislation addressing the problem of incapable adults should give a prominent place to these two principles.<sup>53</sup>
- ◆ Maximum preservation of capacity.<sup>54</sup> This principle follows from the fact that different degrees of incapacity may exist and that incapacity may vary from time to time. It implies in particular that a measure of protection should not result in an automatic, complete removal of legal capacity. In this regard it is submitted in the explanatory memorandum accompanying the Recommendation that “there will never ... be any need to restrict the capacity to vote or make a will or to consent or refuse consent to any medical treatment or other intervention in the health field or make other decisions of a personal nature such as the decision to marry. Such acts should depend on the presence or absence of actual capacity at the relevant time”.<sup>55</sup>
- ◆ Adherence to the principle of proportionality. This principle requires that where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned i.e it should be tailored to the individual circumstances of the case.<sup>56</sup> The protective measure should therefore restrict the legal capacity, rights and freedoms of the

---

<sup>52</sup> Recommendation No R 99 Part II Principle 5.

<sup>53</sup> Jansen 2000 **European Journal of Health Law** 335.

<sup>54</sup> Recommendation No R 99 Part II Principle 3.

<sup>55</sup> Jansen 2000 **European Journal of Health Law** 336.

<sup>56</sup> Recommendation No R 99 Part II Principle 6.

adult concerned by the minimum which is consistent with achieving the purpose of the intervention:

For countries which still only provide for the ‘classic’ curatel, [this] principle ... would mean that the curator is under the obligation to involve the person concerned in the realisation of his tasks and duties; and foremost: to allow the adult to act him- or herself wherever possible. Participation and self realisation are the keywords now.<sup>57</sup>

## **Trends in comparable jurisdictions**

- 3.6 The Commission’s investigation takes place against the background of extensive law reform on issues related to substitute decision-making in other jurisdictions over the past 15 years. In several comparable jurisdictions the concept of enduring power of attorney was introduced in the 1980’s and has since been refined. In many instances enduring powers for personal welfare and health care or advanced directives for health care (frequently including provision for the cessation or refusal of medical treatment) have been incorporated in such reform.<sup>58</sup> More recently comprehensive legislative schemes to deal with the problems faced by adults with incapacity, their families and caregivers have been introduced through law reform. The latter include reform in England, Australia, Canada and most notably and recently in Scotland. Similar developments have taken place in most of the European jurisdictions, with one of the most interesting being that of the Netherlands.<sup>59</sup> In some of these countries completely new systems comprising substitute “decision-makers” have replaced old and intrusive systems which required appointment of public officials where it was unnecessary.
- 3.7 The systems introduced and the changes made differ vastly in detail and cannot be fully discussed in this Discussion Paper. Where relevant, reference will be made to some of the detail below. Certain common trends however run through

---

<sup>57</sup> Jansen 2000 **European Journal of Health Law** 336.

<sup>58</sup> See par 7.30 et seq and 7.167 below.

<sup>59</sup> See par 6.43 et seq below.

the new legislation and many of the principles and values underlying it are similar in nature. Broadly, these include the following:

- ◆ New systems are aimed at enabling incapacitated persons to gain greater freedom and independence. Substitute decision-makers generally have two main responsibilities: exercising rights on behalf of incapacitated persons; or assisting them to exercise their own rights (if this is possible) and to protect their interests. New legislation generally strives to establish a balance between autonomy and paternalism.<sup>60</sup>
- ◆ Official substitute decision-makers (who are usually appointed by a Court eg as in our current curatorship system) are appointed only if the needs of the person concerned cannot be met by other more informal means.<sup>61</sup> In some jurisdictions this approach is qualified by reference also to the “degree of the person’s incapacity”.<sup>62</sup>
- ◆ In keeping with the principle of choosing the least restrictive alternative, several jurisdictions have espoused the concept of limited substitute decision-making which allows the extent of the decision-maker’s authority to be tailored to the particular needs of the person concerned.<sup>63</sup> This principle is realised by introducing a graded system with differentiated levels of substitute decision-makers.<sup>64</sup> Opponents to this approach argue that it is not sufficiently flexible and places less emphasis on individual requirements. Proponents however point out that the graded system may be more practical to operate and that it extends to a wider range of people than the old schemes of substitute decision-making (which accommodated total incompetence only).<sup>65</sup>

---

<sup>60</sup> Cf English Law Commission **Consultation Paper No 119** 1991 131-132.

<sup>61</sup> Ibid 132-133.

<sup>62</sup> For instance in New Zealand (English Law Commission **Consultation Paper No 119** 1991 132-133). See also the more recent approach of the European Union referred to in paragraph 3.5 above.

<sup>63</sup> English Law Commission **Consultation Paper No 119** 1991 133.

<sup>64</sup> Ibid 133-135.

<sup>65</sup> Ibid.

- ◆ There is a definite trend towards legal and procedural safeguards against abuse or the undue restriction of rights. Procedural safeguards adopted in different jurisdictions differ, but include combinations of the following:<sup>66</sup>
  - \* Widely drawn standing to bring an application (eg for the termination of authority under an enduring power of attorney).
  - \* Improvement in the quality of hearings - some of which are held in public.
  - \* Provision for notice to be given to anyone likely to have a useful point of view to contribute.
  - \* A presumption that the incapacitated person will attend proceedings, or will be interviewed.
  - \* Representation for the person whose capacity is subject to challenge.
  - \* Provision for more rigorous testing of medical evidence and for assessments of social competence of the incapacitated person.
  - \* Power to obtain specialist reports.
  - \* Prescribed time limits.
  - \* Regular review of the appointment of substitute decision-makers.
  - \* Provision for appeal procedures.
  - \* Provision for reasoned decisions to be given.
- ◆ In all jurisdictions there has been an attempt to balance the need for procedural safeguards (which would suggest a more formal procedure) and welfare considerations (which suggest that proceedings should be easily accessible). Greater emphasis on the former may suggest that a Court is the proper forum to hear applications and to fulfill a supervisory role; while emphasis on the latter regard multi-disciplinary tribunals as being stronger on informality and better able to assess the views of medical and social services professionals.<sup>67</sup>
- ◆ There is a move away from tests of incapacity which are based on an individual's physical or mental status; or on a diagnosis (without further enquiry about how this actually affects the person's capacity to function).

---

<sup>66</sup> Ibid.

<sup>67</sup> Ibid 135.

In accordance with this, tests for capacity in some jurisdictions cover a combination of factors including disability, functional incapacity, and the need for a substitute decision-maker.<sup>68</sup>

- ◆ Priority is generally given to the appointment of relatives or friends of the incapacitated person as substitute decision-makers. Many persons with incapacity will however have to fall back on professional help because of lack of suitable relatives. Other jurisdictions have therefore increasingly provided for some default arrangement or a watchdog service, which can also act as substitute decision-maker of last resort when necessary.<sup>69</sup>
- ◆ There has been a growing recognition of the complexity of the role of substitute decision-makers and the need to provide training and education for those who undertake it - especially in view of the move away from appointing professionals for this role and concentrating on legitimising the role of family, friends and carers.<sup>70</sup> To deal with this, some jurisdictions have included instructions to persons acting as decision-makers in schedules or annexures to their legislation.<sup>71</sup>

3.8 Each jurisdiction has to respond to its individual needs and circumstances. It is accepted that models of reform that evolved in developed countries are not naturally translatable to developing regions as they are often not sustainable economically and are essentially urban-based. It would however be extraordinary if nothing is to be learned from the experience in other countries. The Commission is guided by the reform done in the countries referred to in conducting its investigation.<sup>72</sup>

---

<sup>68</sup> Ibid 136.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid; Creyke 1991 **Western Australian Law Review** 135. In Alberta (Canada), for instance, the Law Reform Institute recommended that a schedule to recommended legislation on enduring powers of attorney should contain notes explaining some of the formalities, the effect, and extent of an enduring power. This recommendation was not implemented. In a subsequent investigation on abuse of enduring powers the Institute again emphasised the necessity for information and recommended that the Government should provide the public through appropriate outlets, on a sustained basis (eg through informational pamphlets) with simple form information about enduring powers and about an agent's duties (Alberta Law Reform Institute **Report No 59** 1990 38 and **Final Report No 88** 2003 16).

<sup>72</sup> Cf English Law Commission **Consultation Paper No 119** 1991; English Law Commission **Consultation Paper No 128** 1992; Scottish Law Commission **Discussion Paper No 94** 1991;

## **Increase in the number of persons with decision-making incapacity**

- 3.9 The greater awareness of the needs of persons with incapacity is partly due to the increasing number of persons with incapacity.
- 3.10 Throughout the developing and the developed worlds, improved health and social care have led to dramatic increases in life expectancy.<sup>73</sup> Figures from selected large as well as small countries illustrate that there is increasing survival beyond 65 with the percentage of the elderly who are in their 80s growing all the time.<sup>74</sup> The aged population (i.e. the elderly over pensionable age) in South Africa currently consists of about 7% of the total population (a number of about 2,5 million persons).<sup>75</sup> Many of these persons will gradually lose their ability to administer their assets and to care for themselves. Because of the ageing of the population, in the future there will be relatively more people in the age groups most at risk of dementia.<sup>76</sup> Although little is known about the specific prevalence of dementia in South Africa, it is currently estimated that about 110 000 persons suffer from Alzheimer's disease and related dementia's in South Africa.<sup>77</sup>
- 3.11 Apart from the fact that medical advances play a significant role in the greying of the population, it also contributes to the rapid increase in the number of young adults with neurological injuries who are being kept alive after motor vehicle

---

Scottish Law Commission **Report No 151** 1995; Scottish Executive **Making the Right Moves** 1999; Queensland Law Reform Commission Report **No 49** 1996.

<sup>73</sup> Alzheimer's Disease International **Factsheet 4** March 1999; Kirkwood 2003 **BMJ** 1297 et seq.

<sup>74</sup> Ibid. Global life expectancy has more than doubled over the past two centuries (White **BMJ** 18 May 2002 1173; Khaw **BMJ** 20 November 1999).

<sup>75</sup> Department of Social Development Report **Mothers and Fathers of the Nation** 2001 Vol 2 1; **Census in Brief** 22.

<sup>76</sup> Alzheimer's Disease International **Fact Sheet 3** April 1999 and **Factsheet 4** March 1999. Dementia is strongly related to old age, with numbers doubling with every 5 years of age (Ineichen 2000 **Social Science & Medicine** 1673). See fn 19 above for information about dementia and Alzheimer's disease.

<sup>77</sup> Information supplied to the researcher by Dr F Potocnik, Psychogeriatric Unit, Department of Psychiatry, University of Stellenbosch on 10 December 2002.

accidents.<sup>78</sup> Road traffic accidents cause most of the severe head injuries and are likely to become the third most common cause of death and disability worldwide over the next 20 years.<sup>79</sup> Even patients with “mild” injury can suffer long term disability, with up to 47% being classed as moderately or severely disabled one year after injury.<sup>80</sup>

- 3.12 Several studies have moreover indicated an increased incidence of intellectual disability.<sup>81</sup> In 1996 7% of the South African population was classified as disabled.<sup>82</sup> These included persons suffering from physical disabilities, mental disabilities, multiple disabilities and disabilities relating to sight and hearing.<sup>83</sup>

## Constitutional considerations

- 3.13 Since 1996 the Bill of Rights contained in Chapter 2 of the Constitution of the Republic of South Africa, 108 of 1996 enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.<sup>84</sup> That the mentally and physically disabled are included in this constitutional protection has been answered unequivocally in the affirmative - at least where the nature of the right so permits.<sup>85</sup>
- 3.14 This view is fortified by section 9(3) of the Constitution providing that the state may not unfairly discriminate against “anyone” on the ground of “disability” (which

---

<sup>78</sup> Dobson 2003 **BMJ** 1004.

<sup>79</sup> Wasserberg 2002 **BMJ** 454.

<sup>80</sup> Ibid.

<sup>81</sup> Hogg et al 3; English Law Commission **Consultation Paper 119** 1991 14-18; Scottish Law Commission **Discussion Paper 94** 1991 3-6; Queensland Law Reform Commission **Discussion Paper 38** 1992 1-2.

<sup>82</sup> **Census in Brief** 32-33.

<sup>83</sup> Ibid 33.

<sup>84</sup> Sec 7(1) of the Constitution.

<sup>85</sup> Cockrell in **Bill of Rights Compendium** 3E-30.



is regarded as sufficiently wide to include both physical and mental disability).<sup>86</sup> “Unfair” discrimination sorts permissible from impermissible discrimination - it distinguishes between discrimination against vulnerable groups and the privileged.<sup>87</sup> The harm caused by measures that disadvantage vulnerable groups (which would include persons with mental and physical disabilities) goes beyond the evil of discrimination. Such treatment is “unfair” in that it perpetuates and exacerbates existing disadvantages.<sup>88</sup> Moreover, the question whether a person or persons has been unfairly discriminated against will be answered with reference to certain policy considerations including “institutional aptness, functional effectiveness, technical discipline, historical congruency, compatibility with international practice and conceptual sensitivity”.<sup>89</sup>

- 3.15 The right to equality<sup>90</sup> (encompassing the right not to be unfairly discriminated against) is closely intertwined with the right to dignity.<sup>91</sup> According to sec 10 of the Constitution everyone has inherent dignity and the right to have their dignity respected and protected. In *Hoffmann v South African Airways* (where the right to equality was applied to discrimination against people with HIV/AIDS

---

<sup>86</sup> Cf *S v Makwanyane* 1995 (3) SA 391 (C) par 482E. See also sec 6 of the Promotion of Equality and Prevention of Discrimination Act 4 of 2000 which provides that “[N]either the State nor any person may unfairly discriminate against any person”. See also the discussions by Cockrell in *Bill of Rights Compendium* 3E-30; and De Vos in *The Principle of Equality - A South African and a Belgian Perspective* 153-154.

<sup>87</sup> Kentridge in *Constitutional Law of South Africa* 14.5(a); De Vos in *The Principle of Equality - A South African and a Belgian Perspective* 143-145.

<sup>88</sup> Ibid with reference to the Constitutional Court’s interpretation in *Brink v Kitshoff NO* 1996 (6) BCLR 752 par 42 on the scope and ambit of the prohibition against unfair discrimination in the corresponding provision (sec 8(2)) of the interim Constitution (Act 200 of 1993).

<sup>89</sup> *The National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) at par 122; see also De Vos in *The Principle of Equality - A South African and a Belgian Perspective* 141.

<sup>90</sup> Sec 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

<sup>91</sup> *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) par 41; *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) par 31-33; *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC) par 50. See also Rautenbach in *Bill of Rights Compendium* 1A-58 on the role of human dignity as the cornerstone of the protection of all other rights; and De Vos in *The Principle of Equality - A South African and a Belgian Perspective* 142-143.

[regarded by some as a “disability”<sup>92</sup>] Ngcobo J underscored the importance of the link between the rights to equality and dignity:<sup>93</sup>

“At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victims of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.”

3.16 The right to bodily and psychological integrity conferred in section 12(2) of the Constitution is of specific significance.<sup>94</sup> “Integrity” embraces ideas of self-determination and autonomy and section 12(2) aims to protect self-determination with regard to body as well as mind against interference by the state and others.<sup>95</sup> The right to self-determination stems from the value of individual autonomy which implies that we should be left alone to make choices about the kind of lives we want to lead.<sup>96</sup>

“The value of autonomy derives from the capacity it protects: the capacity to express one’s own character - values, commitments, convictions and critical as well as experiential interests - in the life one leads. Recognizing an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent - but in any case, distinctive - personality. It allows us to lead our own lives rather than be led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what we have made of ourselves”.

---

<sup>92</sup> **HIV/AIDS and the Law** 68-69.

<sup>93</sup> 2000 (11) BCLR 1211 (CC) at par 27.

<sup>94</sup> Sec 12(2) provides that everyone has the right to bodily and psychological integrity. Expressly included in this is the right not to be subjected to medical or scientific experiments without informed consent (sec 12(2)(c)). In the latter regard see also par 3 of the illustrative list of unfair practices contained in the Schedule to sec 29 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which includes “[s]ubjecting persons to medical experiments without their informed consent”.

<sup>95</sup> Cf Currie and Woolman in **Constitutional Law of South Africa** 39.6(c).

<sup>96</sup> Ibid referring to Dworkin’s description (Ronald Dworkin *Life’s Dominion* 1993 225) of the value of autonomy.

- 3.17 The above rights are not absolute and may be limited, but only to the extent that the limitation is reasonable and justifiable.<sup>97</sup> Although the Constitutional Court indicated that no absolute standards can be laid down in this regard,<sup>98</sup> generally speaking, this would mean that -

“the level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be”.<sup>99</sup>

The relevance of this in the context of substitute decision-making concerns in particular the right to self-determination as discussed in the previous paragraph. Although the law is usually not implicated in mundane decisions of every day life, self-determination or autonomy becomes a legal issue where it is in conflict with the legitimate interest that we have in the ways other people lead their lives: If we are concerned that the choices they make are not in their own interest, it may be justified for the law to intervene.<sup>100</sup> When individual autonomy is diminished or absent as a result of illness, age, or mental incompetence the law may become implicated in the need to make decisions on behalf of an afflicted person.<sup>101</sup> The recognition of a constitutional right to autonomy however means that intervention in other peoples' lives must be kept to the minimum.<sup>102</sup> In accordance with this, South African legal experts addressing this issue are unanimous in the view that in cases of diminished or absent autonomy the Court (or other legally appointed decision-maker) would be required to substitute its

---

<sup>97</sup> According to sec 36(1) of the Constitution, the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

<sup>98</sup> **S v Makwanyane and Another** 1995 (6) BCLR 665 (CC) at par 104.

<sup>99</sup> Formulation of the Constitutional Court's approach in ascertaining whether it is justified to limit an entrenched right in terms of sec 36 by O'Regan J and Cameron AJ (as he then was) in **S v Manamela and Another (Director-General of Justice Intervening)** 2000 (3) SA 1 (CC) par 69.

<sup>100</sup> Currie and Woolman in **Constitutional Law of South Africa** 39.6(c).

<sup>101</sup> Ibid.

<sup>102</sup> Ibid. The view has for instance been expressed that the exclusion of persons with unsound mind or those who are mentally disordered from voting (see the Electoral Act referred to in fn 3 above) perhaps constitutes unfair discrimination in terms of sec 9(3) of the Constitution and might be overbroad since some of the mentally affected may be perfectly capable of voting. It has been suggested that provision should instead be made for affected persons to approach a tribunal or a Court to prove their fitness to vote (De Waal in **Constitutional Law of South Africa** 23-16(b)(iii)).

own judgment for the autonomous judgment that would have been made by the person concerned had he or she possessed the capacity to make the decision in question:<sup>103</sup>

“The right to self-determination demands that such a decision gives primary weight to the value of autonomy”.<sup>104</sup>

3.18 Since the introduction of our new constitutional dispensation questions have already arisen about the constitutional acceptability of the common law restrictions on legal capacity of mentally disabled persons; and the principle of appointing curators to those who cannot manage their own affairs:

- ◆ The common law restrictions on legal capacity (the most important of which is that any juristic act a person has purported to perform when his or her mental condition was such that he or she could not understand or appreciate the nature and consequences of the act, is null and void *ab initio*),<sup>105</sup> are not regarded as an unjustified violation of any of a mentally disabled person’s rights under the Bill of Rights. The reason for this is that the limitation of rights would be justified in terms of the logic of the common law that proceeds from the premise that a consenting mind is a prerequisite for the performance of juristic acts.<sup>106</sup>
- ◆ The broad principle that a curator can be appointed for someone who does not have the capacity or is unable to control his or her affairs is generally regarded as constitutionally acceptable.<sup>107</sup> Some argue that this is so because the object of appointing a curator is to protect the person who is placed under curatorship.<sup>108</sup> Others arrive at the same

---

<sup>103</sup> Currie and Woolman in **Constitutional Law of South Africa** 39.6(c); Cockrell in **Bill of Rights Compendium** 3E-34 (see the author’s rejection of other models of curatorship referred to in par 3.18 below); Heaton in **Boberg’s Law of Persons and the Family** 137-138 referring to Cockrell.

<sup>104</sup> Currie and Woolman in **Constitutional Law of South Africa** 39.6(c) referring to the standard laid down in **Airedale NHS Trust** [1993] 1 All ER 821 845d-g where an English Court was approached for an order declaring that a hospital may legally terminate life support on a patient in a persistent vegetative state.

<sup>105</sup> See par 4.9 et seq below for a discussion of the common law restrictions on legal capacity of the mentally ill.

<sup>106</sup> Cockrell in **Bill of Rights Compendium** 3E-31; cf also Heaton in **Boberg’s Law of Persons and the Family** 105.

<sup>107</sup> See par 6.3 et seq below for a discussion of the curatorship system.

<sup>108</sup> Heaton in **Bill of Rights Compendium** 3C-37.

conclusion but in doing so distinguish between the requirements that would justify the limitation of rights in respect of the appointment of a curator to the mentally ill on the one hand, and to persons suffering from other conditions rendering them incapable of managing their affairs (including physical handicap, serious illness, old age or mental retardation) on the other.<sup>109</sup> They argue that the appointment of curators to the mentally ill must at least be based on a finding by a competent authority that the person concerned is mentally ill in order to be constitutionally justified.<sup>110</sup> Since the current procedure for the appointment of curators to the mentally ill is premised on a finding that the person concerned is “of unsound mind and incapable of managing his or her own affairs” such appointment would be regarded as constitutionally justified.<sup>111</sup> As regards the appointment of curators to persons suffering from certain other conditions, it is argued that only where the curator’s appointment leads to decisions based on the substituted judgment model (i.e. on what the person concerned would have done had he or she been capable), would the appointment of the curator be constitutionally acceptable.<sup>112</sup> This model is preferred as it is regarded as the approach which best protects individual self-determination and best promotes respect for the personhood of the disabled person.<sup>113</sup> In coming to this conclusion other models of curatorship were rejected: The welfare-orientated-therapeutic model (based on what is best for the ward), and the parent-child-developmental model (based on promotion of the development of the ward) were regarded as being premised on

---

<sup>109</sup> Cockrell in **Bill of Rights Compendium** 3E-33 and 3E-34.

<sup>110</sup> Ibid 3E-33. Cockrell bases his argument on a decision of the European Court of Human Rights in **X v United Kingdom** ((1982) 4 EHRR 188) where the Court affirmed the following three *minimum conditions* in order for involuntary confinement of mental patients to be lawful: “... except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder”.

<sup>111</sup> See the discussion of Rule 57 of the Uniform Rules of Court, setting out the so-called *de lunatico inquirendo* procedure in par 6.5 below.

<sup>112</sup> Cockrell in **Bill of Rights Compendium** 3E-34.

<sup>113</sup> Ibid.

protective, paternalistic and conservative notions which do not fit in with the underlying premise of the Bill of Rights.<sup>114</sup>

- 3.19 To be constitutionally sound, new or additional measures making substitute decision-making possible will have to comply with the requirements reflected above - bearing in mind that other rights conferred in the Bill of Rights not mentioned above, may also be relevant. These may include the rights to freedom and security of the person;<sup>115</sup> privacy;<sup>116</sup> property;<sup>117</sup> and social security.<sup>118</sup>

## **Related law and policy developments in South Africa**

- 3.20 Current South African mental health legislation (the Mental Health Act 18 of 1973) regulating the care, treatment and rehabilitation of persons who are mentally ill is in the process of being updated and replaced. The new legislation (the Mental Health Care Act 17 of 2002) expressly recognises the international change in attitude towards persons with mental disability in its emphasis on the rights to equality, dignity and privacy.<sup>119</sup> The 2002 Act amongst others provides for the care and administration of property of “mentally ill” persons and persons with “severe or profound intellectual disabilities” as defined in the Act. In contradistinction to the 1973 Act, which mainly confirmed common law principles in this regard (by confirming the applicability of the curatorship system), the new

---

<sup>114</sup> Ibid.

<sup>115</sup> Sec 12(1) provides that everyone has the right to freedom and security of the person.

<sup>116</sup> Section 14 provides that everyone has the right to privacy, which includes the right not to have their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed.

<sup>117</sup> Sec 25(1) provides that no one may be deprived of property except in terms of law of general application; and no law may permit arbitrary deprivation of property.

<sup>118</sup> Sec 27(1)(c) provides that everyone has the right to have access to social security. Sec 27(2) further provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

<sup>119</sup> The Act prohibits unfair discrimination on the ground of mental health status (sec 10); and expressly requires respect for human dignity and privacy (sec 8), and adherence to the principle of consent to treatment (sec 9). This is also in concert with constitutional principles (see the discussion in par 3.13 et seq above).

Act has discarded the common law system for simple and accessible procedures.<sup>120</sup> At the time of preparation of this Paper the new Act has not come into operation yet.

- 3.21 The development of draft legislation on the status of the elderly is presently receiving the attention of the Department of Social Development.<sup>121</sup> Broadly speaking the legislation is aimed at providing for the protection and welfare of older persons; care of their interests; establishment and registration of institutions for their accommodation and care; and the establishment of an office of Ombudsperson for older persons.<sup>122</sup> In accordance with the international principles referred to in paragraphs 3.4 and 3.5 above, the legislation under preparation restates the law with regard to older persons with a view to facilitate accessible and equitable services and to empower older persons to continue to live meaningfully and constructively in society.<sup>123</sup> It is relevant to note that the measures to be included in the legislation is based, amongst others, on the assumption that until shown otherwise older persons are competent to make informed choices and decisions about their own lives.<sup>124</sup>
- 3.22 New legislation to provide a framework for a structured uniform health system is also under preparation. The National Health Bill, 2003<sup>125</sup> (which is currently before Parliament), amongst others contains provisions which aim to regulate consent to medical treatment, participation in research, and anatomical

---

<sup>120</sup> See the discussion in par 6.19 et seq below.

<sup>121</sup> The envisaged new legislation follows on the 2001 Report of the Ministerial Committee on Abuse, Neglect and Ill-treatment of Older Persons which in turn followed on media reports in March 2000 about the abuse of older people in residential institutions, pension queues and in the community (Department of Social Development Report **Mothers and Fathers of the Nation** 2001 Vol 1 1-4).

<sup>122</sup> Cf the long title of the draft Older Persons Bill (draft dated April 2003 as available on the Internet at [www.contacttrust.org.za/parldocs/20030409socdev\\_Bill.doc](http://www.contacttrust.org.za/parldocs/20030409socdev_Bill.doc) accessed on 29 April 2003).

<sup>123</sup> Preamble of the draft Bill.

<sup>124</sup> Clause 4(b) of the draft Bill.

<sup>125</sup> National Health Bill, 2002 (B 32 – 2003) published in **Government Gazette** No 23696 of 8 August 2002.

donations.<sup>126</sup> The Bill in particular emphasises a person's right to participate in any decision affecting his or her personal health and treatment.<sup>127</sup>

## The anthropological position regarding mental illness in African societies

- 3.23 In the African view it is the community which defines the person as person, and there is a distinctive nexus between individual and community.<sup>128</sup> In the context of the mentally ill,<sup>129</sup> this communalistic view implies that the group to which persons with incapacity belong has a responsibility to care for them. In practice this means that if the father of a mentally ill person dies, his brothers have the responsibility to care for such person.<sup>130</sup>
- 3.24 Legal competence of contracting parties is currently determined by common law, - even in the case of typical customary contracts such as *isondlo* and *sisa*.<sup>131</sup> Experts indicate that the literature on customary law makes no mention of mental illness as a ground for legal incapacity to enter into a contract.<sup>132</sup> They believe

---

<sup>126</sup> See par 6.26 et seq below.

<sup>127</sup> Clause 8 of the Bill.

<sup>128</sup> Labuschagne et al 2003 **CILSA** 113-114.

<sup>129</sup> It is not necessary in this Discussion Paper to set out the different forms or causes of mental illness as perceived in African culture. As indicated in par 2.4 the Commission's premise is to investigate the need for assisted decision-making structures however the decision-making incapacity was caused. See Labuschagne et al 2003 **CILSA** 106 et seq for information on mental illness in the context of ancestral veneration, witchcraft and spirit possession in African culture.

<sup>130</sup> Labuschagne et al 2003 **CILSA** 114.

<sup>131</sup> According to sec 11(3) of the Black Administration Act 38 of 1927 the contractual capacity of an African in respect of a customary law right or obligation used to be determined in accordance with customary law. Sec 11(3) was however repealed and the Customary Marriages Act 120 of 1998 (sec 53 read with the Schedule) now provides that despite the rules of customary law, the age of majority is determined in accordance with the Age of Majority Act 57 of 1972 (see also Labuschagne et al 2003 **CILSA** 116).

*Isondlo* refers to the custom to remunerate somebody who brings up and maintains a child if this person is someone other than the child's natural guardian. *Sisa* refers to the custom whereby cattle or other livestock are deposited by their owner with some other person on the understanding that such person shall enjoy the use of them, but that the ownership shall remain with and increase accrue to the depositor (Olivier et al par 169, 170).

<sup>132</sup> Labuschagne et al 2003 **CILSA** 116-117.



that this is probably because incapacity poses no problems in the communalistic context referred to in the previous paragraph, and that the family head or agnate group would stand in for a contracting party who becomes insane.<sup>133</sup> Against this background they suggest that the role of family should be recognised in new legislation dealing with substitute decision-making. In suggesting this, they emphasise that more recently sociologists have in fact found that kith and kin form adapted extended families in urban areas where they provide material and emotional security by way of mutual assistance, cooperation and care.<sup>134</sup> In addition to this they point to another significant development in African communities: The increasing establishment of small-scale societies (such as burial societies, *stokvels*<sup>135</sup> and church groups) which provide support, protection and security to their members. It is suggested that law reform should recognise and build on these existing support systems.<sup>136</sup> This view is confirmed in comments received on Issue Paper 18.<sup>137</sup>

## The demographics of South African society

- 3.25 Problems related to substitute decision-making are complicated by enormous disparities in wealth and standards of living in South African society.<sup>138</sup> This diverse situation calls for solutions to be developed in respect of both more complex and more simplified needs as far as management of financial affairs in particular is concerned. In the case of indigent persons with incapacity medical and other expenses related to their incapacity further deplete their already limited

---

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> A *stokvel* is a savings club which provides an informal financial service where formal financial institutions are not always accessible or available. It is made up of a group of people who each agree to donate a certain amount every week or month. The accumulated amount is then awarded to a member on a rotational basis or is saved and shared among members at the end of the year. There are approximately 800 000 stokvels countrywide with a total membership of around 10 million individuals (Smit et al [Internet]).

<sup>136</sup> Labuschagne et al 2003 **CILSA** 117.

<sup>137</sup> See eg the comments from the following persons and bodies, who emphasised, amongst others, the need to recognise cultural values and in particular the role of family: Prof Gina Buijs; Project Elderly, Attridgeville; and Garankuwa Management Committee for the Aged and Disabled.

<sup>138</sup> Cf **The State of South Africa's Population Report** 29.

resources. They simply do not have the means to engage in expensive legal procedures, to pay for the services of professionals to assist them, or to undertake long journeys to get to larger centres where such procedures are exclusively available.

- 3.26 As in other developing countries, rapid ageing of our society is accompanied by dramatic changes in family structures and roles, as well as in labour patterns and migration. Urbanisation, the migration of young people to cities in search of jobs, and smaller families means that fewer people are available to care for older persons with incapacity when they need assistance.<sup>139</sup> In the absence of family support or family involvement, the lack of safety nets can result in extreme outcomes such as psychological and financial abuse that could impact on decision-making about personal welfare<sup>140</sup> and financial affairs.<sup>141</sup>
- 3.27 Gender can also have a profound effect on the ability of persons with incapacity to access services – especially in the case of the elderly.<sup>142</sup> Women live longer than men in almost all areas of the world. In South Africa they make up approximately two-thirds of the population over age 75.<sup>143</sup> While women have the advantage of longer lives, they are more likely than men to experience discrimination in access to health care, inheritances, social security measures and political power. These cumulative disadvantages mean that women are more likely than men to be open to the possibility of abuse and exploitation. In addition, because of women's longer life expectancy and the tendency of men to marry younger women and to remarry if their spouses die, female widows dramatically outnumber male widowers in all countries. Older women who are alone, and who may themselves be incapacitated, are highly vulnerable to

---

<sup>139</sup> Cf Bezuidenhout (Unpublished) 4.

<sup>140</sup> Eg threats of placements in a nursing home, or isolation (Department of Social Development Report **Mothers and Fathers of the Nation** 2001 Vol 1 14).

<sup>141</sup> Eg improper exploitation of the person's material property or financial resources including theft, use of the person's money without authorisation, or influencing the person to relinquish control over finances (Department of Social Development Report **Mothers and Fathers of the Nation** 2001 Vol 1 14).

<sup>142</sup> Cf WHO Health and Ageing: A Discussion Paper 1999 19.

<sup>143</sup> Ibid 14.

financial abuse and social isolation. In some cultures, destructive attitudes may rob widows of their dignity and independence. These situations are often worse for older people living in rural areas. Special efforts are thus essential to ensure the protection of women with incapacity.<sup>144</sup>

**Previous relevant recommendations of the Commission:**  
*Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons, 1988*

3.28 The Commission previously undertook an investigation to address a range of problems stemming from the inaccessibility of the curatorship system and the termination of powers of attorney on mental incapacity. Its Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons, published in 1988, contained two main recommendations:

- ◆ First, it proposed the introduction of the concept of enduring power of attorney in South African law.<sup>145</sup> Although a majority of persons and bodies who commented on the issue at the time supported this recommendation, it was not promoted by the government. No official reasons are available for this. However, arguments raised against introduction of the enduring power recorded in the Commission's Report included the following:<sup>146</sup>
  - \* The concept is perceived to be foreign to South African law and should therefore not be introduced.<sup>147</sup>
  - \* Its introduction would lead to malpractices, abuse and exploitation of mentally incapacitated persons.

---

<sup>144</sup> Ibid 14-16.

<sup>145</sup> **SALRC Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons 1988** 50.

<sup>146</sup> Ibid 42-50.

<sup>147</sup> According to Van Dokkum 1997 **Southern African Journal of Gerontology** 20 this view of the Commission might have made the legislature reluctant to introduce the enduring power. Cf also par 7.29 below where we refer to the Commission's 1988 view.

- \* Its application would prove to be severely limited (as it will not offer a solution to those who have suffered from mental incapacity since childhood, or those who postpone the granting of such a power until it is too late, and as few people would be prepared to leave their personal affairs in the hands of another).

The problem of a power of attorney ceasing on incapacity continues to be a major cause for concern in the context of lack of decision-making capacity and is fully discussed in Chapter 7 with reference to the Commission's previous recommendations.

- ◆ Second, it recommended a simplified and less expensive procedure for the appointment of a curator of property to mentally incapacitated persons.<sup>148</sup> This recommendation was indeed promoted and resulted in the insertion of section 56A in the Mental Health Act 18 of 1973.<sup>149</sup> In terms of section 56 of the Act the Court may appoint a curator to perform or exercise on behalf of a person declared to be mentally ill any particular act in respect of such person's property, to take care of or administer such person's property, or to carry on any business or undertaking of such person. In terms of the inserted section 56A a person may apply to the Master of the High Court for the appointment of a curator to a person who is not declared to be mentally ill but whom the applicant believes to be suffering from mental illness to such a degree that such person is incapable of managing his or her own affairs. The Master may then appoint a curator to perform the functions stipulated above. This change was an improvement in the sense that application for appointment of a curator of property could be made to the Master (in stead of the Court) and that the person concerned need not be declared mentally ill. The section 56A procedure can however be utilised only where the incapacitated person's estate does not exceed a value of R100 000 or his or her income is not more than R24 000 per year. Apart from the fact that these amounts are currently perceived to be too low, the simplified

---

<sup>148</sup> SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons 1988** 45.

<sup>149</sup> The amendment was effected by the Mentally Ill Persons Legal Interests Amendment Act 108 of 1990.

procedure applies to persons who are incapable of managing their affairs because of “mental illness” only. The Act’s definition of “mental illness” is wide but it is accepted by some that it does not cover persons suffering from incapacity related to acquired organic brain diseases such as dementia.<sup>150</sup> Although these measures are now largely of academic interest (as the 1973 Act is in the process of being replaced), the new Mental Health Care Act 17 of 2002 does not address the needs referred to.<sup>151</sup> This will be taken into account in developing recommendations under the current investigation.

## THE REPOSE ON ISSUE PAPER 18

3.29 Issue Paper 18 was published in December 2001 as a first step in involving the public in the Commission’s investigation.<sup>152</sup> The Paper contained basic background information and a questionnaire. It did not propose specific solutions but pointed to possible broad options for reform based on reform in other jurisdictions. The questions covered the following main issues concerning assisted decision-making for adults with decision-making incapacity with reference to the appropriateness or sufficiency of the current position and the need for change:

- ◆ The general need for change and its possible scope.

---

<sup>150</sup> “Mental illness” is defined in the Act as “any disorder or disability of the mind, and includes any mental disease and any arrested or incomplete development of the mind ...” (sec 1). On the Act’s possible non-applicability to dementia see the Commission’s 1988 Report at 13, 22 and 24.

<sup>151</sup> See Chapter VIII of the Act dealing with the care and administration of property of mentally ill persons or persons with severe or profound intellectual disability; the definitions of “mental illness” and “severe or profound intellectual disability” in sec 1; and reg 56 of the Draft Regulations published under the Act (Government Notice No 233 in **Regulation Gazette** 7578 of 14 February 2003) fixing the estimated property value and annual income for utilising the new procedure for the care and administration of property of the mentally ill at R200 000 and R24 000 respectively. See also par 6.19 below for more detail on the new procedure.

<sup>152</sup> The Paper was distributed to more than 900 identified persons and bodies. Invitations for comment were published in the *Government Gazette* (Notice 2357 in Gazette No 22904 of 14 December 2001) and in the national media. The Paper was also made available on the Internet. The return date for comment was 28 February 2002. The date was extended to 31 March 2002 at public request, and since sufficient comment had not been received at that stage.

- ◆ The approach to “capacity”.
- ◆ Managing personal care and welfare.
- ◆ Managing property and financial affairs.
- ◆ Medical and health related decisions.
- ◆ Provision for future incapacity.
- ◆ Possible problems related to individual autonomy and public safety.
- ◆ Broad options for reform.
- ◆ Possible approaches to reform and principles which should guide intervention.

The broad response is reflected below. Comments on individual issues are discussed throughout the Paper.

3.30 Seventy-three written submissions were received between December 2001 and August 2002. The comments represented a range of relevant interests as is evident from the list of respondents included in the **ANNEXURE**. Some expressed the views of interest groups of considerable extent while others came from private individuals, professionals dealing with adults with incapacity, researchers, and small organisations. Amongst the responses were valuable comments received from some of the Masters of the High Court, certain non-governmental organisations and certain medical experts. Significantly, the comments included responses from family and carers (professionals as well as others) of adults with dementia and early stage dementia. In many instances the latter group of respondents, instead of reacting to the questions posed, commented more generally on what they would like the law to provide for, or they supplied information on case records to illustrate the needs and problems that have to be met. These comments were valuable as they highlighted the social circumstances which call for a change of the law. We also reflect below information received and impressions gained during informal discussions (frequently using Issue Paper 18 as basis) with interested members of the public and representatives of certain organisations.<sup>153</sup>

---

<sup>153</sup>

These include discussions with representatives of the Alzheimer's and Related Dementias Association on 2 August 2001; the Parkinson's Association of South Africa on 8 February 2002; the Tshwane Bipolar Association on 20 February 2002; the Brain Injury Group (Pretoria) on 5 March 2002; Sterkfontein Hospital, Krugersdorp and Roodepoort Geriatric Clinic on 5 April 2002; and Multiple Sclerosis South Africa on 27 November 2002. It also includes presentations and/or

- 3.31 On the whole, the comments provide strong confirmation that a change to the law is necessary. However, respondents differ in their opinions on the extent of the reform needed and on what would be suitable options to replace or supplement the current position. The legal profession in general seems to be largely unaware of the problems suffered by persons with diminished capacity. In contradistinction, persons with incapacity, their families and carers were outspoken in their criticism of the current position which, according to them, offers little in way of support.
- 3.32 Respondents confirmed that several practical problems are encountered by adults with incapacity which should be dealt with by the law. Although our questionnaire revealed no empirical studies in this regard, many professionals (mainly from the medical and social service professions) stated that numerous examples and anecdotes present themselves in daily practice which they submitted supply sufficient evidence of the considerable extent of the problems. Apart from a range of obvious practical problems related to the management of personal welfare, health care, and financial affairs from the point of view of persons with incapacity and a range of obvious problems related to the current curatorship system, comments specifically reflected the following:
- ◆ A need for the law to provide for substitute decision-making measures for persons who are not “insane” or clearly incapable and who do not have large estates or complicated affairs to be administered - perceived to be the majority of persons to be in need of protection by the law.
  - ◆ A need for the law to address the position of those adults with incapacity who do not have family or relatives to activate available procedures to assist them with managing their affairs.

---

discussions with members of the public at the 17th International Conference of Alzheimer's International, New Zealand 25-27 October 2001; Miller Du Toit / Law Faculty of the University of the Western Cape Family Law Conference on 25 March 2002; the 12th Alzheimer Europe Conference, Maastricht on 4-6 June 2002; Alzheimer's and Related Dementias Support Group Facilitators Training on 3 October 2002; the Hofmeyr Herbststein & Gihwala Centre for Family Law Seminar on 9 November 2002; and a Multi Sclerosis SA Seminar for professionals caring for persons with multiple sclerosis on 24 May 2003.

3.33 Commentators were virtually unanimous in their opinion that common-law measures are still appropriate but insufficient. Several reasons were advanced for this, the major reasons given being the following:

- ◆ Current measures are inadequate in breadth and need to be extended to provide for substitute decision-making in grey areas (eg in instances of temporary incapacity, fluctuating incapacity and mild cognitive impairment where there is no need to appoint a curator).
- ◆ Current measures do not accommodate the move towards a human rights approach (which would in particular call for measures aimed at preserving autonomy and dignity of persons with incapacity).
- ◆ Current measures do not take into account the complexity of the South African society (which would call for cultures and values of African people to be recognised eg in taking into account the important role of family).
- ◆ Current measures are inaccessible to the majority of persons in South Africa who live in poverty-stricken communities and don't have the funds to utilise sophisticated legal options.
- ◆ Current measures do not provide sufficient protection against abuse and exploitation of adults with incapacity by unscrupulous professionals and relatives.
- ◆ Several respondents also pointed to the law reform in comparable jurisdictions and the need to likewise update the South African system.

3.34 As indicated above, there was difference of opinion on the extent of the reform needed. Broadly, the following is reflected in the comments:

- ◆ On condition that sufficient protection against possible abuse is provided for, there is overwhelming support for the introduction of the concept of enduring power of attorney (covering financial affairs, personal welfare and health related issues) in our law. Whatever changes is brought about, this concept should be part of it.
- ◆ There seems to be relative consensus that the curatorship system should be retained rather than abolished, and that additional or alternative measures should be established alongside it to address its current shortcomings. On the one hand these alternatives could be fairly limited and provide for a streamlined "curatorship system", which is more user



friendly, more accessible, and within the financial reach of a broader spectrum of people. On the other hand such alternatives could be broader and more comprehensive, providing for a combination of measures to address the variety of circumstances arising from the current unsatisfactory state of affairs. Because of the range of needs identified, the majority of commentators believed that even if a comprehensive new system is not necessary, reform will have to entail more than merely introducing the concept of enduring power of attorney.

### **General pointers for reform emerging from the comments**

3.35 In spite of the differences of opinion on the extent of the reform needed and what specific form it should take, the comment firmly established that solutions will have to be developed to accommodate the following needs:

- ◆ Any change to the law should provide legal certainty regarding management of the affairs of adults with incapacity.
- ◆ Clear principles and values should underpin intervention in the affairs of adults with incapacity.
- ◆ The law should recognise and provide for progressive, temporary and fluctuating loss of capacity.
- ◆ New measures should reflect a human rights approach as well as the complexity of the South African society.<sup>154</sup>
- ◆ Provision should be made for an affordable system that would be accessible to the majority of South Africans.
- ◆ Provision should be made for a more flexible, less cumbersome system than that presently in place.
- ◆ Better control and safeguards should be implemented to protect the interests of adults with incapacity against abuse.

---

<sup>154</sup>

See par 3.23 et seq above for the relevance of the anthropological position regarding mental illness in African societies, and the demographics of South African society.

- ◆ Foundational legislation should be supplemented by a public awareness campaign, education, guidelines and codes of good conduct to provide a yardstick for family, caregivers and health care providers and to protect the interests of adults with incapacity.

3.36 As far as the Commission's process is concerned, certain social service organisations and carers of persons with incapacity emphasised that it should not be assumed that their views necessarily reflect the views of persons with incapacity. They suggested that, as far as is possible within the restraints of the Commission's resources, the views of such persons should be obtained in developing recommendations for reform. They suggested that this could be done by making use of facilitators and "advocates" during the consultation process.<sup>155</sup>

## Other issues

3.37 As indicated in Chapter 1, this investigation has certain limitations.<sup>156</sup> Because of concerns raised by family and carers about behaviour of persons with Alzheimer's disease in particular, questions were nevertheless included in Issue Paper 18 regarding the need for additional measures to deal with issues related to individual autonomy and public safety of such persons; the need for legislation to regulate the behaviour of adults with incapacity; and whether a diagnosis which entails incapacity should be reported to a public agency. On the whole commentators believed that there is no need for reform in this regard:

- ◆ In a small percentage of cases practical problems with for instance, driving motor vehicles, the possession of fire-arms and the practice of certain professions might exist but the majority of respondents were of the opinion that additional statutory measures are not called for.<sup>157</sup>

---

<sup>155</sup> See eg the comments of the SA Federation for Mental Health.

<sup>156</sup> See par 1.7 above.

<sup>157</sup> Examples of problems mentioned by respondents included numerous quality of life questions centering on the social integration or isolation of persons with incapacity and included, for instance, whether persons with incapacity can move around safely without becoming lost; whether they should have access to potentially dangerous objects like firearms, sharp objects, and power-driven machinery; whether they are still fit to safely drive a motor vehicle; and whether they are fit to

- ◆ Although single commentators expressed a need for legislation regulating the behaviour of persons with incapacity and the possible liability of their family and carers, the general view was that there is no need outside already existing legislation and the prevailing principles regarding contractual and delictual liability to provide for this. In this regard reference was specifically made to the existing provisions of the Mental Health Care Act, 1973 dealing with intervention in cases of urgency or where the mentally ill are dangerous.<sup>158</sup> Caution was expressed not to over-legislate. It was also pointed out that to single out a specific group as target for such legislation is undesirable and would probably be regarded as unfair discrimination. Strong views emerged that general legal principles should govern the activities of adults with incapacity.
- ◆ Finally, the vast majority of respondents believed that routine reporting of incapacity would entail an unacceptable intrusion into several fundamental rights of adults with incapacity and found it to be an unacceptable suggestion.

Emphasising the social nature of the problems usually encountered with regard to behaviour of persons with incapacity, and the fact that “the law cannot hope to cover all eventualities” some respondents suggested that these problems should rather be dealt with by training family, carers and relevant authorities on existing legislative measures aimed at regulating behaviour of persons with incapacity; and on how to empower persons with incapacity without controlling them.<sup>159</sup> In the latter context it was specifically suggested that guidelines (for instance in the form of a code of conduct) are needed as yardstick indicating desirable limits of authority and power to act in respect of persons with incapacity. Such a code should be underpinned by clear principles on when intervention in the affairs of

---

continue their usual occupation (see eg the comment of the Occupational Therapy Association of SA). See par 1.7 et seq above and the accompanying footnotes where the applicable legal framework in respect of most of the activities mentioned is briefly set out.

<sup>158</sup> See sec 8-27 of the 1973 Act. The Mental Health Care Act, 2002 also contain provisions in this regard (see sec 32-34 and 40 dealing with involuntary mental health care and the authority of the South African Police Service to intervene when necessary).

<sup>159</sup> See eg the comments of the SA Federation for Mental Health; and Dr Felix Potocnik and colleagues.

persons with incapacity would be appropriate and could be developed by relevant experts, bodies and lobby groups.<sup>160</sup>

3.38 The public was also invited to bring to the Commission's attention any additional issues for possible law reform related to this investigation. Issues raised in response include the following:

- ◆ The need for procedures regulating mediation and settlement of disputes related to decisions concerning adults with incapacity.<sup>161</sup> This need is addressed under the Commission's investigation into Arbitration: Alternative Dispute Resolution (Project 94) and the comments concerned have been referred to the relevant researcher.
- ◆ Sexual autonomy of persons with Alzheimer's disease.<sup>162</sup> Comments in this regard were referred to the Commission's researchers involved in its investigation into Sexual Offences (Project 107). The Commission's Report on Sexual Offences was published in January 2003.
- ◆ Issues related to parental authority of adults with incapacity with minor children.<sup>163</sup> These comments were referred to the Commission's researchers involved in its investigation on The Review of the Child Care Act (Project 110). The Commission's Report on The Review of the Child Care Act was published in January 2003.
- ◆ Issues related to procedure with regard to dissolution of marriage on the ground of mental incapacity; and protection of the interests of adults with incapacity in the case of divorce.<sup>164</sup> These concerns have been brought to the attention of the researcher dealing with the Commission's current investigation on The Review of Aspects of the Law of Divorce (Project 128).

---

<sup>160</sup> See eg the comments of the Occupational Therapy Association of SA. Cf also the comment of Dr Felix Potocnik and colleagues of the Department of Psychiatry, Faculty of Health Sciences, University of Stellenbosch who suggested practical ways of dealing with, for instance, situations where a person with incapacity becomes incapable of effectively driving a motor vehicle. Dr Potocnik and colleagues offered to assist with training of traffic authorities to show them how to identify such incapacity and how to implement the current statutory measures.

<sup>161</sup> Comments by Prof Jan Bekker.

<sup>162</sup> Comments by Prof JMT Labuschagne.

<sup>163</sup> Comments by Prof Jan Bekker and the Family Advocate, Pretoria.

<sup>164</sup> Comments by Prof Jan Bekker and Prof Francis Bosman.

## PREMISE: A NEED FOR CHANGE

- 3.39 The Commission is convinced that the factors reflected by the wider context in which this investigation is conducted strongly indicate that a change to the law regulating substitute decision-making can no longer be postponed: International guidelines, requirements and developments; constitutional considerations; and current changes to national law with regard to the related issues of mental health and the status of the elderly all point in this direction. The Commission had moreover previously clearly identified a need for the introduction of the enduring power of attorney. The latter need has not been addressed and has escalated in accordance with the escalation in the number of people in need of such a measure. Finally, and most significantly, the range of problems faced by persons with incapacity, their families and carers as reflected in the comments on our first round of consultation unequivocally exposed the gaps and deficiencies in the existing law.<sup>165</sup>
- 3.40 How wide the change should be will be clarified as the investigation progresses. At this stage the Commission believes that a strong case has been made out for introducing the enduring power of attorney. In concert with the comments received, the debate in this Paper is not about whether this concept should be introduced but how it should be regulated to best serve the interests of persons with incapacity who wish to make use of an advance decision-making device. The Commission is further of the view that a more accessible and cost effective alternative to the curatorship system should at least be made available adjacent to the current system. How extensive such an alternative should be and whether it would be sufficient to establish a procedure similar to that introduced by the new Mental Health Care Act, 2002 but with regard to persons with incapacity not covered by that Act, is explored in Chapter 6.
- 3.41 Although the Commission acknowledges the many practical day-to-day problems that could be encountered with regard to behaviour of persons with incapacity, it

---

<sup>165</sup>

See also par 6.32 et seq below.

agrees with the majority of respondents that current law provides a sufficient framework within which to deal with them.<sup>166</sup> The problems raised by commentators concern essentially social issues which fall outside the scope of the law and which are unlikely to be solved by introducing additional legislation. The Commission supports the suggestion that needs in this regard could be dealt with by education and training; and by the development of guidelines by relevant experts and bodies to assist family, carers and others in need of such guidance.<sup>167</sup>

3.42 Finally, the Commission in Chapter 1 indicated its commitment to public consultation - including participation by persons with impaired decision-making capacity, their families and carers - in the development of its recommendations.<sup>168</sup> We trust that we will receive the assistance of support and service organisations, and family and carers of persons with incapacity to achieve this aim.

### 3.43 PRELIMINARY RECOMMENDATION

In view of the above we proceed on the following premise:

**A change to the law is necessary. Legislation should be developed to establish substitute decision-making measures as alternative to and in addition to those currently available in accordance with the needs set out in paragraph 3.35 above. In particular it should aim to -**

- ♦ **provide a legal framework to govern the many informal day-to-day decisions that are made by carers, family members or treatment providers on behalf of adults with incapacity;**
- ♦ **provide a more accessible alternative to the current curatorship system;**

---

<sup>166</sup> See par 1.7 and the accompanying footnotes above for reference to relevant measures.

<sup>167</sup> See commentators' suggestions referred to in par 3.37 and fn 160, for instance.

<sup>168</sup> See par 1.4 above.

- ♦ enable people to give advance instructions about managing their affairs or to choose substitute decision-makers in anticipation of a time when they are no longer capable of making decisions or communicating them;
- ♦ provide adequate safeguards to ensure that adults with incapacity and their assets are protected against abuse; and
- ♦ achieve the above through simple and inexpensive measures.

## 4

# The concept of capacity

## INTRODUCTION

- 4.1 *Capacity* refers to someone's ability to do something. In the legal context it refers to a person's ability to perform a specific juristic act (a voluntary human act to which the law attaches at least some of the legal consequences willed by the party or parties performing the act – such as for instance entering into a contract granting a power of attorney, or making a will).<sup>169</sup> *Incapacity*, or the inability to enter into a transaction, is either imposed by the law for policy reasons (usually since the individuals concerned need to be protected from their own inexperience and imprudence and from exploit by others eg as in the case of children); or arises by reason of mental disorder.<sup>170</sup> Capacity in the legal sense is a threshold requirement for persons to retain the power to make decisions for themselves.<sup>171</sup>
- 4.2. The legal and medical concepts of capacity should be distinguished from each other. They differ from each other and the way in assessing them also differs.<sup>172</sup> Whether a person has or lacks capacity to do something is ultimately a legal question - attempts to establish legal capacity however invariably rely on an assessment by the medical profession.<sup>173</sup> Capacity in the medical sense thus

---

<sup>169</sup> **Wille's Principles of South African Law** 55. See also Lush 37 et seq; Roca in **Aging and the Law** 223.

<sup>170</sup> Ibid.

<sup>171</sup> Alzheimer Europe **LAWNET Final Report** 54 et seq; Kapp in **Protecting Judgment-Impaired Adults** 25-17.

<sup>172</sup> British Medical Association Report on Assessment of Mental Capacity 2-11; Cooper and Vernon 213-216; Kapp in **Protecting Judgment-Impaired Adults** 25-17; English Law Commission **Consultation Paper 119** 1991 19-21, 45-50.

<sup>173</sup> Ibid.



relates to a clinical evaluation of an individual's functional ability to make autonomous, authentic decisions about his or her own life; while capacity in the legal sense relates to the judgment of a Court of law about the same issue, which generally is the prelude to appointment of a substitute decision-maker for the person deemed to be incompetent and which generally refers to the medical evaluation.<sup>174</sup>

- 4.3. It has been said that a legally and medically usable definition of capacity that is both sufficiently specific to avoid false positives and broad enough to avoid false negatives is probably impossible.<sup>175</sup> Work done by law reform commissions in other jurisdictions reflects the difficulties in attempting to achieve a precise, easily measurable and easily applied legal definition of decisional incapacity.<sup>176</sup>

## ASSESSING CAPACITY IN THE MEDICAL CONTEXT

- 4.4. Extensive information (recording mostly research done in the United States) exists in the health and human services professions on defining and assessing decisional capacity, in particular for purposes of consent to medical treatment.<sup>177</sup> Traditionally the following five approaches to evaluating capacity have been identified:<sup>178</sup> ability evidencing a choice;<sup>179</sup> rational reasons for choice;<sup>180</sup>

---

<sup>174</sup> Ibid.

<sup>175</sup> Kapp in **Protecting Judgment-Impaired Adults** 15-16, 27.

<sup>176</sup> Cf English Law Commission **Consultation Paper 119** 1991 22-54; Queensland Law Reform Commission **Draft Report** 1995 6, 32-36, 132-134, 208; Scottish Law Commission **Discussion Paper 94 1991** 341 et seq.

<sup>177</sup> Kapp in **Protecting Judgment-Impaired Adults** 16.

<sup>178</sup> Wolff in **Aging and the Law** 326-336.

<sup>179</sup> This is the least stringent test: If a patient can make a choice - any choice - that decision serves to prove sufficiently his or her competency. This test values highly patient autonomy and does not evaluate the quality of the decision.

<sup>180</sup> This test evaluates the quality of decision-making - asking whether the choice was based on rational reasons. This test necessarily includes a subjective evaluation.

reasonable outcome of choice;<sup>181</sup> ability to understand;<sup>182</sup> and actual understanding.<sup>183</sup> Each approach is aimed at balancing patient autonomy against social goals in a different way.<sup>184</sup> These approaches have been criticised and have since been reduced to four specific tests (ability to evidence and communicate a choice; ability to understand relevant information; the quality of the patient's thinking process; and the patient's appreciation of his or her own situation).<sup>185</sup> These have in turn been broken down into just two elements: capacity to assimilate relevant facts; and appreciation or understanding by the patient of his or her situation as it relates to the facts.<sup>186</sup>

- 4.5. In spite of difference of opinion on the suitability of specific standards of evaluation, it seems to have been uniformly accepted that capacity to make personal choices must be judged on a decision-specific basis as opposed to a global all-or nothing basis.<sup>187</sup> A patient's capacity must thus be judged according to the particular decision with which that patient is confronted. A patient may, for instance, be generally capable of making most decisions but unable emotionally to weigh risks and benefits concerning a specific question; or may not be able to comprehend information or engage in a rational thought process on most matters but be capable of focusing sufficiently on a specific matter of importance for him or her.<sup>188</sup> In a similar vein, there is board consensus that capacity may be partial

---

<sup>181</sup> This test requires that the evaluator agree that the patient has made a "right" or "responsible" decision. This test does not value patient autonomy.

<sup>182</sup> This test requires an evaluation of the patient's *ability* to understand the risks, benefits, and alternatives involved in the decision. The patient should be given the information necessary to make an informed decision. This test is consistent with standards of informed consent.

<sup>183</sup> This test requires that the patient *actually* understand the costs, benefits and alternatives involved in the decision.

<sup>184</sup> Wolff in **Aging and the Law** 326-336.

<sup>185</sup> Kapp in **Protecting Judgment-Impaired Adults** 17-19. Cf also the discussion in Scottish Law Commission **Discussion Paper 94** 1991 341 et seq.

<sup>186</sup> Ibid.

<sup>187</sup> Kapp in **Protecting Judgment-Impaired Adults** 21. Cf also Fazel et al 1999 **BMJ** 493-497; Roca in **Aging and the Law** 222-224.

<sup>188</sup> Ibid.

or compromised rather than entirely absent. Capacity thus may fall or fluctuate along points of a continuum, instead of resting at either end.<sup>189</sup> Likewise, there is little dispute that decisional capacity refers only to a minimal or baseline functional level, rather than an ideal of perfect comprehension and rational thought.<sup>190</sup>

## THE LEGAL PRINCIPLES

### Introduction

4.6 The law is primarily concerned with rights and obligations. Rights and obligations cannot exist in a vacuum – they are attached to persons. A person in the legal sense is any being that the law endows with the capacity of acquiring rights and incurring obligations. There are four main types of capacities that can be acquired:

- ◆ The capacity to have rights and obligations (the only capacity common to all persons - although the extent of it may vary);
- ◆ the capacity to perform juristic acts (to enter into legal transactions);
- ◆ the capacity to litigate (to appear in a Court as a party to a lawsuit); and
- ◆ the capacity to incur delictual or criminal responsibility.

One's ability to acquire these capacities is influenced by one's legal status (a person's legal position in relation to other persons and the wider community). Legal status is in turn influenced by certain factors (circumstances in which the person finds him- or herself) and varies from one person to another. One of the

---

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

important factors influencing legal status is mental disability - it affects in particular a person's capacities to perform juristic acts and to litigate.<sup>191</sup>

- 4.7 The tests for legal capacity and the effects of incapacity of persons with mental deficiency are determined by common law principles as extended by the Courts and are not regulated by legislation.<sup>192</sup> The principles are the same, irrespective of how the incapacity was caused.<sup>193</sup> Statutory measures applicable to mentally ill persons (the Mental Health Act 18 of 1973 which is currently in the process of being replaced by the Mental Health Care Act 17 of 2002) must be distinguished from the common law principles.
- 4.8 The common law (as well as statutory law) also provides measures and procedures dealing with lack of decision-making capacity and giving others the power to decide on behalf of persons with incapacity. These are fully discussed in Chapter 6. Briefly, they are as follows:
- ◆ Under common law the High Court may declare a person to be mentally ill and, as such, incapable of managing his or her affairs.<sup>194</sup> The proceedings, which are prescribed in Rule 57 of the Uniform Rules of Court, are known as *de lunatico inquirendo*.<sup>195</sup> The High Court also has the common law power to supplement lack of capacity by appointing a

---

<sup>191</sup> Other factors are nationality, domicile, age, marital status, illegitimacy, adoption, prodigality and insolvency. For the general legal position regarding status and capacity see **Wille's Principles of South African Law** 55-56; Heaton in **Boberg's Law of Persons and the Family** 65-75; Hosten et al 557-561; Barnard et al 33-35.

<sup>192</sup> **Wille's Principles of South African Law** 218; Cronjé and Heaton **South African Law of Persons** 33-35, 113-121; Heaton in **Boberg's Law of Persons and the Family** 105 et seq.

<sup>193</sup> Ibid.

<sup>194</sup> **Wille's Principles of South African Law** 218, 223; Heaton in **Boberg's Law of Persons and the Family** 106-107; Cronjé in **LAWSA Vol 20** Part 1 par 390-391 and the authorities referred to by the authors.

<sup>195</sup> The application is usually brought by next-of-kin, but can be brought by any person with a sufficient interest in the person concerned; the person against whom the declaration is claimed must be properly represented by a *curator ad litem*; and the Court, after hearing all the medical and other evidence, if satisfied that the person is mentally ill, and as such incapable of managing his or her own affairs, makes the declaration (Rule 57(1)-(11); see also **Wille's Principles of South African Law** 223-224).

curator to the person and/or property of a person who lacks capacity.<sup>196</sup>

It is not a condition precedent to the appointment of a curator that the Court should declare the person to be mentally ill.<sup>197</sup> The procedure for the appointment of curators is likewise prescribed by Rule 57 of the Uniform Rules of Court.

◆ Broadly similar measures are available under statutory law:

A person can be declared mentally ill under the Mental Health Act, 1973.<sup>198</sup> Although this will no longer be possible under the 2002 Act, less discriminatory procedures will still signal a person's subjection to mental health legislation.<sup>199</sup> Mental health legislation also provides for supplementation of lack of decision-making capacity: In the 1973 Act these measures confirmed (or mirrored) the common law position in that it provided for the appointment, under certain circumstances, of a curator to the property of persons subject to the Act.<sup>200</sup> The 2002 Act does not use the common law concept of curatorship. It introduces a new and more accessible measure by providing for the appointment of an "administrator"

---

<sup>196</sup> *Ex parte Dixie* 1950(4) SA 748 (W); *Minister of the Interior v Cowley* 1955 (1) SA 307 (N). See also *Wille's Principles of South African Law* 218, 223; Heaton in *Boberg's Law of Persons and the Family* 115, 131-135; Cronjé in *LAWSA Vol 20* Part 1 par 390-391.

<sup>197</sup> Cf Rule 57(1) and (13); Nathan, Barnett & Brink B1-392, B1396; Herbststein and Van Winsen 1136-1138; *Wille's Principles of South African Law* 225, 227. Note however that the Courts are reluctant to appoint a *curator personae* unless the circumstances clearly require it (see par 6.4 et seq below).

<sup>198</sup> At proceedings ordered by a judge in chambers following on a reception order issued by a magistrate (sec 19 and 56).

<sup>199</sup> Compare sec 8, 9 and 19 of the 1973 Act with sec 32 and 36 of the new Act. See also par 4.13 and fn 216 below.

<sup>200</sup> Sec 19(1)(b), 56(1) and 56A. Note that the 1973 Act by implication only makes provision for the appointment of a *curator personae* (see sec 19, 58 and 60). The 2002 Act contains no provisions for supplementation of capacity as regards personal care and welfare. It has been suggested that a person who is being detained or cared for in an institution under mental health legislation will in any event rarely require a *curator personae*, because the whole object of such detention or care is to ensure that his or her personal needs are adequately provided for (cf *Ex parte Dixie* 1950(4) SA 748 (W) at 752; *Wille's Principles of South African Law* 227). Furthermore, both the 1973 and the 2002 Acts provide for supplementation of capacity as regards consent to medical treatment (see par 4.19 below).

to care for and administer the property of a person who is “mentally ill” or “severely or profoundly intellectually disabled” as defined in the Act.<sup>201</sup>

## The influence of mental illness on legal capacity

- 4.9 According to common law a person lacks capacity if he or she is “generally unable to manage his or her affairs”.<sup>202</sup> With reference to specific juristic acts a person lacks capacity if he or she is incapable of understanding the nature and consequences of the particular act.<sup>203</sup> (Similarly, the capacity to litigate is denied a person who is unable to appreciate the nature of legal proceedings.<sup>204</sup>) The motivation behind this is that “the use of reason is the first requisite to constitute the obligation of a promise”.<sup>205</sup>
- 4.10 Legal transactions entered into by persons with impaired capacity are void *ab initio* (and therefore cannot be ratified [i.e. validated])<sup>206</sup> whether the other party was aware of the mental incapacity or not.<sup>207</sup> The “innocent” other party can therefore not insist on the agreement being carried out.<sup>208</sup> Where the transaction is void for want of capacity each party must restore what he or she has received

---

<sup>201</sup> Sec 59-61 of the 2002 Act.

<sup>202</sup> ***Pheasant v Warne*** 1922 AD 481 at 488; ***Theron v AA Life Assurance Association Ltd*** 1995 (4) SA 361 (A).

<sup>203</sup> Ibid. This test was extended in ***Lange v Lange*** 1945 AD 332: A person is also regarded as lacking capacity if he or she indeed understood the nature and consequences of the transaction in question, but was motivated or influenced by insane delusions caused by a mental disease (see also Cronjé 106).

<sup>204</sup> Cf ***De Villiers v Espach*** 1958(3) SA 91 (T) at 96. A *curator ad litem* is appointed by the Court to supplement a person's lack of capacity to litigate.

<sup>205</sup> ***Molyneux v Natal Land & Colonization Co Ltd*** [1905] AC 555(PC) at 561.

<sup>206</sup> ***Phil Morkel Bpk v Niemand*** 1970(3) SA 455 (C) at 456.

<sup>207</sup> ***Molyneux v Natal Land and Colonization Co Ltd*** supra at 561.

<sup>208</sup> **Wille's Principles of South African Law** 233; Heaton in **Boberg's Law of Persons and the Family** 111.

under the transaction on the principle of unjust enrichment.<sup>209</sup> A mentally ill person can, under certain circumstances also be held liable on the basis of *negotiorum gestio*.<sup>210</sup>

- 4.11 The present mechanisms to identify incapacity for legal purposes are based on the premise that a person is presumed to have the requisite capacity.<sup>211</sup> A lack of capacity must be alleged and proved before a Court in order that it may decide the issue. The onus is upon the person alleging lack of capacity to prove this allegation.<sup>212</sup> Whether a person lacked capacity at a certain point in time is a question of fact to be determined by the circumstances of the specific case.<sup>213</sup> Direct evidence of a person's mental condition at the time when he or she entered into a particular transaction is seldom available and whether a person lacked capacity at a specific point in time will mostly have to be proved through medical or psychiatric evidence.<sup>214</sup> The judicial declaration that a person is mentally ill<sup>215</sup> or the person's subjection to the provisions of mental health legislation is not decisive.<sup>216</sup> Judicial declaration or subjection to mental health

---

<sup>209</sup> Ibid.

<sup>210</sup> Ibid. See par 6.11 et seq below.

<sup>211</sup> **Lange v Lange** 1945 AD 332 at 343 et seq.

<sup>212</sup> **Pheasant v Warne** 1922 AD 481 at 489; **Vermaak v Vermaak** 1929 OPD 13 at 15, 18.

<sup>213</sup> **Pienaar v Pienaar's Curator** 1930 OPD 171 at 174-175.

<sup>214</sup> Barnard et al 105. Cf also Heaton in **Boberg's Law of Persons and the Family** 109-110.

<sup>215</sup> Referring to a Court's declaration under common law of a person as being of unsound mind (see par 4.8 above).

<sup>216</sup> **Molyneux v Natal Land and Colonization Co Ltd** supra at 561; **Prinsloo's Curators Bonis v Crafford and Prinsloo** 1905 TS 669 at 673; **Pienaar v Pienaar's Curator** 1930 OPD 171 at 174-175. See also Heaton in **Boberg's Law of Persons and the Family** 106.

Sources consulted refer specifically to the provisions of the 1973 Act dealing with "reception orders" and "certification" of the mentally ill (see sec 8, 9 and 19). Hosten et al (at 573-574) submit that the common law test of capacity is not the same as the test laid down in the 1973 Act for reception and detention by a magistrate or declaration by a judge that the person be further detained. The test for reception and detention turns on the definitions of "mental illness" and "patient" in the 1973 Act. Therefore "declaration" or "certification" in terms of the Act does not per se affect a person's private law status – the latter is a question of fact that has to be proved in every instance. The same argument will probably also apply in respect of "decisions" regarding "care, treatment and rehabilitation" or "further hospitalisation" of a person under the 2002 Act (see sec 32 and 36). Such "decisions" would also not be decisive of the question whether a person had the required legal

legislation is however relevant as far as the onus of proof is concerned: It creates a rebuttable presumption of incapacity, shifting the onus of proof to the party who seeks to hold the person so subjected bound by the transaction.<sup>217</sup>

## The influence of mental incapacity on the ability to take specific decisions

### *Personal welfare and financial affairs*

- 4.12 A person cannot enter into a valid transaction pertaining to his or her personal welfare or financial affairs if he or she is unable to appreciate the nature and consequences of the act in question. The person must have the necessary capacity at the time of entering into the transaction - a question of fact which depends on the circumstances of the case.<sup>218</sup>
- 4.13 As indicated above, both common law and statutory measures provide for the supplementation of incapacity. In the context of a discussion on capacity, the following should be noted:
- ◆ Under common law the High Court can appoint a curator to the person (a *curator personae*) and/or property (a *curator bonis*) of a person “who is incapable of managing his or her own affairs, whether by reason of mental illness or otherwise”.<sup>219</sup> There is no *numerus clausus* of categories of persons to whom curators may be appointed, and it has been said that the reason why a person cannot manage his or her own

---

capacity at a certain point in time but would, as is the position with regard to the 1973 Act, create a rebuttable presumption of incapacity.

<sup>217</sup> ***Prinsloo's Curators Bonis v Crafford and Prinsloo*** 1905 TS 669. See also Heaton in **Boberg's Law of Persons and the Family** 107; Barnard et al 104-105.

<sup>218</sup> See par 4.11 above.

<sup>219</sup> See the sources referred to in fn 196 above.



affairs is not important.<sup>220</sup> Apart from reasons related to mental illness, curators have, for instance, been appointed to persons by reason of physical defect or handicap, serious illness, old age, and mental weakness or retardation.<sup>221</sup> The test is always whether the person concerned is capable of managing his or her own affairs or not.<sup>222</sup>

- ◆ Under the Mental Health Act, 1973 curators can be appointed to take care of the property of persons who are detained as or declared to be mentally ill, who are patients under the Act<sup>223</sup> or who are suffering from mental illness to such a degree that they are incapable of managing their own affairs.<sup>224</sup> “Mental illness” is defined in the Act as –

“any disorder or disability of the mind, and includes any mental disease and any arrested or incomplete development of the mind”.<sup>225</sup>

Under the Mental Health Care Act, 2002 a Master of the High Court may appoint an administrator to care for and administer the property of a “mentally ill person” or “person with severe or profound intellectual disability” where the person concerned is “incapable of managing his or her property”.<sup>226</sup> The Act defines “mental illness” as –

“a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis”;<sup>227</sup>

and “severe or profound intellectual disability” as –

---

<sup>220</sup> Barnard et al 113-114.

<sup>221</sup> Ibid 225. Heaton in **Boberg’s Law of Person’s and the Family** 132-133.

<sup>222</sup> Barnard et al 114.

<sup>223</sup> Cf sec 19(1), 56. A “patient” refers to a person who is “mentally ill to such a degree that it is necessary that he be detained, supervised, controlled and treated, and includes a person who is suspected of being or is alleged to be mentally ill to such a degree” (sec 1).

<sup>224</sup> Sec 56A, 58.

<sup>225</sup> Sec 1.

<sup>226</sup> Sec 59 and 60. See especially sec 59(1)(b) and 60(2)(b) and (c) for the requirement of incapacity to manage property.

<sup>227</sup> Sec 1.

“a range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care”.<sup>228</sup>

- 4.14 A mentally ill person, as well as one who has not been declared mentally ill but merely incapable of managing his or her affairs, retains active legal capacity to the extent that he or she is able to exercise it from time to time.<sup>229</sup> Placement under curatorship (because of mental illness or inability to manage affairs) does not in itself terminate active legal capacity. The person can therefore enter into a valid legal transaction with its normal consequences if, at a given moment, he or she is mentally and physically capable of doing so. The capacity to do so remains a question of fact.<sup>230</sup> Some however regard this as of academic interest only and point out that in practice it would be very difficult, if not impossible, to persuade a third party to enter into legal transactions with a person who has been declared mentally ill or incapable of managing his or her affairs, or in respect of whose person and/or property a curator has been appointed.<sup>231</sup>

---

<sup>228</sup> Ibid.

<sup>229</sup> ***Pienaar v Pienaar’s Curator*** 1930 OPD 171; ***Mitchell v Mitchell*** 1930 AD 217; ***De Villiers v Espach*** 1958(3) SA 91 (T) at 95-96. Barnard et al 103-105, 113-116; Heaton in **Boberg’s Law of Person’s and the Family** 106, 116, 137, 142-143.

<sup>230</sup> Ibid.

<sup>231</sup> SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 28.

*Medical treatment (routine treatment; participation in research; anatomical donations; and treatment in ending life)*<sup>232</sup>

- 4.15 A medical practitioner or health care worker has no general right to treat a person. The freedom “to make certain important decisions about what happens to one’s own body” is protected by the common law<sup>233</sup> and constitutional right<sup>234</sup> to bodily security. This right is also confirmed in the National Health Bill, 2003.<sup>235</sup> This means that a person must consent to all forms of medical treatment and has the right to refuse medical treatment.<sup>236</sup> Exceptions to the rule (where treatment may be provided without consent) include cases of emergency;<sup>237</sup> or where the patient is under a statutory duty to submit to treatment in his or her own interest.<sup>238</sup>

---

<sup>232</sup> Treatment of mental patients for mental illness (such as psychiatric treatment), is regulated by the Mental Health Act 18 of 1973 (to be replaced by the Mental Health Care Act 17 of 2002) and is not discussed here.

<sup>233</sup> **Stoffberg v Elliot** 1923 CPD 148.

<sup>234</sup> Sec 12(2) of the Constitution provides that everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.

<sup>235</sup> Clause 7(1) of the National Health Bill, 2003 (B 32 – 2003) published in **Government Gazette** No 23696 of 8 August 2002.

<sup>236</sup> **Castell v De Greeff** 1994 (4) SA 408 (C). See also Strauss 4, 9-10, 19-20; McQuoid-Mason and Strauss in **LAWSA Vol 17** par 195; Neethling et al 106-108. Cf also clause 6(d) of the National Health Bill, 2003.

<sup>237</sup> **Stoffberg v Elliot** 1923 CPD 148. See also McQuoid-Mason and Strauss in **LAWSA Vol 17** par 195; Neethling et al 106-108; Strauss 3, 89 et seq. Cf also the National Health Bill, 2003 which allows the provision of health services without consent if any delay in its provision might result in the death or irreversible damage to the health of the person concerned and he or she has not expressly, impliedly or by conduct refused that service (clause 7(1)(e)).

<sup>238</sup> See eg the provisions of the Mental Health Act 1973 in terms of which the consent of a mental patient institutionalised under the Act by virtue of a compulsory detention order, is not required for “standard” psychiatric treatment (sec 9(3)); the Mental Health Care Act 2002 providing for compulsory treatment of a mental patient without consent if there is reasonable belief that the patient is likely to inflict serious harm to him or herself or others (sec 32); and the National Health Bill, 2003 which allows treatment without consent where failure to treat the person, or group of people which includes such person, will result in a serious risk to public health (clause 7(1)(d)). See also Strauss 3; McQuoid-Mason and Strauss in **LAWSA Vol 17** par 195.

4.16 To be valid, consent to medical treatment must satisfy certain common law requirements.<sup>239</sup> These are confirmed in the National Health Bill, 2003.<sup>240</sup>

- ◆ The consent must be obtained from someone who is able in law to give it. In the case of an adult patient (i.e. a patient above the age of 21) this will be consent by a patient who is capable of volition i.e. who is intellectually mature enough to appreciate the implications of his or her acts and who is not mentally ill. Consent will normally be given by the adult patient him or herself.<sup>241</sup>
- ◆ It must be informed consent.<sup>242</sup> The purpose of the informed-consent requisite is two-fold: To ensure the patient's right to self-determination and freedom of choice; and to encourage rational decision-making by enabling the patient to weigh and balance the benefits and disadvantages of the proposed intervention in order to come to an informed choice either to undergo or to refuse it.<sup>243</sup> Generally, in order to give informed consent the patient must understand the supplied information, comprehend the consequences of acting on that information, be able to assess the relative

---

<sup>239</sup> **Castell v De Greeff** 1994 (4) SA 408 (C). Strauss 4-13; McQuoid-Mason and Strauss in **LAWSA Vol 17** par 195-196; Neethling, Potgieter and Visser 101-104; Neethling et al 106-108.

<sup>240</sup> See clauses 6 and 7.

<sup>241</sup> Strauss 12; Neethling, Potgieter and Visser 100. See also clause 7(2) of the National Health Bill, 2003 which provides that "informed consent" for purposes of the Bill means "consent ... given by a person with legal capacity to do so".

<sup>242</sup> Cf also clauses 6 and 7 of the National Health Bill, 2003 which provides that (bar certain exceptions) health services may not be provided to a user without the user's informed consent (clause 7(1)). The person concerned must be informed as contemplated in clause 6. Clause 6 requires that every health care provider must inform a user of - the user's health status except in circumstances where there is substantial evidence that its disclosure would be contrary to the best interests of the user; the range of diagnostic procedures and treatment options generally available to the user; the benefits, risks, costs and consequences generally associated with each option; and the user's right to refuse health services. "Health services" is defined as "health care services, including reproductive health care and emergency medical treatment, contemplated in section 27 of the Constitution; basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution; medical treatment contemplated in section 35(2)(e) of the Constitution; and municipal health services" (sec 1 of the Act). The relevant constitutional provisions refer to a general right to health care (sec 27); health care services for children (sec 28); and medical treatment for arrested, detained and accused persons (sec 35).

<sup>243</sup> Van Oosten 1995 **De Jure** 168-169.

benefits and dangers of the proposed action, and be able to provide a meaningful response to the question of what should be done.<sup>244</sup>

- ◆ The consent must be clear and unequivocal. Often medical treatment entails a certain amount of risk. Upon the assumption that the patient has been fully informed, it should be clearly established that the patient has left no doubt that he or she is prepared to undergo the suggested treatment notwithstanding the risk.<sup>245</sup>
- ◆ The consent must be comprehensive (i.e. inclusive of its entire consequences).<sup>246</sup>

4.17 Whether or not there was consent in a particular situation is a question of fact.<sup>247</sup> Consent can be given expressly or tacitly (i.e. by conduct). Mere submission to treatment does not amount to consent, but where patients who are capable of manifesting their will submit themselves to medical treatment in the full knowledge of its nature and consequences and offer no resistance or make no objection, the inference will generally be drawn that they have tacitly consented.<sup>248</sup> Such consent will however not be inferred in the case of mentally ill or impaired persons.<sup>249</sup>

4.18 The doctrine of informed consent requires that for every patient there must be a decision-maker.<sup>250</sup> As indicated above, normally this would be the patient him or herself. Currently, in the case of persons who do not have the required capacity

---

<sup>244</sup> Cf also Frolik and Kaplan 23.

<sup>245</sup> See also Strauss 12. Cf clause 6(c) of the National Health Bill, 2003.

<sup>246</sup> McQuoid-Mason and Strauss in **LAWSA Vol 17** par 195. Cf clause 6(c) of the National Health Bill, 2003.

<sup>247</sup> Strauss 12; McQuoid-Mason and Strauss in **LAWSA Vol 17** par 195; Neethling, Potgieter and Visser 100. Cf clause 7(2) of the National Health Bill, 2003 which couples the inability to consent with “legal incapacity” and not with any mental condition or diagnosis.

<sup>248</sup> McQuoid-Mason and Strauss in **LAWSA Vol 17** par 196. Cf also clause 7 of the National Health Bill, 2003 which does not require that the required consent for treatment must be express consent.

<sup>249</sup> McQuoid-Mason and Strauss in **LAWSA Vol 17** par 196.

<sup>250</sup> Cf Frolik and Kaplan 24-25. Cf also clause 7(1) of the National Health Bill, 2003.

to consent, consent must, in accordance with the common law, be given by a curator appointed by the Court to the person of the patient concerned.<sup>251</sup> The National Health Bill, 2003 aims to expressly allow surrogate consent under the following circumstances:<sup>252</sup>

- ◆ Where the “user” (i.e. the individual concerned)<sup>253</sup> is unable to consent, consent may be given by a person mandated by the user in writing to grant consent on his or her behalf; or by a person authorised in terms of any law or Court order.
- ◆ Where no person is mandated or authorised to give consent, the required consent may be given by the spouse or partner of the user, or in the absence of such spouse or partner, a parent, an adult child or a brother or a sister of the user in the specific order as listed.

The Bill clearly states that “informed consent” means consent given by a person with legal capacity to do so ...”.<sup>254</sup> A person who is “unable to give informed consent” is thus a person who does not have the required capacity - a question of fact - irrespective of whether the person is for instance, “mentally ill” or belongs to a certain category or is subject to a specific diagnosis which might signify incompetence.

#### 4.19 Mental health legislation specifically regulates consent to medical treatment of and operations (for illness other than mental illness) on mental patients:

---

<sup>251</sup> **Ex parte Dixie** 1950(4) SA 748 (W). The sterilisation of persons who are incapable or incompetent to consent to it is governed by the Sterilisation Act 44 of 1998 (sec 3). Leucotomies performed on mental patients are governed by GN R565 of 1975 as amended (this will be replaced by regulations to be promulgated in terms of the Mental Health Care Act 17 of 2002 - see draft reg 37).

<sup>252</sup> Clause 7(1)(a) and (b).

<sup>253</sup> The Bill in clause 1 defines a “user” as “a person receiving treatment in a health establishment ... or using a health service”; and “health establishment” as “any public or private facility at which any health service is provided, but excludes a military establishment”. “Health services” is an all encompassing concept – see fn 242 above for the definition.

<sup>254</sup> Clause 7(2).

- ◆ The Mental Health Act 1973 makes provision in general terms for consent to medical treatment of and operations performed on mental “patients”<sup>255</sup> to be given on behalf of such patients by a priority list of persons: the curator, spouse, parent, major child or brother or sister of the patient. If there is none of the persons enumerated, or if such persons cannot be found, the superintendent of the institution where the patient finds him or herself can consent if the life of the patient is endangered or his or her health seriously threatened.<sup>256</sup> However if the person is *not a patient in a mental hospital*, or if his or her life is not endangered the only alternative would be to apply for the appointment of a curator to grant the necessary consent.<sup>257</sup>
- ◆ The position will be more or less the same under the Mental Health Care Act, 2002. According to draft Regulations to be published under the Act<sup>258</sup> a similar list of persons<sup>259</sup> (although not necessarily in priority order)<sup>260</sup> may consent on behalf of a “mental health care user”<sup>261</sup> who is

---

<sup>255</sup> See the definition of “patient” in fn 223 above.

<sup>256</sup> Section 60A of the Act. The section makes no distinction between *curator personae* and *curator bonis*. Even a *curator bonis* would thus apparently be allowed to give the required consent (**Wille’s Principles of South African Law** 227-228).

<sup>257</sup> Cf also Strauss 38-39; Van Oosten 2000 **Journal of Contemporary Roman Dutch Law** 16; McQuoid-Mason and Strauss in **LAWSA Vol 17** par 200.

<sup>258</sup> Government Notice No R 233 in **Regulation Gazette** 24384 of 14 February 2003 - see draft reg 37.

<sup>259</sup> To the list under the draft Regulations are however added: next of kin, guardian, partner and associate; and “major” child is replaced with child “over the age of 18” (draft reg 37).

<sup>260</sup> In the draft Regulations the former provision stating that the list of persons must be approached for consent in priority order has been omitted.

<sup>261</sup> The Act uses the term “mental health care user” (instead of “patient”) which is defined as “a person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user” (sec 1). “Involuntary ... users” refers to people incapable of making informed decisions due to their mental health status and who refuse health intervention but require such services for their own protection or for the protection of others (sec 1). “Assisted ... users” refers to persons who are incapable of making informed decisions due to their mental health status and who do not refuse health interventions (sec 1).

deemed to be incapable of consenting to treatment or an operation.<sup>262</sup> The head of a health establishment<sup>263</sup> where the user *resides* may grant consent if none of the persons referred to in the list is available, if the relevant alternatives have been discussed with the head of the establishment and he or she is satisfied that the most appropriate intervention is to be performed and if the medical practitioner who is going to perform the operation recommends the treatment or operation. Although the requirement that the user's life must be endangered or his or her health threatened has been done away with under the draft provisions, the user will still have to be resident in a health establishment for the head of that establishment to be able to consent to treatment. If a user is not so resident the only alternative will still be to have a curator appointed to grant the necessary consent.

- 4.20 The legal position regarding surrogate consent to participation in medical research (involving, for instance, clinical trials of drugs or treatments) is complex and unclear and there is currently no general consensus on how to balance the possible risks and benefits to vulnerable individuals against the public interest in conducting research.<sup>264</sup> Section 12(2) of the Constitution provides that everyone "has the right to bodily and psychological integrity, which includes the right ... not to be subjected to medical or scientific experiments without *their* informed consent" (our emphasis).<sup>265</sup> This formulation makes it patently clear that the only person who is capable of giving consent to medical research is the research

---

<sup>262</sup> Reg 37(2) and (3) of the draft Regulations referred to in fn 258 above. Cf sec 66 of the Act authorising the Minister of Health to make regulations on "... surgical procedures or medical or therapeutic treatment for mental health care users".

<sup>263</sup> See fn 253 above for the Act's definition of "health establishment".

<sup>264</sup> Cf the discussions by Van Wyk 2001 **Journal of Contemporary Roman-Dutch Law** 3-22; and Van Oosten 2000 **Journal of Contemporary Roman Dutch Law** 5-31. The uncertainty is also acknowledged in the ethical guidelines of the Health Professions Council of South Africa (**HPCSA Guidelines on Seeking Patients' Consent** July 2002 par 15.3).

<sup>265</sup> Cf also par 3 of the Schedule to sec 29 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which lists the following as an illustration of an unfair practice: "Subjecting persons to medical experiments without their informed consent".



subject and that surrogate consent to medical research (whether by a curator appointed under common law to the person of an adult with incapacity or a substitute decision-maker as indicated in mental health care legislation<sup>266</sup>) is out of the question.<sup>267</sup> There are those who argue that limitations on this constitutional right are justified.<sup>268</sup> These arguments need not be considered now. The National Health Bill, 2003 provides that “notwithstanding anything to the contrary in any other law, research or experimentation on a living (adult) person may only be conducted ... with the written consent of the person after he or she has been informed of the objects of the research or experimentation and any positive or negative consequences on his or her health”.<sup>269</sup> The Bill makes no provision for surrogate consent for research or experimentation on behalf of persons who are incapable of giving valid consent.

- 4.21 The Human Tissue Act 65 of 1983 comprehensively governs both anatomical donations by *living persons* for therapeutical and other uses; and the removal of tissue,<sup>270</sup> blood or gametes<sup>271</sup> from *dead bodies* for transplantation. Broadly similar provisions in the National Health Bill, 2003 will replace these provisions.<sup>272</sup>
- ◆ Removal of tissue from *living persons* may be effected only with the written consent of the donor him or herself (in the case of an adult

---

<sup>266</sup> I.e. the enumerated list of persons in sec 60A of the Mental Health Act 1973 (to be replaced by reg 37 of the draft Regulations referred to in fn 258 above).

<sup>267</sup> Van Oosten 2001 **Journal of Contemporary Roman Dutch Law** 9.

<sup>268</sup> Cf the discussions by Van Wyk 2001 **Journal of Contemporary Roman-Dutch Law** 3-22; and Van Oosten 2000 **Journal of Contemporary Roman Dutch Law** 5-31.

<sup>269</sup> Clause 76(1)(b). Clause 11(2) in addition requires that where a health establishment (i.e. any private or public facility providing health services) provides services for experimental or research purposes the person concerned as well as the health care provider primarily responsible for the user's treatment, the head of the health establishment in question, and the relevant health research ethics committee (or a delegated person) must give their prior written consent.

<sup>270</sup> “Tissue” is defined in the Act as “any human tissue, including any flesh, bone, organ, gland or body fluid, but excluding any blood or gamete” (sec 1). The definition in the National Health Bill, 2003 is virtually similar (sec 1).

<sup>271</sup> “Gametes” are the generative cells essential for human reproduction (sec 1). The National Health Bill, 2002 contains a virtually similar definition in sec 1.

<sup>272</sup> See Chapter 8 of the Bill and the Schedule attached to the Bill.

donor).<sup>273</sup> The consent will have to be given by a donor who is legally able to consent and would thus exclude persons with incapacity as envisaged in this Discussion Paper.<sup>274</sup> The Act contains no provision for consent on behalf of adults with incapacity or the mentally ill. The Act in fact expressly stipulates that tissue obtained from mentally ill persons as defined in the Mental Health Act, 1973<sup>275</sup> may not be used for any of the purposes provided for in the Act (including transplanting; production of a therapeutic, diagnostic or prophylactic substance; transfusing of blood; production of a blood product; and artificial insemination).<sup>276</sup> The National Health Bill, 2003 however stipulates that the Minister of Health may authorise removal of tissue from the mentally ill and impose conditions in respect of such removal.<sup>277</sup>

- ◆ Consent is also a prerequisite for the removal of organs for donation from *dead bodies*.<sup>278</sup> The consent must be given by the deceased prior to his or her death, for instance in a will, or a written or oral statement.<sup>279</sup> Also

---

<sup>273</sup> Sec 18(b)(i). In the case of the removal of tissue replaceable by natural processes, or the withdrawal of blood, oral consent is regarded as sufficient (sec 18(aa)). See also Strauss 148; McQuoid-Mason and Strauss in **LAWSA Vol 17** par 221. Cf clause 60 of the National Health Bill, 2003. The Bill does not allow oral consent.

<sup>274</sup> See the common law requirements for valid consent in par 4.16 above; and sec 7(2) of the National Health Bill, 2003.

<sup>275</sup> This will be interpreted to refer to comparable definitions in the new Mental Health Care Act, 2002.

<sup>276</sup> Sec 19. Cf clause 61 of the National Health Bill, 2003 which corresponds with this.

<sup>277</sup> Clause 61(2)(b).

<sup>278</sup> Sec 2 of the Act and clause 67(1) of the National Health Bill, 2003. Although the donor must be deceased, the Act does not define "death". This is an intensely debated issue and currently an open question in South African law. There is difference of opinion on whether death must be described as the cessation of both heart and brain activity, or brain activity only. For purposes of the National Health Bill, "death" has now been defined as "brain death". This seems to be an acceptable criterion as it means that organs can be removed from a body where the heart is still beating, and this may be necessary because organs differ from other tissue in that they must be removed almost immediately after death and transplanted without delay (Strauss 151-152; McQuoid-Mason and Strauss in **LAWSA Vol 17** par 222). Cf also SALRC **Report on Euthanasia and the Artificial Preservation of Life** 1998 where the Commission recommended that for purposes of cessation of medical treatment a person is considered dead according to any of the two criteria (irreversible absence of spontaneous respiratory and circulatory functions, or persistent clinical absence of brain-stem function) (29 et seq and (xv)). These recommendations have not been implemented by the government (see par 4.23).

<sup>279</sup> Sec 2(1). Cf the broadly similar provisions in the National Health Bill, 2003 (clause 67(1)).

in this instance the required consent will have to be granted by a person legally capable of granting consent.<sup>280</sup> In the absence of consent by the deceased (prior to death), consent may be granted after the deceased's death by an enumerated list of relatives, or if none of them can be located, by the Director-General of the Department of Health.<sup>281</sup> Such consent can be given only if the deceased has not (prior to his or her death) forbidden it.<sup>282</sup> Surrogate consent to organ donation on behalf of an incompetent deceased who never had the mental capacity to forbid organ donation, would probably not be allowed.<sup>283</sup>

4.22 The corollary of the requirement of informed consent for medical treatment is the right of a patient who has the necessary mental capacity to refuse to undergo treatment.<sup>284</sup> In accordance with this the following is currently allowed under South African common law in the context of terminal illness:

- ◆ The withdrawal or withholding of medical treatment from a terminally ill patient or a patient suffering from unbearable pain. This is sometimes referred to as “passive euthanasia” and would include the withdrawal of treatment and nourishment from a patient in a permanent vegetative state with no prospect of recovery; and the termination of treatment in hopeless

---

<sup>280</sup> Sec 2(1) of the Act (and clause 67(1)(a) of the National Health Bill) expressly provides that the required consent may be granted by a person who is competent to make a will.

<sup>281</sup> Sec 2(2). The list of persons includes the deceased's spouse, major child, parent, guardian or a major brother or sister. Cf clause 67(2) of the National Health Bill – the Bill includes in the list (as alternative to spouse) the deceased's partner.

<sup>282</sup> Sec 2(2) of the Act and clause 67(2) of the National Health Bill.

<sup>283</sup> Cf Strauss's analogous conclusion in his discussion of the question whether the Director General of Health would be able to consent to organ donation by a deceased whose identity is unknown. He argues that it would not be possible as the requirement that the official must have taken all reasonable steps to trace a relative of the unidentified deceased would obviously be impossible to fulfill (Strauss 153).

<sup>284</sup> ***Esterhuizen v Administrator, Transvaal*** 1957 (3) SA 710 (T).

cases after all possible procedures have failed so as to allow the patient to die naturally.<sup>285</sup>

- ◆ The administration of drugs to relieve pain, even when there is no longer any hope of recovery.<sup>286</sup>
- ◆ The administration of drugs to alleviate pain and suffering by a patient with a terminal disease, even if such drugs incidentally reduce the patient's life expectancy.<sup>287</sup>

4.23 Valid consent of the patient concerned is required for the above conduct and it is therefore clear that a mentally incompetent person as envisaged in this Discussion Paper cannot consent thereto.<sup>288</sup> In the case of a mentally incompetent person an application will have to be made to the High Court to have a curator appointed with the specific power to authorise the cessation of treatment.<sup>289</sup> The Court would probably appoint a curator for such purpose if the medical evidence unambiguously indicates that there is no prognosis for the patient recovering to the point where he or she will enjoy some quality of life.<sup>290</sup>

---

<sup>285</sup> **Clarke v Hurst** 1992 (4) SA 630(D). See also McQuoid-Mason and Strauss in **LAWSA Vol 17** par 209; Strauss 339-342; SALRC **Report on Euthanasia and the Artificial Preservation of Life** 1998 42-43. "Passive euthanasia" should be distinguished from so-called "active euthanasia" which is generally regarded as occurring where a person intentionally and actively participates in causing the death of a terminally ill patient to end pain and suffering (for example by administering a fatal injection or dose of medicine). "Active euthanasia" is unlawful and constitutes murder (**S v Hartman** 1975 (3) SA 532 (C)); see also Strauss 339-342; McQuoid-Mason and Strauss in **LAWSA Vol 17** par 209; SALRC **Report on Euthanasia and the Artificial Preservation of Life** 1998 66 et seq).

<sup>286</sup> McQuoid-Mason and Strauss in **LAWSA Vol 17** par 210; Strauss 345; SALRC **Report on Euthanasia and the Artificial Preservation of Life** 1998 50-52.

<sup>287</sup> Ibid.

<sup>288</sup> Cf **Re Farrell** 529 A 2d 404 (1987) as referred to by McQuoid-Mason and Strauss in **LAWSA Vol 17** par 209; SALRC **Report on Euthanasia and the Artificial Preservation of Life** 1998 37-40, 42, 152.

<sup>289</sup> See **Clarke v Hurst** 1992 (4) SA 630 (D) where the incompetent patient's wife approached the Court for an appointment as curatrix specifically for this purpose.

<sup>290</sup> Cf **Clarke v Hurst** supra; Lupton 1992 **SA Journal of Criminal Justice** 348.

4.24 Mechanisms such as an advance directive (in the form of a living will, or an enduring power of attorney for health care dealing expressly with end-of-life decisions) could permit an incompetent individual, while still competent, to make decisions regarding refusal or cessation of treatment in the circumstances as envisaged in paragraph 4.22.<sup>291</sup> The enduring power of attorney dealing with end-of-life decisions is currently not part of our law and the legal validity of the living will is unclear.<sup>292</sup> The Commission in 1998, in its Report on Euthanasia and the Artificial Preservation of Life, recommended legislation to deal with uncertainty regarding the scope and content of obligations to care for terminally ill patients (both mentally competent and incompetent).<sup>293</sup> The Commission's Report with proposed draft legislation was referred to the Minister of Health in 1999. The Report was tabled in Parliament in 2000. The proposed legislation has not been implemented yet. Although the National Health Bill confirms the right to refuse treatment,<sup>294</sup> the Bill does not provide for surrogate consent in the circumstances envisaged in paragraph 4.22. As indicated in Issue Paper 18, this issue will not receive attention under the current investigation.

---

<sup>291</sup> SALRC Report on Euthanasia and the Artificial Preservation of Life 1998 152 et seq.

<sup>292</sup> In *Clarke v Hurst* supra, the patient had executed a living will at a time when he was of sound mind. In it he requested that he should not be kept alive by artificial means if there was no reasonable prospect of his recovery. The Court however did not express itself on the legal standing of a living will. It appointed the patient's wife as curatrix to authorise cessation of medical treatment by taking into account several factors - of which but one was the patient's wishes as expressed in his living will. See also SALRC Report on Euthanasia and the Artificial Preservation of Life 1998 153-154, 178-181.

<sup>293</sup> As far as a request not to be kept alive by artificial means is concerned, the Commission accepted that a living will constitutes a legitimate refusal of consent to medical treatment, provided that compliance with the wishes set out therein would not be unlawful. The Commission acknowledged that several legal systems use the concept of enduring power of attorney to enable a principal to entrust an agent with the decision-making power regarding the principal's wishes not to be kept alive artificially in specific circumstances. In this sense an enduring power of attorney includes authority which corresponds with the usual terms found in a living will. Against this background, the Commission proposed that it is desirable to gain statutory recognition for living wills and enduring powers of attorney authorising certain end-of-life-decisions provided that compliance with the wishes set out in these directives would not be unlawful (SALRC Report on Euthanasia and the Artificial Preservation of Life 1998 154 et seq, 185).

<sup>294</sup> Clause 6 provides that "every health care provider must inform a user of ... the user's right to refuse health services".

## NEED FOR THE LAW TO CLEARLY REFLECT “CAPACITY” AS A FUNCTION-BASED CONCEPT

- 4.25 We indicated at the beginning of this Chapter that the general common law test for capacity is the ability to manage one’s affairs. It is the threshold requirement for retaining the power to make legally valid decisions. In accordance with this, inability to manage affairs is the decisive test for the appointment of a curator to act as substitute decision-maker. The question arises whether this test is still appropriate while it has been widely accepted that capacity is function-specific and not a holistic concept.<sup>295</sup> Should the law not reflect this? In particular, would the common law test still be appropriate as base for new substitute decision-making measures which would aim to recognise incapacity as function-specific (requiring, for instance, measures dealing with temporary or fluctuating loss of capacity and with incapacity in relation only to specific decisions)?
- 4.26 In comparable jurisdictions it has been submitted that the common law test is vague; that its simplistic nature fails to address the general problems of identifying incapacity; that it provides no detailed criteria for incapacity; and that it does not take into account functional ability and the potential for autonomy.<sup>296</sup> In jurisdictions where reform has taken place it has been universally accepted that capacity is function-based, and that the test for capacity should be defined accordingly to form a suitable base for new measures developed to accommodate this premise.

---

<sup>295</sup> Cf eg the comment of Prof M Vorster.

<sup>296</sup> Cf English Law Commission **Consultation Paper 119** 1991 44-45.

4.27 The majority of commentators on Issue Paper 18 agreed with the above criticisms: Many of them emphasised that the common law approach is an “all or nothing” approach; that it is too limited and simplistic; that it is not appropriate in all respects any longer; that the law should acknowledge that capacity fluctuates even within a single individual; that different degrees of intervention or assistance with the affairs of incapable adults should thus be provided for and that the test for capacity should reflect this. Some respondents believe that the current test is unacceptable as it focuses on inability only and does not take into account any potential for self-reliance. There was relative agreement amongst respondents that whether capacity is expressly defined or not, and however it is defined, the law should recognise degrees of competency and the focus should be on functional impairment. In this regard the Commission was referred to definitions in other jurisdictions that define capacity in terms of “the act in question”. In addition, it was suggested that the current concept of incapacity needs to be widened to cover temporary incapacity,<sup>297</sup> and incapacity resulting from physical disability and illiteracy.<sup>298</sup> Finally, a small minority submitted that there is no need to define the concept of capacity and that there is no necessity for lay people to understand the current common law definition in view of the fact that the definition is applied exclusively by the Courts. They pointed out that status matters, as matters of utmost importance, are dealt with by the common law and the Courts and that it should remain thus - new definitions and mechanisms would intrude on this discretion.<sup>299</sup>

---

<sup>297</sup> Representatives of the Masters of the High Court Kimberley and Bloemfontein especially pointed out that temporary capacity is currently not covered by the common law measures for substitute decision-making.

<sup>298</sup> See the comment of Ms Margaret Meyer. See also par 4.13 above on the grounds for appointment of a curator. Curators have indeed been appointed for persons with physical disabilities.

<sup>299</sup> See eg the comment of the Laws and Administration Committee of the General Council of the Bar of South Africa.

4.28 We support the criticism of the current position recorded in the previous two paragraphs. We believe that the common law test, even though it is still appropriate in some cases, is not sufficiently flexible. It in particular does not recognise temporary incapacity, does not clearly accommodate fluctuating capacity and is not function-specific. These are issues that need to be addressed in new substitute decision-making measures. The development of new measures that recognise function-based incapacity would inevitably require a test for capacity based on a more suitable premise. Moreover, a specific new test would also clearly indicate to the public when new statutory measures can be applied. As regards the criticism that new definitions will limit or intrude on judicial discretion regarding status matters, it should be noted that the assisted and substitute decision-making measures developed in the course of this Discussion Paper are not aimed at changing the status of the adults with incapacity in respect of whom such measures will be applied. This approach is in accordance with constitutional principles and current international practice regarding intervention in the affairs of persons with incapacity.<sup>300</sup> Any new definition will moreover apply only for purposes of such new measures and will thus not intrude on the common law and the Courts' discretion regarding change of status.

#### 4.29 PRELIMINARY RECOMMENDATION

**The common law test for capacity should be developed for purposes of new substitute decision-making measures to cover current grey areas of temporary incapacity and fluctuating incapacity; and to clearly reflect that decision-making is function-based.**

---

<sup>300</sup>

See par 3.6-3.7 and Chapter 5.



## A DEFINITION OF “CAPACITY” (OR “INCAPACITY”) IN THE CONTEXT OF NEW SUBSTITUTE DECISION-MAKING MEASURES

- 4.30 How should capacity (or incapacity) be defined? I.e. what should the ground or test for intervention in the affairs of adults with incapacity be?
- 4.31 Although the underlying principle that capacity is function-based has been universally accepted, different jurisdictions follow different approaches in defining capacity or incapacity for purposes of substitute decision-making legislation. The approach followed is largely dictated by the nature of the specific measures developed for intervention in the affairs of persons with incapacity. In some jurisdictions the definition is regarded as a threshold indicating the general “client group” provided for by the legislation.<sup>301</sup> In others the definition is added to or slightly altered in the course of the legislation to fit a specific measure of intervention being provided for.<sup>302</sup> Some jurisdictions enacted comprehensive definitions while others preferred a more simplified approach.<sup>303</sup> Where comprehensive tests are used the detail moreover varies considerably.
- 4.32 Many jurisdictions define capacity in terms of cognitive functioning. Cognitive ability is the ability to arrive at a decision by manipulating information and making a choice and is thus usually used as a point of departure.<sup>304</sup> In some formulations cognitive ability refers to the capacity to understand the *nature* and

---

<sup>301</sup> See eg the examples of the definitions recommended by the Law Commission in England; and enacted in Scotland referred to in par 4.35 below.

<sup>302</sup> See eg the New Zealand Protection of Personal and Property Rights Act, 1988 referred to in par 4.35 below.

<sup>303</sup> Cf the examples of the definitions in England, Scotland and Queensland referred to in par 4.35 below.

<sup>304</sup> English Law Commission **Consultation Paper 128** 1992 25-26. See also par 4.4 et seq above on the medical assessment of capacity.

to foresee the *consequences* of decisions.<sup>305</sup> In others it concentrates on the person's ability to understand *information* relevant to the decision and to appreciate its *reasonably foreseeable* consequences.<sup>306</sup>

4.33 Where comprehensive tests for capacity or incapacity have been developed some or a combination of the following elements have, in addition to the requirement of cognitive ability, been included in such tests:

- ◆ A mental disability precondition. In some jurisdictions the cognitive test is coupled with a mental disability precondition (by requiring that the inability to function must be the result of mental disability, illness, or disorder). Proponents of this practice submit that where this threshold is not included, too heavy a burden will be placed on the cognitive test to identify those who should be covered by the legislation while excluding those who should not - especially as the cognitive test is not easy to define or apply, particularly as to the degree of incapacity. They argue that requiring a finding of mental disability will provide a safeguard against improper interference in the lives of adults whose perceived failure to manage their affairs is attributable merely to lack of inclination or eccentricity.<sup>307</sup> Opponents however submit that a mental disability precondition is not an appropriate safeguard: They believe first, that it makes it more difficult and expensive to make use of whatever measures are provided for (as expert evidence will be required to establish mental disability); and second, that a finding of a specific disorder does not offer any real additional protection if it is clear that there is a need for intervention - all it does is to confine intervention to certain instances

---

<sup>305</sup> Eg as in New Zealand where the Protection of Personal and Property Rights Act, 1988 (sec 6(1)(a)) requires that the person concerned "must lack, wholly or partly, the capacity to understand the nature, and to foresee the consequences of decisions in respect of matters relating to his or her personal care and welfare" (see also English Law Commission **Consultation Paper 128** 1992 26).

<sup>306</sup> See eg the approach in Ontario, Alberta and Newfoundland in relation to medical decisions (English Law Commission **Consultation Paper 128** 1992 27).

<sup>307</sup> English Law Commission **Consultation Paper 128** 1992 22-24; Australian Law Reform Commission Discussion **Paper No 39** 1998 14.

while leaving others uncatered for.<sup>308</sup> A person may for instance have a defined disorder but have no need for intervention, or may not have a defined disorder but be very much in need of intervention. Some research moreover showed that in jurisdictions where mental disorder is required as precondition, establishing such disorder is usually either routine (requiring expert evidence from doctors), or it is problematic (in which case the expert witness is usually prepared to say that the person concerned suffers from a catch-all category if the disorder cannot be easily categorised or diagnosed).<sup>309</sup> Opponents submit that information about the cause of a person's decision-making disability, while relevant, is only one of a number of factors to be taken into account in assessing capacity. They feel that particular care should be taken to avoid the assumption that existence of a medically diagnosed condition automatically means that a person's decision-making capacity is impaired. The focus should be on the effect, if any, that the existence of the condition has on the person's ability to make decisions - this will depend on the circumstances of each particular case.<sup>310</sup> Opponents further argue that society's general ignorance regarding mental illness and intellectual disability may lead to stigmatisation of adults with incapacity if they are categorised or labeled as mentally ill under substitute decision-making legislation.<sup>311</sup>

- ◆ An indication of the amount and complexity of the information that the person might have to be able to understand (eg by requiring that the person need only understand information conveyed in broad terms and in simple language).<sup>312</sup>

---

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Queensland Law Reform Commission **Report No 49** 1996 Vol 2 176-177.

<sup>311</sup> Cf Australian Law Reform Commission **Discussion Paper No 39** 1998 14.

<sup>312</sup> English Law Commission **Consultation Paper 128** 1992 28.

- ◆ Consideration of the outcome of the decision (eg by providing that the fact that a person has acted or intends to act in a way an ordinary prudent person would not act should not by itself be evidence of lack of capacity). It is argued that this would provide a safeguard against unnecessary interference in the lives of the merely deviant or eccentric.<sup>313</sup>
- ◆ A true choice test (by regarding incapacity to be present if a person understands the information relevant to taking the decision but is unable to make a true choice in relation to it).<sup>314</sup> In this regard it is argued that a person's will could be overborne by actions of others, or could be overborne as an effect of the person's mental disorder so that the decision arrived at is not a "true" decision.<sup>315</sup>
- ◆ Including inability to communicate the decision in question (eg by providing that a person should be considered unable to make the decision in question if he or she is unable to communicate it to others who have made reasonable attempts to understand it).<sup>316</sup> This approach recognises that some people might be suffering from an inability to communicate rather than incapacity to make any decision; or that there are situations where there is unclarity on whether the person is incapable of decision-making or merely of communicating. It aims in particular to cover inability resulting from physical disabilities or inability that is simply not ascribable to one condition or another.<sup>317</sup> In some jurisdictions intervention is limited to cases where persons are "wholly" incapable of communication – to address concerns that people might be included simply because insufficient effort had been made to understand them.<sup>318</sup> Opponents of the latter approach however argue that the emphasis should not be on

---

<sup>313</sup> Ibid.

<sup>314</sup> Ibid 31-32.

<sup>315</sup> Ibid.

<sup>316</sup> Ibid 34-35.

<sup>317</sup> Ibid.

<sup>318</sup> New Zealand Protection of Personal and Property Rights Act 1988, sec 6(1)(b).

whether the inability is general or partial but whether the person can communicate the particular decision at the time it has to be made.<sup>319</sup>

4.34 In some jurisdictions an express presumption of competence operates alongside a test for capacity (or is formulated as part of the general principles which should govern intervention as discussed in the next Chapter).<sup>320</sup> The legislation sometimes also contains an indication of the standard of proof necessary to rebut the presumption of competence. It is generally accepted that the ordinary standard applicable in civil law (proof on a balance of probabilities) should apply.<sup>321</sup>

4.35 Some practical examples of tests for capacity or incapacity formulated in legislation in other jurisdictions are as follows:

- ◆ In both England<sup>322</sup> and Scotland,<sup>323</sup> for instance, fairly complex tests (containing several of the elements referred to in the previous paragraph)

---

<sup>319</sup> English Law Commission **Consultation Paper 128** 1991 35.

<sup>320</sup> Queensland Law Reform Commission **Report No 49** Vol 2 28. See also par 5.2 below.

<sup>321</sup> English Law Commission **Consultation Paper 119** 1991 103-104 and **Consultation Paper 128** 35.

<sup>322</sup> According to the recommendations a definition of what it means to be “without capacity” should consist of the following elements:

“(1) A person should be regarded as unable to make a decision if at the material time he or she is -

(a) unable by reason of mental disability to make a decision on the matter in question; or  
(b) unable to communicate a decision on that matter because he or she is unconscious or for any other reasons.

(2) An ‘inability to make a decision’ means -

(a) an inability to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision; or

(b) an inability to make a decision based on that information.

(3) ‘Mental disability’ means ‘a disability or disorder of the mind or brain, whether permanent or temporary which results in an impairment or disturbance of mental functioning’ (English Law Commission **Report 231** 1995 par 1.3-1.4).

<sup>323</sup> Sec 1(6) of the Adults with Incapacity (Scotland) Act 2000 defines “incapable” (with regard to a specific decision or act described in the Act) as “incapable of acting; making decisions; communicating decisions; understanding decisions; or retaining the memory of decisions, ... by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of

have been suggested by the law reform bodies concerned. In both instances the tests are based on cognitive functioning, and emphasise inability to make a decision as well as inability to communicate any decision made. In both cases the inability must stem from mental disability and must be function-specific. In both cases the definition serves as a general threshold for application of the proposed legislation (which provides for formal intervention in the affairs of persons with incapacity and also legalise informal assistance).

- ◆ In New Zealand different tests (based on cognitive impairment) apply in respect of different measures of intervention. The tests seem to be directly linked to the specific measures (in contradistinction to the position in England and Scotland where a single test serves as a general threshold for application of the legislation).<sup>324</sup>
- ◆ In Queensland, Australia a more simplified test was recommended: While it also emphasised inability to make the decision as well as inability to communicate a decision, the recommended test does not require that the inability must stem from mental disability.<sup>325</sup> The test further clearly

---

communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise)".

324

The Court can eg make a "personal order" (a specific instruction requiring an action to be taken in respect of a specific part of an incapacitated person's care and welfare) only if the person concerned –

"lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences of decisions in respect of matters relating to their personal care and welfare; or have these capacities but totally lack the capacity to communicate decisions about their personal care and welfare".

The Court can appoint a "welfare guardian" (someone to make and implement decisions on behalf of a person in relation to all aspects of their personal care) only where the person concerned –

"lacks wholly or partly, the capacity to make or communicate decisions about an area or areas relating to their personal care and welfare" (Information on the Protection of Personal and Property Rights Act, 1988 supplied by the Family Court of New Zealand available on the Internet at <http://www.courts.govt.nz/family/pppr.html> accessed on 3/7/03).

325

According to the Law Reform Commission's recommendations a person has "decision-making capacity" for a specific decision if "the person is capable, whether with or without assistance, of understanding the nature and foreseeing the effects of the decision; and communicating the decision in some way". A person has "impaired decision-making capacity" in respect of a specific

implies that if a decision can be made with “assistance” (i.e. assistance by an “informal decision-maker” such as a family member) there is no need for recourse to the procedures being provided for by the legislation. The intervention provided for by the legislation consists of the appointment of various types of substitute decision-makers by a tribunal or other official body. “Informal assistance” is not covered by the legislation. In Queensland it was recommended that the test should operate alongside an express presumption of capacity (which was included in the proposed legislation as one of the principles governing intervention in the affairs of persons with incapacity).<sup>326</sup>

- ◆ In the Netherlands, where an additional (more informal and less intrusive) system of substitute decision-making was established to operate parallel to the existing system of curatele (without abolishing the existing system as was done in England, Scotland and Queensland), the codified common law test of inability to manage affairs (which operates in respect of curatele) was in effect retained but further developed to expressly accommodate the elements of temporary incapacity and incapacity related to physical condition: The new measures of “bewind” (management of financial affairs) and “mentorschap” (management of personal and welfare affairs) can be instituted where an adult, as a result of his or her *physical* or *mental condition*, is *temporarily* or *permanently* incapable of managing such affairs.<sup>327</sup> These tests are

---

decision “if the person does not have decision-making capacity for the decision” (Queensland Law Reform Commission Report **No 49** 1996 Vol 2 176).

<sup>326</sup> The proposed presumption was formulated as follows: “An adult is presumed to have the capacity to make the adult’s own decisions” (Queensland Law Reform Commission **Report No 49** 1996 Vol 2 28).

<sup>327</sup> The new measures of “bewind” and “mentorschap” can be instituted where an adult, as a result of his or her physical or mental condition, is temporarily or permanently incapable of fully managing his or her financial affairs (in the case of “bewind”); or incapable or has difficulty in managing his or her non-financial affairs (in the case of “mentorschap”) (our translations). While the application of “curatele” required that the adult should be unable to manage his or her affairs “wegens een geestelijke stoornis” the new measures require that the inability should be caused by “lichamelijke of geestelijke toestand” (BW Title 16 sec 1:378; BW Title 19 sec 1:431; and BW Title 20 sec 1:450; see also Van Duijvendijk-Brand and Wortmann 195-196, 219-220 and 226-227).

formulated against the following background: an appointment for a “bewindvoerder” or “mentor” can be made by a judicial officer who must exercise his or her discretion as to whether “the person concerned can manage his or her affairs”. However, the new tests clearly address the need to acknowledge that capacity can be fluctuating and be temporarily lost. The tests are based on the premise that the intervention provided for may only be used if less formal arrangements (which the law does not regulate) are inadequate.<sup>328</sup>

4.36 As indicated in paragraph 4.27 above, commentators who were in favour of a new definition of “incapacity” in general suggested that such definition should be function-based and should deal with fluctuating and temporary incapacity. Apart from this, the comments reflect the following:

- ◆ There were several suggestions (in particular from the medical fraternity and social services professions) for specific and comprehensive definitions based on a cognitive test.<sup>329</sup> Proponents of this approach in general submitted that the definition should provide a uniform assessment scale, known to all, with specific criteria which should be clear and which should not allow for discretion. Many of these respondents emphasised that it is nearly impossible to capture assessment of capacity in a simple and short definition.<sup>330</sup> Others, acknowledging this, however stressed the necessity to have a user-friendly definition.<sup>331</sup> Some respondents from the social service professions specifically emphasised that the law should allow more input from their professions in determining capacity.<sup>332</sup>

---

<sup>328</sup> Van Duijvendijk-Brand and Wortmann 219-220.

<sup>329</sup> See eg the comments of Prof Vorster; Dr Sean Kaliski; the Society of Advocates of KwaZulu-Natal; SA Federation for Mental Health; Occupational Therapy Association of SA; and Dr Felix Potocnik and colleagues. Dr Potocnik specifically pointed out that decisions are weighted i.e. that there are degrees of competency required for different decisions.

<sup>330</sup> Comments of Prof Vorster.

<sup>331</sup> See eg the comments of Dr Sean Kaliski; and the Occupational Therapy Association of SA.



Respondents in favour of the cognitive test approach suggested that the following elements should be reflected in a test for incapacity:<sup>333</sup>

- \* A finding or diagnosis of mental disability (or a clinical condition) and the state of that condition (eg whether it fluctuates, is stable, temporary or permanent) (i e a mental disability precondition).<sup>334</sup>
- \* The influence of the clinical condition on the judgment of the person concerned (i e a cognitive test).<sup>335</sup> Some respondents included a requirement that the ability to make a *rational* decision should be part of the test for capacity.<sup>336</sup>
- \* Whether the person was vulnerable to being influenced (i e a “true choice” test).<sup>337</sup>
- \* Difficulty in communicating decisions.<sup>338</sup> Some commentators specifically referred to the inability to communicate as a result of illiteracy and suggested that persons who are exploited because of illiteracy should be regarded as a vulnerable group that should be protected by new measures.<sup>339</sup>

---

<sup>332</sup> See eg the comments of ARDA who suggested that incapacity should be established by a team of multi-disciplinary professionals.

<sup>333</sup> See eg the comments of Prof Vorster; Dr Sean Kaliski; and Dr Felix Potocnik and colleagues.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> See eg the comments of Dr Felix Potocnik and colleagues.

<sup>337</sup> See eg the comments of Prof Vorster.

<sup>338</sup> See eg the comments of the SA Federation for Mental Health. It is not clear whether the Federation suggests that difficulty in communicating decisions should, or should not, be regarded as “incapacity” for purposes of new substitute decision-making measures. Cf also the comments of Dr Felix Potocnik and colleagues referring to the assessment standards for capacity of their New Zealand counterpart, Dr Greg Young, which included the following: awareness of surroundings; awareness of available choices; awareness of consequence of each choice; consistence of choice (i e will the person still make the same choice tomorrow); absence of undue influence; and a decision reflecting a reasonable choice – if not reasonable a good reason must be given.

<sup>339</sup> See eg the comments of Ms Margaret Meyer.

- \* The influence of cultural beliefs and practices on decision-making should be taken into account.<sup>340</sup>
- ◆ Others preferred a more simplified test: Respondents in this category emphasised the need for new measures to essentially deal with cases of incapacity not currently covered by the legal definition of “incapacity” – i.e. cases where assistance is needed without a finding that the person is unable to manage his or her affairs for reasons related to or stemming from mental disability or a specific disorder or condition.<sup>341</sup> It was argued in this regard that it is emotionally traumatising for all concerned to institute proceedings whereby the person who needs assistance could be classified or categorised as being mentally ill. Tests or definitions based on a diagnosis of mental illness or disorder should thus be avoided. In this context it was suggested that a simple definition that allows intervention in respect of persons “who require assistance with decision-making or administration of assets” should suffice.
- ◆ Several members of the legal fraternity who commented preferred a broad, vague test where the assessment of capacity is left in the discretion of the High Court based on evidence by medical experts. They were in general in favour of retaining the current common law test of inability to manage affairs.<sup>342</sup> The view was for instance expressed that “definitions of mental capacity which would on the one hand create a sort of yardstick by which the mental capacity of persons are measured and which on the other hand would limit the discretion of the relevant person determining the question of mental capacity in a particular case, would not serve the interests of society in general. A proper judicial discretion

---

<sup>340</sup> See eg the comments of the SA Federation for Mental Health. Cf also the discussion of this issue in par 5.12 below in the context of a possible principle governing intervention in the affairs of persons with incapacity.

<sup>341</sup> See eg Comment No 6 (anonymous); see also the comments of the Department Legal Services, Provincial Administration Western Cape who pointed out that the cause of incapacity should not be decisive.

<sup>342</sup> See eg the comments of the Master, Cape Town; Johannesburg Bar Council; and the General Council of the Bar of SA. Cf also the comments of Ms Margaret Meyer.

has to be exercised and that judicial discretion must not be limited by a number of so-called mechanisms and definitions which cannot make provision for every individual or situation".<sup>343</sup>

- ◆ A fourth group submitted that it would be very difficult, and indeed too difficult, to develop a satisfactory definition as capacity depends on too many variables and a definition will have to cover too many possibilities. This group submitted that an attempt should not be made to define the concept.
- ◆ A single commentator pointed out that the nature of the measures to be developed (its permanence, its extent, and the nature of the intervention) should determine the contents of the test for capacity or incapacity.<sup>344</sup>

4.37 As indicated in paragraph 4.29 the Commission is in favour of expressly defining "incapacity" for purposes of any new substitute decision-making measures. We concede that it will be difficult to formulate a suitable test, but believe that it is necessary in order to clearly indicate in respect of whom any new measures we recommend could be applied. We already indicated in our preliminary recommendation in paragraph 4.29 that the definition should be function-based and that it should cover temporary incapacity and fluctuating incapacity. In addition to this, for reasons indicated earlier in this Chapter,<sup>345</sup> we favour a definition based on a clear cognitive test rather than a vague test similar to that of the common law. This approach would be in accordance with international practice and with the comment we received on Issue Paper 18. We however believe that the cognitive test should be formulated as simple as possible and should refer mainly the following elements:

- ◆ Ability to assimilate the facts necessary to arrive at an informed, rational decision;

---

<sup>343</sup> Comments of the General Council of the Bar of SA. Cf also the comments of the Department Legal Services, Provincial Administration Western Cape.

<sup>344</sup> Comments of the Department Legal Services, Provincial Administration Western Cape.

<sup>345</sup> See the criticism of the common law test referred to in par 4.25 et seq.

- ◆ ability to base a rational decision on the facts; and
- ◆ ability to communicate the decision to others.

For the following reasons we are not in favour of requiring that the incapacity concerned must be the result of “mental illness” or a specific diagnosis:

- ◆ We want to avoid complex definitions of “mental illness” which are inaccessible to the lay person. In addition, we want to avoid the difficulties related to the classification of specific conditions and differences of opinion on whether certain conditions can be classified as “mental illness” or not. As indicated at the outset of this Paper, the Commission aims to introduce measures which will benefit persons with decision-making incapacity however the incapacity was caused. Our definition of incapacity should reflect this.<sup>346</sup>
- ◆ We want new measures to accommodate persons who are currently excluded from making use of existing substitute decision-making measures because they do not fit the labels of “mentally ill” or “incapable of managing affairs”.
- ◆ We want to get away from discriminatory labeling of persons with incapacity by finding or declaring them incapable or mentally ill. In addition, we want to avoid subjecting such persons and their families to the traumatising procedures which traditionally formed the basis of such findings.

We further agree with our commentators that illiteracy should not be considered a cause for incapacity and we believe that any proposed legislation should expressly deal with this. We are also concerned that the influence of cultural beliefs and practices on decision-making should not lead to a person being regarded as incapacitated.<sup>347</sup> Finally we would aim to draft a definition in simple terms, as far as this is possible.

---

<sup>346</sup> See par 2.4.

<sup>347</sup> Cf also par 4.33 (third bulleted subparagraph) where it is submitted that the outcome of the decision should not by itself be evidence of lack of capacity.

#### 4.38 PRELIMINARY RECOMMENDATION

**A statutory definition of incapacity should contain the following elements:**

- ♦ **It should be function-based;**
- ♦ **it should accommodate fluctuating and temporary incapacity;**
- ♦ **it should not be based on a specific diagnosis or a precondition of mental illness;**
- ♦ **it should be based on a cognitive test;**
- ♦ **it should accommodate inability to communicate;**
- ♦ **it should accommodate the influence of cultural beliefs and practices on decision-making; and**
- ♦ **it should be formulated as clear and uncomplicated as possible.**

## 5

# General principles governing intervention in the affairs of persons with incapacity

- 5.1 As indicated in Chapter 3, people with incapacity are entitled to respect for their human dignity and to assistance to become as self-reliant as possible. At the same time they are entitled to be protected from neglect, abuse and exploitation. This premise is embodied in relevant international instruments<sup>348</sup> and also in the Constitution.<sup>349</sup> The question whether and to what extent such people require assistance to make decisions involves a balance between their right to the greatest possible degree of autonomy and their need to be protected. It is generally accepted that legislation dealing with substitute decision-making should expressly embody principles that give statutory recognition to the rights of persons with incapacity. Such principles should bind those who determine whether a person needs assistance to make decisions and if so, the extent of the assistance required. They should also bind a substitute decision-maker in assisting a person with incapacity to make decisions or in making decisions on behalf of such person.<sup>350</sup>

## TYPICAL PRINCIPLES

- 5.2 The principles that should underpin intervention in the affairs of persons with incapacity have been the subject of much debate in jurisdictions where reform has been affected.<sup>351</sup> In view of the wide variety of situations that can arise in

---

<sup>348</sup> See par 3.4-3.5 above.

<sup>349</sup> See par 3.13-3.19 above.

<sup>350</sup> Cf eg Queensland Law Reform Commission **Discussion Paper No 38** 1992 1-3.

<sup>351</sup> English Law Commission **Consultation Paper 119** 1991 101.

respect of adults with incapacity, opinions differ on the suitability and applicability of some of them. The demarcation between them is moreover not always particularly clear, some overlap and others are to some extent pulling in different directions, reflecting the conflict between self-determination and paternalism, rights and welfare, autonomy and protection.<sup>352</sup> Principles that have gained recognition in other systems include the following:<sup>353</sup>

♦ ***Best interests***<sup>354</sup>

The best interests approach is basically derived from child-care law and presents a more paternalistic and possibly restrictive approach: the decision taken is that which the decision-maker thinks is best for the person concerned. In some jurisdictions criticism against the paternalistic nature of this principle has been overcome by fleshing it out in requiring that a person's best interests should be established with reference to specific factors. These factors then incorporate some of the other (more acceptable) principles (eg by requiring that best interests must be ascertained with reference to the wishes of the person concerned).<sup>355</sup> Others seem to have retained the principle in essence but refrained from expressly referring to it (eg by requiring that any intervention must "benefit" the person concerned).<sup>356</sup> As indicated above, South African constitutional law experts have expressed the view that the best interests approach – being based on protective, paternalistic and conservative notions - does not fit in with the underlying premise of self-determination

---

<sup>352</sup> Ibid 108.

<sup>353</sup> See in general English Law Commission **Consultation Paper 119** 1991 101-110; Scottish Law Commission **Report No 151** 1995 19-25; Queensland Law Reform Commission **Discussion Paper No 38** 1992 1-6 and **Report No 49** 1996 5-12; Jansen 2000 **European Journal of Health Law** 333-340.

<sup>354</sup> See in general English Law Commission **Consultation Paper 119** 1991 105-107; Scottish Law Commission **Report No 151** 1995 20-21.

<sup>355</sup> English Law Commission **Report No 231** 1995 par 1.3; The Lord Chancellor's Department **Report on Making Decisions** 1999 (Internet).

<sup>356</sup> See eg the Scottish Law Commission's use of a principle referred to as "benefit to the incapable adult" (Scottish Law Commission **Report No 151** 1995 20-21). See also par 5.5 below.

and respect for personhood enshrined in the Constitution and is therefore unacceptable.<sup>357</sup>

◆ ***Substituted judgment***<sup>358</sup>

The substituted judgment standard prefers the decision that the incapacitated person would have made had he or she been competent to do so. Guidance as to what the person is likely to have decided in a particular situation can be provided by consultations with the person and with his or her family, friends and carers. The principal advantage of this approach is its implicit respect for the autonomy of the individual and it is generally considered preferable to the best interests test. South African constitutional law experts agree with this.<sup>359</sup> The substituted judgment approach is however not appropriate in every situation: it would be difficult or impossible to apply in the case of someone who has never had capacity (eg in the case of a person with a severe intellectual disability). Significant decisions in such a person's life will invariably have been taken by others and any choices made by him or her will have been from a very restricted range of options and it would thus be difficult to draw meaningful conclusions about the views or values such person would have had if of full capacity. Any decision will therefore involve a process of pure speculation, or will inevitably be influenced by the decision-maker's view of what will be best for the person. In the latter instance the distinction between the best interests and the substituted judgment standards might become "little more than a matter of language".<sup>360</sup> The substituted judgment test is more appropriate in respect of someone who once had capacity. However, even in this case it might be problematic, for instance if the person with incapacity was throughout his or her earlier life

---

<sup>357</sup> See par 3.18 above. Note that these remarks were made with reference to intervention in the affairs of physically disabled persons (who would fall in the category of persons requiring intervention in their affairs for reasons other than mental illness).

<sup>358</sup> See in general English Law Commission **Consultation Paper 119** 105-108; Queensland Law Reform Commission **Discussion Paper No 38** 3; Heaton in **Boberg's Law of Persons and the Family** 137-138; Cockrell in **Bill of Rights Compendium** 3E-34.

<sup>359</sup> See par 3.18 above. Note that this preference has bearing on the situation of persons with physical disabilities (who would fall in the category of persons requiring intervention in their affairs for reasons other than mental illness).

<sup>360</sup> English Law Commission **Consultation Paper 119** 107.



a notoriously bad judge of certain matters. Allowing some degree of “censorship” by those applying the test, or introducing an element of reasonableness in such a situation detracts from the very purpose behind adopting this standard and in practice the outcome would probably not be much different if the best interests standard was applied.<sup>361</sup> Some argue however that even if this were the case, emphasis on the substituted judgment standard would at least be symbolic of the respect for human individuality - which might have a value greater than its practical effect.<sup>362</sup> Others argue that to overcome the limitations of the substitute judgment standard, it could be replaced with the principle of “least restrictive intervention” in those cases where its application is impossible.<sup>363</sup>

◆ **Normalisation**<sup>364</sup>

This standard has been expressed in a variety of ways and is also referred to as **maximum preservation of capacity** or **encouragement of self-reliance**. It follows from the fact that different degrees of incapacity may exist and that incapacity may vary from time to time. It implies in particular that a measure of protection should not result in an automatic, complete removal of legal capacity and recognises that people who have a severe mental or intellectual disability may still have ways of communicating their preferences on matters within their competence. Basically it aims to treat incapacitated persons as much like other people as possible and encouraging them, as far as is possible, to make decisions for themselves in using their existing skills and in developing new skills. In doing so it emphasises the autonomy of the person with incapacity. Note that this requirement cannot be made absolute as it would be unreasonable to require substitute decision-makers to encourage adults with rapidly deteriorating capacity to acquire new skills; and impracticable for those with virtually no capacity to exercise existing

---

<sup>361</sup> Ibid 107-108.

<sup>362</sup> Ibid 108.

<sup>363</sup> Queensland Law Reform Commission **Discussion Paper No 38** 1992 5. See further down in this paragraph for information on the “least restrictive intervention” approach.

<sup>364</sup> See in general English Law Commission **Consultation Paper 119** 1991 102-103; Queensland Law Reform Commission **Discussion Paper No 38** 3; Scottish Law Commission Report **No 151** 1995 22; Jansen 2000 **European Journal of Health Law** 336.

skills. Some persons moreover grant enduring powers of attorney in order to be relieved of the burden of managing their affairs and would not welcome being encouraged to exercise their existing skills.

♦ ***Presumption of competence***<sup>365</sup>

This principle requires that the questions whether and to what extent intervention is necessary in the decision-making process of a person with incapacity, should be approached on the basis that the person is capable of making his or her own decisions until the contrary is proved. It implies that although a person may be categorised for certain purposes, this should not be used as criterion to allow intervention. The standard of proof required would normally be the balance of probabilities. Some argue however, that in view of the drastic consequences of an adverse finding, the criminal standard of proof beyond reasonable doubt would be more appropriate.<sup>366</sup> It should be noted that the presumption of competence can only operate alongside a clear system for determining incapacity.<sup>367</sup>

♦ ***Least restrictive intervention having regard to the purpose of the intervention***<sup>368</sup>

This principle is also known as that of ***necessity and subsidiarity***<sup>369</sup> - considered by certain experts<sup>370</sup> to be one of the key principles that should underpin intervention in the affairs of persons with incapacity. It implies that where a person requires assistance to make decisions it should be done in such a way as to cause the least restriction of the

---

<sup>365</sup> See in general English Law Commission **Consultation Paper 119** 1991 103-104; Queensland Law Reform Commission **Discussion Paper No 38** 1992 3.

<sup>366</sup> English Law Commission **Consultation Paper 119** 1991 104.

<sup>367</sup> Ibid.

<sup>368</sup> See in general English Law Commission **Consultation Paper 119** 1991 104; Queensland Law Reform Commission **Discussion Paper No 38** 1992 4; Scottish Law Commission **Report No 151** 21-22; Jansen 2000 **European Journal of Health Law** 335. Note that in some jurisdictions this principle is being formulated as the “minimum necessary” intervention. Those who favour “least restrictive” intervention argue that the latter is preferable as it focuses on the practical results of an intervention (Scottish Law Commission **Report No 151** 1995 21).

<sup>369</sup> Cf Recommendation No R (99) 4 of the Committee of Ministers of the Council of Europe to Member States on Principles Concerning the Legal Protection of Incapable Adults, 1999 (Jansen 2000 **European Journal of Health Law** 335).

<sup>370</sup> Jansen 2000 **European Journal of Health Law** 335.

rights of that person while at the same time providing adequate protection. In practice this approach would mean that assistance should be provided on an “as needs” basis only; that in appropriate situations it should take the form of support rather than intervention; and wherever possible the views of the person concerned should be sought and taken into account in determining whether intervention is necessary. In some jurisdictions this has led to a preference for informality rather than compulsory powers. (In recommendations by the Council of Europe, for instance, “subsidiarity” expressly refers to the requirement that a response by means of legal measures should be subsidiary to a response by means of the use of informal arrangements or the provision of assistance).<sup>371</sup> In others it signified the development of concepts of limited authority over persons with incapacity that is tailored to meet the particular needs of the individual concerned.<sup>372</sup> It is significant to note that often this principle incorporates the substitute judgment principle (i.e. decisions by a substitute decision-maker should be based on what the person concerned would have decided had he or she been competent to do so).<sup>373</sup>

◆ ***Proportionality***<sup>374</sup>

This principle requires that where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned i.e. it should be tailored to the individual circumstances of the case.<sup>375</sup> The protective measure should therefore restrict the legal capacity, rights and freedoms of the adult concerned by the minimum which is consistent with achieving the purpose of the intervention. This principle clearly overlaps with the principles of normalisation and of least restrictive intervention discussed above.

---

<sup>371</sup> Recommendation No R (99) of the Committee of Ministers of the Council of Europe to Member States on Principles concerning the Legal Protection of Incapable Adults, 1999, principle 5. See also par 3.5 above.

<sup>372</sup> Cf English Law Commission **Consultation Paper 119** 1991 104; Queensland Law Reform Commission **Discussion Paper No 38** 1992 4.

<sup>373</sup> Ibid.

<sup>374</sup> Jansen 2000 **European Journal of Health Law** 336.

<sup>375</sup> See eg Principle 6 of the Council of Europe Recommendations referred to in fn 371 above.

♦ **Consultation**<sup>376</sup>

Decisions made on behalf of a person with incapacity can impact significantly on the lives of people who are in existing supportive relationships with that person. Recognition should therefore be given to the importance of preserving such relationships by requiring that these people be consulted. This requirement should however not be so onerous as to be unworkable. Some jurisdictions thus require that the degree of consultation should be appropriate to the scale of the proposed intervention (i.e. consultation is not required in respect of every minor matter). In jurisdictions where this principle applies the following persons usually have to be consulted:<sup>377</sup> the nearest relative and the primary carer of the person; any curator (or similar person appointed by a tribunal or the Court to manage the affairs of the person concerned); any agent under an enduring power of attorney; any person whom the Court or a relevant tribunal has directed to be consulted; and any other person appearing to have an interest in the welfare of the person with incapacity or in the proposed intervention. Note that such consultation is usually required in addition to ascertaining the past and present wishes of the person with incapacity him or herself.

## EXAMPLES OF RECENT TRENDS IN OTHER JURISDICTIONS

- 5.3 Recent trends in other jurisdictions indicate that a set of governing principles is usually included in legislation rather than a single principle. Such principles usually apply throughout substitute decision-making legislation and are not limited to exercising powers in relation to specific types of decisions only.<sup>378</sup>

---

<sup>376</sup> See in general Queensland Law Reform Commission **Discussion Paper No 38** 1992 5; Scottish Law Commission **Report No 151** 1995 22-23.

<sup>377</sup> Cf eg sec 1 of the Adults with Incapacity (Scotland) Act 2000.

<sup>378</sup> See eg Scottish Law Commission **Report No 151** 20; English Law Commission **Report No 231** 1995 par 1.5.

5.4 Although in reform recommended in England a single principle (best interests) is provided for, it is broken down in a number of factors which should be taken into account whenever something has to be done or a decision made on behalf of a person without capacity. The Law Commission believed that although the best interests test and the substituted judgment test are often presented in opposition to each other, they need not be mutually exclusive, and favoured a compromise whereby the best interests test is modified by other (more acceptable) requirements. The following four factors have to be taken into account in ascertaining what may be in a person's best interests:<sup>379</sup>

- ◆ Ascertainable past and present wishes of the person.
- ◆ The need to permit and encourage the person to participate, or to improve his or her ability to participate, in anything done for and any decision affecting him or her.
- ◆ If it is practicable and appropriate to consult them, the views as to the person's wishes of any person named by him or her; any person engaged in caring for or interested in the person's welfare (eg a spouse, partner in a permanent life partnership, relative or friend); the agent under an enduring power of attorney granted by the person; and any person appointed by the Court to administer the person's affairs.
- ◆ Whether the purpose for which any action or decision is required can be as effectively achieved in a manner less restrictive of the person's freedom of action.

Broadly speaking, this approach combines the principles of best interests, substituted judgment, normalisation, least restrictive intervention, and consultation referred to above. The Government, after further consultation, however indicated its intention of adding to the Law Commission's proposed list the following two factors to be taken into account in determining best interests:

- ◆ Whether there is a reasonable expectation of the person recovering capacity to make the decision in the reasonably foreseeable future.
- ◆ The need to be satisfied that the wishes of the person without capacity were not the result of undue influence.

---

<sup>379</sup>

English Law Commission **Consultation Paper 128** 1992 111-13 and **Report No 231** 1995 par 1.5.

It also suggested that the list of factors should not be applied too rigidly and should not exclude consideration of any relevant factor in a particular case.

5.5 In Scotland legislation provides that there shall be no intervention in the affairs of an adult unless the intervention *will benefit* the adult and that such benefit cannot reasonably be achieved without the intervention.<sup>380</sup> The intervener should have to weigh the intervention against the benefit – the more serious the intervention the greater the benefit that should have to result from it.<sup>381</sup> The Commission argued that the best interests approach is too vague; that it does not give enough weight to the views of the adult with incapacity (especially those expressed while still capable); and that it is wrong to equate adults who previously had capacity with children (since the best interests standard was traditionally developed in the context of child law). The Commission therefore avoided referring expressly to “best interests”.<sup>382</sup> In addition to the benefit requirement the following principles (which broadly corresponds with the four factors recommended by the English Law Commission) are provided for:<sup>383</sup>

- ◆ Where an intervention is to be made, it shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.
- ◆ In determining if and what intervention is to be made, account shall be taken of the present and past wishes and feelings of the person with incapacity; the views of the nearest relative and the primary carer of the person; the views of any guardian or agent acting under an enduring power of attorney who has powers in relation to the proposed intervention; the views of any person whom the Court has directed to be consulted; and the views of any other person appearing to have an interest in the welfare of the adult or in the proposed intervention.
- ◆ Any person exercising substitute decision-making powers shall encourage the adult to exercise whatever skills he or she has concerning

---

<sup>380</sup> Adults with Incapacity (Scotland) Act 2000 sec 1(2).

<sup>381</sup> Scottish Law Commission **Report No 151** 1995 20-21.

<sup>382</sup> Ibid.

<sup>383</sup> Adults with Incapacity (Scotland) Act 2000 sec 1(3)-(5).

his or her property, financial affairs or personal welfare, and to develop new skills.

As in England, this approach includes the majority of typical principles referred to above (benefit or best interests, substituted judgment, normalisation, least restrictive intervention, and consultation).

- 5.6 The Queensland, Australia Law Reform Commission followed a somewhat different approach in recommending an extensive list of principles which must be complied with by every person or body who performs functions or exercise powers under substitute decision-making legislation. These principles include some of the typical principles referred to above (viz providing for a presumption of competence; and requiring encouragement of self-reliance, maximum preservation of capacity, least intrusive intervention and assistance appropriate to the needs of the adult concerned) but also some general human rights and social principles (viz recognition of the rights to equality, dignity, and privacy; recognising the person with incapacity as a valued member of society; encouraging such person to participate in community life; and maintaining the person's cultural and linguistic environment and values).<sup>384</sup>
- 5.7 The Council of Europe, in Recommendations dealing specifically with principles underpinning intervention in the affairs of persons with incapacity, also combines some of the typical principles referred to above with human rights principles. Its drafters however indicated that the key principles in the Recommendations are the following: respect for human dignity; necessity and subsidiarity; maximum preservation of capacity; and proportionality.<sup>385</sup>

---

<sup>384</sup> Queensland Law Reform Commission Report **No 49** 1996 Vol 1 30-43 and Vol 2 28-31 (clauses 21-31 of the proposed draft legislation).

<sup>385</sup> Jansen 2000 **European Journal of Health Law** 335-336. The Recommendations contain 10 basic principles. The others are: flexibility in legal response; publicity (apparently preservation of the right to privacy); procedural fairness and efficiency; paramountcy of interests and welfare of the person concerned; respect for wishes and feelings of the person concerned; and consultation (Ibid 342-344).

## RECENT TRENDS IN RELATED SOUTH AFRICAN LEGISLATION

5.8 Relevant underlying principles reflected in the recent legislative developments on mental health care and on the status of the elderly are as follows:<sup>386</sup>

- ◆ The new Mental Health Care Act, 2002 generally emphasises the best interests approach in providing that “in exercising the rights and in performing the duties set out in this [Act], regard must be had for what is in the best interests of the mental health care user”.<sup>387</sup> “Best interests” is not defined in the Act. The rights and duties referred to however reflect further underlying principles (both human rights principles and principles specific to the issue being legislated for) and include the following:<sup>388</sup> equality;<sup>389</sup> respect for human dignity and privacy;<sup>390</sup> maximum preservation of capacity;<sup>391</sup> and proportionality.<sup>392</sup>
- ◆ The draft legislation on the status of the elderly currently being developed in its preamble places special emphasis on the right to human dignity. The Act itself concentrates on principles specific to the subject being

---

<sup>386</sup> See par 3.20-3.22 above for information on these developments.

<sup>387</sup> Sec 7(2). See also sec 3(a)(i) which lists as one of the objects of the Act the following: “... to regulate the mental health care in a manner that makes the best possible ... services available to the population ... efficiently and in the best interest of mental health care users ...”. The National Health Bill, 2003 although only relevant as regards surrogate decisions in the context of consent to medical treatment, also emphasises the “best interests” principle (sec 6(a)).

<sup>388</sup> Principles relevant to the current investigation are referred to only. Others include eg consent to treatment (sec 9); protection from exploitation and abuse (sec 11); a determination of mental health status must be based on factors exclusively relevant to that person’s mental health status and not on socio-political or economic status, cultural or religious background or affinity (sec 12(1)); and mental health care users must normally be informed (in an appropriate manner) of their rights before treatment is administered (sec 17).

<sup>389</sup> Unfair discrimination on the basis of mental health status is prohibited and care and treatment given must be in accordance with standards equal to those applicable to other health care users (sec 10).

<sup>390</sup> Sec 8(1).

<sup>391</sup> Services must be provided that improve the mental capacity of the user to develop to full potential and to facilitate his or her integration into community life (sec 8(2)).

<sup>392</sup> Treatment and care must be proportionate to the mental health status of the user and may intrude only as little as possible (sec 8(3)).



legislated for.<sup>393</sup> Significantly, one of the general principles underpinning the planned legislation is the assumption, until shown otherwise, that older persons are competent to make informed choices and decisions about their own lives.<sup>394</sup>

## FINDING A SUITABLE APPROACH

5.9 Respondents on Issue Paper 18 were adamant that intervention in the affairs of persons with incapacity should be allowed on the basis of clear principles only. Although the responses were, in many instances, apparently influenced by respondents' different professional perspectives (i.e. medical, legal and social services) much emphasis was in general placed on constitutional principles.<sup>395</sup> Of these, respondents generally believed that the rights to equality, autonomy and dignity are of particular significance. Other principles mentioned included the following:

- ◆ Intervention should take place only on the ground of objective evidence that the person concerned cannot manage his or her affairs. Some commentators (mostly from the medical fraternity) indicated that this should be medical evidence (i.e. evidence of a clinical assessment of competency or of a specific diagnosis) while others believed that the intervention should take place only after authorisation by a Court.<sup>396</sup>
- ◆ Intervention should take place only on application of the person concerned or someone on his or her behalf; where risks to the person concerned or others are involved; or where necessary.<sup>397</sup>

---

<sup>393</sup> See Clause 4 of the draft Older Persons Bill (latest available draft dated 9 April 2003).

<sup>394</sup> Clause 4(b). Other principles include the right to live safely and without fear of abuse; the right to be treated fairly and be valued independently of economic contribution; and the right to have access to employment, health welfare, transportation, social assistance and other support systems without regard to economic status (clause 4(a), (c) and (d)).

<sup>395</sup> See the discussion on constitutional considerations in par 3.13-3.19 above.

<sup>396</sup> This view broadly reflects preference for the principle of necessity, and for working with a presumption of competence.

<sup>397</sup> Reflecting preference for the principle of necessity.

- ◆ Intervention should recognise the unique needs of every person with incapacity.<sup>398</sup>
- ◆ Intervention should empower persons with incapacity.<sup>399</sup>
- ◆ Intervention should be aimed at the protection of the person concerned.<sup>400</sup>
- ◆ Intervention should allow for the freedom of choice of the person concerned.<sup>401</sup>

5.10 The Commission agrees that intervention in the affairs of persons with incapacity can take place only on the basis of clear principles and that these should, in accordance with international and national trends be included in any new legislation on substitute decision-making.

5.11 Should it be a single principle, or a range of principles? It is clear from the background information supplied that a single principle (although it could have the advantage of providing clarity and simplicity) would not suffice. There is no single principle referred to in the relevant literature that clearly and fully encompasses all the situations in which persons with incapacity find themselves and in which intervention will be necessary. On the other hand, an extensive range of principles including principles specific to the issue to be legislated for as well as all the possibly applicable constitutional principles listed in Chapter 3 above, might be confusing. In accordance with the need for legal certainty and clarity the Commission's aim would be to keep any legislation to be developed to govern substitute decision-making as clear and simple as possible.<sup>402</sup> We therefore believe that such legislation should provide a clear test or guidelines for intervention in the affairs of persons with incapacity rather than a compilation of all the constitutional, social and other principles that could possibly apply to the situation. Although constitutional principles are of utmost importance, the concept of constitutional supremacy (as expressed in section 2 of the Constitution) in any event dictates that the rules of the Constitution are binding

---

<sup>398</sup> Mainly reflecting preference for the principle of proportionality.

<sup>399</sup> Reflecting preference for the principle of normalisation.

<sup>400</sup> Broadly reflecting preference for the principle of least restrictive intervention.

<sup>401</sup> Broadly reflecting preference for the substituted judgment principle.

<sup>402</sup> See par 3.35 above for general pointers for reform.

on all branches of the government and have priority over any other rules made by the government.<sup>403</sup> Any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law.<sup>404</sup> In addition to this, section 8 of the Constitution provides that the Bill of Rights has supremacy over all forms of law and that it binds all branches of the state and, in certain circumstances, private individuals as well. Moreover, respect for human rights is in any event also clearly reflected in the typical principles favoured by other jurisdictions. Against this background we prefer the examples of the English and Scottish Law Commissions that abided by a single principle which is defined in terms of a number of key concepts specific to the issue under legislation.

- 5.12 What should the governing principle be? In practice, different degrees of intervention will be appropriate in different circumstances, and there are bound to be differing opinions upon the right degree in any particular case.<sup>405</sup> The right balance could possibly be found in the following comments on Issue Paper 18 by the Johannesburg Bar Council:

“Any legislative reform that is undertaken should have as its primary objective the *protection of the interests of incapable adults*, with the least possible intrusion upon the right of such persons in a manner which is cost effective, efficient, and practical, and which allows as much participation as possible by the incapable adult’s family members and close associates” (our emphasis).

This balance is to a large extent also reflected in the prominence given to certain principles in international instruments, reform in other jurisdictions, relevant South African legislation, and suggestions by respondents on Issue Paper 18 – which suggests that the following principles should possibly be included in our proposed legislation:

- ◆ Best interests (or a similar principle of beneficence). It is debatable whether “protection of the interests of incapable adults” in the view quoted above conveys or means something different than “best interests of

---

<sup>403</sup> Sec 2 provides that the Constitution “is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

<sup>404</sup> ***Executive Council of the Western Cape Legislature v President of the Republic of South Africa*** 1995 (4) SA 877 (CC) par 62. See also De Waal et al 8.

<sup>405</sup> Cf English Law Commission **Consultation Paper 119** 1991 109.

incapable adults". We submit that criticism against the "best interests" principle in the context of substitute decision-making as discussed in paragraph 3.18 above can be dealt with by clearly defining "best interests" in terms of constitutionally acceptable concepts for purposes of the proposed legislation. This approach will also deal with other criticism which has (albeit in the field of protection of children's rights) been raised against the principle, namely that it fails to provide a determinate standard.<sup>406</sup> The Commission wants to emphasise that its use of the "best interest" principle is not meant to not convey any paternalistic or conservative notions. We propose that the base for intervention established in the proposed legislation should in particular embody the principles of protection of autonomy and self-determination. By identifying key concepts in terms of which "best interests" should be applied and interpreted, we submit that the right basis for intervention will be established.

- ◆ Least restrictive intervention (i.e. necessity and subsidiarity).
- ◆ Substituted judgment.
- ◆ Normalisation (i.e. maximum preservation of capacity).
- ◆ Proportionality.
- ◆ Consultation.

In response to the need that new measures should reflect the complexity of South African society, we would add to the above that intervention in the affairs of adults with incapacity should take into account the importance of maintaining the cultural environment, values and beliefs of that adult. South Africa is a multi-cultural society and people from different cultural backgrounds may employ different value bases in making decisions. They may also have, within their own traditions, ways of overcoming problems caused by impaired decision-making capacity. Recognition must be given to systems of support which operate in different ethnic or cultural communities.<sup>407</sup> Although this sentiment is also contained more indirectly in the principle of subsidiarity, we believe that it should

---

<sup>406</sup> Cf De Waal et al 416.

<sup>407</sup> Cf the information in par 3.23-3.24 above on the African perspective regarding mental illness. Cf also the emphasis on this need in legislation developed by the Queensland Law Reform Commission (**Report No 49** 1996 38-40).

be given prominence by referring expressly to it. Finally, we do not propose that the presumption of competence should be included as one of the principles to govern intervention. The presumption of competence is already part of our law and merely restating it would be unnecessary and undesirable.<sup>408</sup>

### 5.13 PRELIMINARY RECOMMENDATION

**The key principle to govern any intervention in the affairs of an adult with incapacity under or in pursuance of the proposed new legislation should be that any intervention must be in the best interests of the adult concerned. “Best interests” should be defined in terms of the following:**

- ♦ **Where an intervention is to be made, it must be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.**
- ♦ **No intervention should take place unless it is necessary taking into account the individual circumstances and the needs of the adult concerned. In deciding whether a measure is necessary, account should be taken of any less formal arrangements that might be made, and of any assistance which might be provided by family members or by others.**
- ♦ **Any person exercising functions under the new legislation in relation to an adult must, in so far as it is reasonable and practicable to do so, encourage the adult to participate, or improve his or her ability to participate, as fully as possible in anything done for and any decision affecting him or her.**
- ♦ **Any intervention must take into account the importance of maintaining the cultural environment, values and beliefs of the adult with incapacity.**
- ♦ **In determining if an intervention is to be made and, if so what intervention, account must be taken of -**
  - \* **the ascertainable past and present wishes and feelings of the adult;**

---

<sup>408</sup>

See par 4.11 on the presumption of competence.

- \* the views of other people whom it is appropriate and practical to consult including –**
  - + any person named by the adult as someone to be consulted;**
  - + any person engaged in or interested in the adult's welfare (such as a spouse, partner in a permanent life partnership, relative, friend or carer);**
  - + any curator, manager or mentor appointed by the Court or the Master;**
  - + an agent appointed under an enduring power of attorney who has powers in respect of the proposed intervention;**
  - + any person whom the Court or the Master has directed to be consulted; and**
  - + any other person appearing to have an interest in the welfare of the adult concerned or in the proposed intervention.**

**The above principles should not exclude consideration of any relevant factor in a particular case.**

## 6

# Dealing with existing incapacity: Current measures, criticism, and possible options for reform

## INTRODUCTION

- 6.1 We indicated in Chapter 4 that common law as well as statutory law provide for supplementation of incapacity. In this Chapter we set out the measures of supplementation currently available. We record the criticism against the current position (as reflected in the comments on Issue Paper 18); identify the needs emanating therefrom that should be addressed by law reform; and provide information on how other jurisdictions dealt with similar needs. Against this background we offer some options for reform.

## CURRENT MEASURES

- 6.2 There are limited possibilities under current law to deal with lack of decision-making capacity:
- ◆ Under common law the legal solution consists mainly of the curatorship system. Curatorship finds application in respect of all three areas of decision-making discussed in this Paper: financial affairs, personal welfare and medical treatment. The concept of *negotiorum gestio* (“unauthorised management” of another’s affairs) could possibly also be applicable, although to a very limited extent.
  - ◆ Statutory measures relevant to decision-making in the areas referred to are found in mental health legislation (the current Mental Health Act, 1973 which is in the process of being replaced by the Mental Health Care

Act, 2002); and, as regards medical treatment in particular, in the National Health Bill, 2003. For the sake of clarity we again point out, as was done earlier in this Paper, that the Mental Health Care Act, 2002 has not come into operation yet, and that the National Health Bill is currently before Parliament.<sup>409</sup>

## Common law measures

### *Curatorship*

6.3 Curatorship is the officially supervised care for the person and/or the estate of someone who, because of mental illness or otherwise is incapable of managing his or her own affairs.<sup>410</sup> A curator can be appointed by the High Court to an individual's person (*curator personae*) of property (a *curator bonis*):

- ♦ A ***curator personae*** is usually appointed where, because of advanced age, or mental or physical incapacity, a person is found to be incapable of managing his or her personal and health affairs and can be appointed either generally<sup>411</sup> or for specific purposes (eg to grant consent for a medical operation).<sup>412</sup> A *curator personae* will typically have to take decisions regarding where the incapacitated person should live; whether he or she should be admitted to an institution or be cared for at home; whether he or she should undergo medical treatment or an operation and by whom it should be performed. There are however limits to the scope of a *curator personae*'s functions: some acts are of too personal a nature to be performed by a legal representative (eg contracting a marriage,

---

<sup>409</sup> See in general par 3.20-3.22 above.

<sup>410</sup> Cronjé and Heaton **South African Family Law** 244. See also par 4.8 above.

<sup>411</sup> ***Ex parte Powrie*** 1963(1) SA 299 (W).

<sup>412</sup> ***Ex parte Dixie*** 1950(4) SA 748 (W).



seeking a divorce,<sup>413</sup> exercising parental power and making testamentary dispositions on behalf of the person under curatorship<sup>414</sup>).<sup>415</sup>

- ♦ A ***curator bonis*** can be appointed to take care of an incapacitated person's property, and supplement the person's lack of capacity to contract. A *curator bonis* is typically appointed when an individual is found to be incapable of managing his or her own financial or property affairs.
- ♦ A ***curator ad litem*** can be appointed by the Court to conduct civil legal proceedings on behalf of an incapacitated person. Where the appointment of a *curator personae* or *curator bonis* is sought, the normal procedure is to apply initially for the appointment of a *curator ad litem* to assist the person concerned in the application that will follow.<sup>416</sup> We discuss this role of the *curator ad litem* in paragraph 6.5 below. A *curator ad litem* (who is usually an advocate of the High Court) has no power over the person or property of the person whom he or she is appointed to represent and his or her authority extends no further than the proceedings to which his or her appointment relates.<sup>417</sup>

6.4 A substantial degree of evidence is required before appointing a curator.<sup>418</sup> The South African Courts are moreover slow to appoint *curators personae*, because these appointments constitute such a serious inroad into rights and liberties and drastically diminish the legal status of the persons concerned.<sup>419</sup> In border line cases, where the person to be placed under curatorship is still in possession of his or her mental faculties, considerable importance will be attached to the person's own wishes, in deciding whether to appoint a curator. Where the person

---

<sup>413</sup> ***Ex parte AB*** 1910 TPD 1332.

<sup>414</sup> ***Estate Watkins-Pitchford v Commissioner for Inland Revenue*** 1955 (2) SA 437 (A) 458. See also Cronje and Heaton 117.

<sup>415</sup> See also the similar position with regard to powers of attorney in par 7.19 below.

<sup>416</sup> Rule 57(10) of the Uniform Rules of Court.

<sup>417</sup> Hutchison in **Wille's Principles of South African Law** 228-229; Barnard et al; see also Rule 57(10) of the Rules of Court.

<sup>418</sup> Cf the requirements in Rule 57 of the Rules of Court.

<sup>419</sup> ***Mitchell v Mitchell*** 1930 AD 217. Cronje 114.

in respect of whom the application is made opposes the appointment of a curator, the applicant must satisfy the Court on a balance of probabilities that the appointment is necessary.<sup>420</sup> However, the Court does not regard it as proper that a person him- or herself applies to be declared incapable of administering his or her affairs and be placed under curatorship. The reason for this is that if the person is incapable of managing his or her affairs, then, strictly speaking such person has no *locus standi in iudicio* and is not entitled to make the application.<sup>421</sup>

6.5 Appointment of a curator involves an application to the High Court. The application must be brought to a Court in whose area the person concerned is domiciled or has immovable property,<sup>422</sup> and can be brought by a member of the person's family or someone else who has an interest in the person or his or her property.<sup>423</sup> There are specific procedures to be adhered to as laid down in Rule 57 of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court (the Uniform Rules of Court) (largely a codification of the practice laid down in many decisions in the different provinces)<sup>424</sup>:

- ♦ The application is usually preceded by an application for the appointment of a *curator ad litem* to assist the person concerned in the application that will follow.<sup>425</sup> Only in exceptional circumstances (for instance where the Court is satisfied that the person concerned understands the nature of the application and consents to the appointment of a curator) will the Court dispense with this requirement.<sup>426</sup> The application for appointment of a *curator ad litem* must contain the following information:<sup>427</sup>

---

<sup>420</sup> ***Ex parte Kloppe: in re Kloppe*** 1961 3 SA 803 (T). See also Cronje and Heaton 125.

<sup>421</sup> ***Ex parte Geldenhuys*** 1941 CPD 243. See also Cronje and Heaton 124-125.

<sup>422</sup> ***Ex parte Derksen*** 1960 (1) SA 380 (N).

<sup>423</sup> ***Ex parte Geldenhuys*** 1941 CPD 243.

<sup>424</sup> Erasmus et al B1-389.

<sup>425</sup> Rule 57(1). See also Herbstein and Van Winsen 151-153.

<sup>426</sup> This practice is apparently more strictly applied by the Cape High Courts than in the other divisions of the High Court (Cronje and Heaton 125-126).

<sup>427</sup> Rule 57(2).

- \* The grounds upon which the applicant claims *locus standi* to make the application.
  - \* The grounds upon which the Court is alleged to have jurisdiction.
  - \* Information about the person concerned (including age, sex, full particulars of means, and information regarding his or her general state of physical health).
  - \* The nature of the relationship between the applicant and the person concerned.
  - \* The facts and circumstances relied on to show that the person is mentally ill and incapable of managing his or her affairs.
  - \* Particulars of the persons suggested for appointment as *curator ad litem* and subsequently as *curator personae* and/or *curator bonis*.
- ◆ The application must be supported by –<sup>428</sup>
- \* An affidavit of at least one person (to whom the person concerned is well-known) containing facts and information concerning the person's mental condition. Full details of the interest the person making the affidavit has in the person concerned must also be supplied.
  - \* Affidavits by at least two medical practitioners, one of whom must be a psychiatrist, who have conducted recent examinations of the person concerned reporting on the nature, extent and possible duration of the person's mental condition. These medical practitioners must be unrelated to the person and without personal interest in the order sought.
- ◆ The Court hears the application and either appoints a *curator ad litem* (who must be an advocate or an attorney) or dismisses the application.<sup>429</sup>
- ◆ The *curator ad litem* must without delay interview the person concerned and prepare a report on the matter. The report must deal with any further information regarding the person's mental condition, means and circumstances, and anything that might influence the Court in considering

---

<sup>428</sup> Rule 57(3).

<sup>429</sup> Rule 57(4).

the application for the appointment of a curator.<sup>430</sup> It must be filed with the registrar of the Court. A copy of the report must also be supplied to the applicant (i.e. the person applying for the curator to be appointed).

- ◆ The applicant must submit the *curator ad litem*'s report to the Master, who must consider the report and must prepare and file a separate report. The Master's report in particular comments on the means and general circumstances of the person concerned and the suitability of the person/s suggested for appointment as curator; and makes recommendations as to the furnishing of security and rendering of accounts by, and the powers to be conferred on, the curator in accordance with the facts of every particular case.<sup>431</sup>
- ◆ The Court must consider the application together with the reports of the *curator ad litem* and the Master and may then declare the person concerned to be mentally ill and unfit to manage his or her affairs and appoint a *curator personae* and/or *bonis*, or dismiss the application. Note that it is not necessary for a Court to declare a person to be of unsound mind to be placed under curatorship.<sup>432</sup> In considering the application the Court may call for any further information or evidence, and may require that the person concerned and the applicant be present to supply any necessary information.<sup>433</sup> The Court may appoint different persons as curator to the person and curator to the property of a person with incapacity.<sup>434</sup>

6.6 The costs of the proceedings to have a curator appointed (i.e. the costs of the application as between attorney and client, including the costs of the application for the appointment and the fees of the *curator ad litem*) are usually paid out of the estate of the person with incapacity.<sup>435</sup>

---

<sup>430</sup> Rule 57(5).

<sup>431</sup> Rule 57(7).

<sup>432</sup> See also par 4.8 above.

<sup>433</sup> Rule 57(9) and (10).

<sup>434</sup> Rule 57(11).

<sup>435</sup> See eg *Ex parte Hulett* 1968 (4) SA 172 (D). See also Erasmus et al B1-396.

- 6.7 A person can only act as curator if he or she is over the age of 21;<sup>436</sup> is not under curatorship him or herself;<sup>437</sup> has not been declared to be unfit of holding the office of curator by a Court;<sup>438</sup> and has provided the necessary financial security for the proper performance of his or her functions to the satisfaction of the Master of the High Court.<sup>439</sup>
- 6.8 The exact scope of a curator's duties depends on whether he or she is a *curator bonis* or *curator personae*, and on the specific terms set out in the relevant Court order. The terms of the order are included in a letter of curatorship granted by the Master of the High Court authorising the curator to act.<sup>440</sup> Generally, a curator's duties include the following:
- ◆ A curator has a common law duty to exercise the care of a prudent and careful person in managing the affairs of the person under curatorship.<sup>441</sup>
  - ◆ A curator must give security for the proper fulfillment of his or her obligations.<sup>442</sup> The Court may however dispense with this requirement.<sup>443</sup>
  - ◆ In the case of a *curator bonis*, the curator must within 30 days of appointment, draw up and lodge with the Master of the High Court an inventory of all the person's property falling under the curator's control.<sup>444</sup>
  - ◆ A curator must avoid conflict between his or her interests and those of the person with incapacity.<sup>445</sup>

---

<sup>436</sup> *Dhanabakium v Subramanian* 1943 AD 160.

<sup>437</sup> Cronje and Heaton **South African Family Law** 246 and the authorities referred to by the authors.

<sup>438</sup> Administration of Estates Act, 1965 sec 85 read with sec 54(4).

<sup>439</sup> Ibid sec 77.

<sup>440</sup> Ibid sec 71 and 72. When a letter of curatorship is granted (and whenever a person ceases to be a curator) the Master must give notice thereof in the **Government Gazette** and in one or more news papers circulating in the district in which the person under curatorship is ordinarily resident (sec 75 of the Act). See also Cronje and Heaton **South African Family Law** 246; Heaton in **Boberg's Law of Persons and the Family** fn 137 at 139; Erasmus et al B1-396.

<sup>441</sup> Heaton in **Boberg's Law of Persons and the Family** fn 137 at 139. Cronje and Heaton **South African Family Law** and the authorities referred to by the authors 246.

<sup>442</sup> Administration of Estates Act, 1965 sec 77.

<sup>443</sup> Ibid sec 77(2)(c). See also Cronje and Heaton **South African Family Law** 246.

<sup>444</sup> Administration of Estates Act, 1965 sec 78.

<sup>445</sup> Cronje and Heaton **South African Family Law** 246.

- ◆ The curator must assist and/or represent the person placed under curatorship in juristic acts.<sup>446</sup>
- ◆ A curator is generally accountable to the Master of the High Court and must submit an annual account of administration to the Master on a date determined by the Master.<sup>447</sup> The account must be in the prescribed form and must be supported by the necessary vouchers and receipts.<sup>448</sup>

A curator is entitled to remuneration out of the income derived from the property concerned or out of the property itself.<sup>449</sup> If the curator is to be remunerated the Court's sanction is usually obtained.<sup>450</sup> Remuneration is not usually – although it may be – claimed where the curator is a relative of the person with incapacity.<sup>451</sup> Remuneration is generally allowed where the estate is complex and the curator is a professional or representative of a bank or trust company. If the Court does not fix the remuneration, it must be assessed according to a prescribed tariff and shall be taxed by the Master.<sup>452</sup>

- 6.9 What is the legal effect of curatorship? Depending on the facts, a person under curatorship – whether to the property or of the person – retains active legal capacity to the extent that he or she is able to exercise it from time to time.<sup>453</sup> We have indicated above that some regard this as of academic interest only as it would in practice be very difficult, if not impossible, to persuade a third party to enter into legal transactions with a person in respect of whose person and/or property a curator has been appointed.<sup>454</sup>

---

<sup>446</sup> Ibid 247.

<sup>447</sup> Administration of Estates Act, 1965 sec 83.

<sup>448</sup> Ibid.

<sup>449</sup> Ibid sec 84(1).

<sup>450</sup> Erasmus et al B1-396.

<sup>451</sup> Ibid.

<sup>452</sup> Administration of Estates Act, 1965 sec 84(1)(b). The current tariff is 6% on income collected during the existence of the curatorship; and 2% on the value of capital assets on distribution, delivery or payment on termination of the curatorship (Regulation No R 473 in *Government Gazette* 3425 of 24 March 1972 as amended).

<sup>453</sup> ***Pienaar v Pienaar's Curator*** 1930 OPD 171 at 175. See also Heaton in **Boberg's Law of Persons and the Family** 142-143.

<sup>454</sup> See par 4.14 above.

6.10 Curatorship terminates under the following circumstances:<sup>455</sup>

- ◆ When the person placed under curatorship dies.
- ◆ If the Court terminates the curatorship (for instance, because the person concerned has regained his or her mental health).<sup>456</sup> Rule 57 specifically provides for application for release from curatorship.<sup>457</sup>
- ◆ If the curator dies.
- ◆ When the period of time for which the curator was appointed has elapsed, or the curator has completed the task for which he or she was appointed.<sup>458</sup>
- ◆ If the curator resigns or is disqualified from being a curator.<sup>459</sup>
- ◆ If the curator is removed from office by the High Court or by the Master.<sup>460</sup> Both the Court and the Master has wide powers to remove a curator. Apart from specified circumstances, the Court can remove a curator if for any reason the Court is satisfied that it is undesirable that he or she should act as curator, while the Master can remove a curator if he or she fails to comply with any lawful request of the Master.<sup>461</sup>

### *Negotiorum gestio*

6.11 *Negotiorum gestio* is the voluntary management (*gestio*) by one person (the *gestor*) of the affairs of another (the *dominus*) without the consent or knowledge

---

<sup>455</sup> See in general Cronje and Heaton **South African Family Law** 247.

<sup>456</sup> Information supplied to the researcher of curatorship orders administered between 1971 and 2002 by the Master of the High Court, Pretoria, indicated that in none of these cases an application has been made (yet) for termination on this ground (information supplied by Ms Margaret Meyer, Senior Lecturer Justice College on 30 June 2003).

<sup>457</sup> Rule 57(14). The person under curatorship must submit this application to the curator and the Master. The Master must consider the application and report thereon to the Court, commenting on any aspects relevant to the application for release. The Court has broad powers in considering the application and the Master's report: it may, amongst others, order the person's release from curatorship; dismiss the application; appoint a *curator ad litem* to make enquiries and to report to the Court; and call for further evidence (Rule 57 (15) – (17)).

<sup>458</sup> Administration of Estates Act, 1965 sec 85 read with sec 56.

<sup>459</sup> Ibid sec 85 read with sec 54. Eg if the curator is convicted of theft, fraud, forgery, uttering a forged instrument or perjury and is sentenced to a term of imprisonment without the option of a fine (sec 54(1)(b)(iii)).

<sup>460</sup> Ibid.

<sup>461</sup> Ibid sec 54(1)(b)(v) and (vi).

of the latter.<sup>462</sup> Because of the absence of consent, the concept is sometimes referred to as “unauthorised management”.<sup>463</sup> Some believe that management of the affairs of a person with incapacity by another can be justified on the basis of this concept. – i.e. they believe that *negotiorum gestio* should be regarded as one of the common law means of dealing with incapacity.<sup>464</sup> There is however little scientific or judicial information on the application of *negotiorum gestio* to persons with incapacity in South African Law<sup>465</sup> and as far as we could ascertain nothing directly on this point. We do accept however that this legal institution is used informally on a substantial scale where relatives simply manage the affairs of incapable adults.

6.12 The institution of *negotiorum gestio* seems to be in conflict with the established principle that it is wrongful to interfere with the affairs of another. However, because the aim of the *gestor* is generally to manage the affairs of the other as an act of friendship or from a sense of duty, and for the sole benefit of the other, this management of affairs is not considered wrongful.<sup>466</sup> Originally *negotiorum gestio* was used to describe the unauthorised management of the affairs of another in circumstances of “urgency” only.<sup>467</sup> Currently, the element of urgency is not a prerequisite for acting as *gestor*, although necessity may indeed be one of the circumstances present in a *negotiorum gestio* situation.<sup>468</sup>

6.13 Virtually any act entailing the management of another's affairs is sufficient to constitute *negotiorum gestio*: Whether of a legal nature (such as entering into

---

<sup>462</sup> Joubert and Van Zyl in **LAWSA** 19; Van Zyl 3 et seq; Labuschagne 1994 **Journal of South African Law** 811-814. It is interesting that there is little scientific or judicial information on the institution of *negotiorum gestio* in South African law (Labuschagne 1994 **Journal of South African Law** 811).

<sup>463</sup> Ibid.

<sup>464</sup> Cf the comment of Mr CH Badenhorst.

<sup>465</sup> Cf Labuschagne 1994 **Journal of South African Law** 811.

<sup>466</sup> Joubert and Van Zyl in **LAWSA** 19-20; Van Zyl 8. The institution of *negotiorum gestio* has been justified on the grounds of “social utility and equity, and the need to encourage a certain altruism in social life and on other similar grounds” (Hahlo and Kahn **The Union of South Africa: The Development of its Laws and Constitution** (1960) 562 as referred to by Van Zyl 8).

<sup>467</sup> De Villiers and Macintosh 271.

<sup>468</sup> Van Zyl 9. Cf the discussion by Labuschagne 1994 **Journal of South African Law** 813-814 of the difference between necessity and *negotiorum gestio* in the criminal law.



legal relationships for the benefit of the other, or making purchases for the other); or of a totally non-legal nature (such as protecting the property of a person who is absent or incapable of acting for him or herself, for instance by incurring the necessary expenses to remove explosives to a place of safety or extinguishing a fire in a building); or generally tending the affairs of an absent owner more or less as a *curator bonis* or even a *curator ad litem* would.<sup>469</sup> Management of the affairs of another person can relate to one or more affairs. Similarly, one and the same act by the *gestor* may be a *gestio* as regards more than one *dominus*.<sup>470</sup>

- 6.14 The authority of the *gestor* is limited: he or she is not permitted to initiate legal proceedings or represent another person in legal proceedings without the consent of the other party. The only exception to this rule appears to be where the *gestor* is closely related to the person whose interests are managed.<sup>471</sup>
- 6.15 A Court does not have the power to appoint a *gestor*. As indicated above, the essence of *negotiorum gestio* is that it is unauthorised. (A Court may however appoint a curator to handle the incapable person's affairs.<sup>472</sup>)
- 6.16 In general the following prerequisites govern the institution of *negotiorum gestio*:<sup>473</sup>
- ◆ There must be at least two parties involved and the affair/s to be managed must pertain to someone other than the *gestor* him or herself.
  - ◆ The essential element of *negotiorum gestio* is that it must be unauthorised. The *dominus* must be absent. "Absence" does not necessarily entail physical absence but "absence from the transaction" in the sense that the *dominus* has to be unaware or ignorant of the fact that his or her affairs are being managed by another.<sup>474</sup> If aware of or

---

<sup>469</sup> Joubert and Van Zyl in **LAWSA** 20-21.

<sup>470</sup> Ibid 22.

<sup>471</sup> Ibid 21.

<sup>472</sup> Ibid. See par 6.3 et seq above for information on the appointment of curators.

<sup>473</sup> Joubert and Van Zyl in **LAWSA** 22-26; Van Zyl 24-48; De Villiers and Macintosh 271-279; Labuschagne 1994 **Journal of South African Law** 811-814.

<sup>474</sup> **Williams' Estate v Molenschoot and Schep (Pty) Ltd** 1939 CPD 360 at 369.

consenting to it, such management is no longer *negotiorum gestio* but may be a contract of mandate.<sup>475</sup> Because the essence of *negotiorum gestio* is that there can be no authority of any nature (not even by way of implied or tacit consent) mere failure to object to the management of affairs once the *dominus* has become aware of it can also amount to a contract of mandate.<sup>476</sup>

- ◆ The *gestor* must act with the intention of managing the affairs of another. In addition, he or she must have the intention of recovering from the other any expenses suffered by him or her during the course of the management of the affairs of the other.
- ◆ The *gestor* must generally act for the sole benefit of the other. The management of affairs by the *gestor* must be conducted in a useful or reasonable way.
- ◆ The *gestor* must do all things necessarily related to the affair/s he has opted to manage. If the *gestor* is not restricted to a particular matter but undertakes the general administration of another's affairs, he or she must act as if holding a general power of attorney to act on behalf of the *dominus*.
- ◆ The *gestor* must render to the *dominus* an account of the administration and management of his or her affairs after its completion.
- ◆ The *gestor* must restore everything which has been received or which has otherwise accrued as a result of management of the affairs of the *dominus* - whether it be in the form of property, capital, interest, etc.
- ◆ The *gestor* is liable for loss or damage caused to the *dominus* as a result of his or her fault during the course of management of the affairs of the *dominus*. The standard of liability required by the Courts appears to be

---

<sup>475</sup> A contract of mandate is a consensual contract between one party (the mandator) and another (the mandatary) in terms of which the mandatary undertakes to perform a mandate or commission for the mandator. In essence the mandatary undertakes to do something at the request or on the instruction of the mandator. A mandate should be distinguished from a power of attorney. The latter gives the authorised party the power to perform juristic acts in the name or on behalf of the principal, while a mandate does not necessarily include any power to represent the mandator legally (Joubert and Van Zyl in **LAWSA** 3-4).

<sup>476</sup> Joubert and Van Zyl in **LAWSA** 23. Should the *dominus* be aware of the management of his affairs and do nothing to prevent it, he may be considered to have ratified or accepted such management of affairs and hence to have given a tacit mandate to the *gestor* to continue with the activity. This may then also be analogous to the case where the act of an unauthorised agent is ratified by the principal (Van Zyl 5).

that of the ordinarily prudent person, although a greater or lesser degree of care may be expected if circumstances warrant it.<sup>477</sup>

- ◆ The *gestor* is entitled to claim all necessary and useful expenses incurred by him or her during the course of the management of the affairs of the *dominus*, provided that his or her conduct was necessary and useful and complied with the further prerequisites for *negotiorum gestio*. Expenses incurred for the sake of pleasure or luxury cannot be recovered by a *gestor* as they will not comply with the requirement of “necessity and usefulness”.<sup>478</sup> It is not necessary for the *gestor* to show that the outcome of the *gestio* was for the benefit of the *dominus*.

6.17 Does the concept have any marked relevance in respect of supplementation of incapacity? It is significant to note that generally, the *gestor*’s claims against the *dominus* are today the very core of *negotiorum gestio*.<sup>479</sup> In contradistinction to this, the need of the person with incapacity for assistance is central to typical measures dealing with supplementation of incapacity. The emphasis on the *gestor*’s claims might have been brought about by the fact that the institution of *negotiorum gestio* plays a constantly shrinking role in a world of ever-improving communications, because it is quite clear that an unauthorised person should not interfere in another’s affairs if it is possible to get in touch with that other.<sup>480</sup> However, it has been pointed out that even in classical Roman law, the activities of the modern equivalent to the Roman curator (*furiosi*, *prodigi* or *minoris*)<sup>481</sup> were governed by a set of special rules and not by *negotiorum gestio*.<sup>482</sup> Nevertheless it appears to be accepted that a person who manages the affairs of a mentally incapacitated person, without being appointed curator by a Court, may lawfully do so as a *negotiorum gestor*.<sup>483</sup> It should be noted however that a family

---

<sup>477</sup> Cf ***Amond Salie v Ragoon*** 1903 TS 100 at 103.

<sup>478</sup> Joubert and Van Zyl in **LAWSA** 30.

<sup>479</sup> Cf Zimmermann 443.

<sup>480</sup> De Villiers and Macintosh 272; Zimmerman 443.

<sup>481</sup> I.e. curators of the mentally ill, prodigals and minors.

<sup>482</sup> Zimmermann 443.

<sup>483</sup> Cf ***Molyneux v Natal Land & Colonisation Co Ltd*** AC 1905 AC 555 at 569; and Heaton in **Boberg’s Law of Persons and the Family** 145.

member or carer will only be able to rely on the institution of *negotiorum gestio* in managing the affairs of an incapacitated person if the latter is unaware of such management.<sup>484</sup> It is difficult to see how it will be possible for any *gestor* for any length of time to take care of another person's affairs without the *dominus* becoming aware of this - except where the incapacity is so severe that such awareness is totally impossible.

## Statutory measures

### *Mental Health legislation*

#### **Mental Health Act, 1973**

- 6.18 We indicated in paragraph 4.8 above that mental health legislation also provides for supplementation of incapacity: The Mental Health Act 1973 mirrored the curatorship system. It implied that the High Court could appoint a *curator personae* under certain circumstances;<sup>485</sup> and expressly provided that a *curator bonis* could be appointed to take care of or administer the property of a person detained or declared to be mentally ill under the Act.<sup>486</sup> Subsequent to the Commission's 1988 recommendations in its Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons, the Act also provided that the Master (in contradistinction to the Court) may appoint a *curator bonis* in respect of small estates irrespective of whether the person concerned was declared to be mentally ill or was detained under the Act.<sup>487</sup> We supplied broad information on the measures contained in the 1973 Act in paragraphs 4.8 and 4.13 above. There is no purpose in discussing them in more detail as the 1973 Act will be replaced by the 2002 Act shortly.

---

<sup>484</sup> See par 6.11 et seq above.

<sup>485</sup> Sec 19, 58 and 60.

<sup>486</sup> See the discussion in par 4.8 and 4.13 above.

<sup>487</sup> Sec 56A of the Act.

### **Mental Health Care Act, 2002**

- 6.19 The 2002 Act does not use the common law concept of curatorship. As indicated in paragraph 4.8 above, the new Act replaces the curatorship system with a more informal and accessible procedure for the care and administration of the property of “mentally ill” persons or persons with “severe or profound intellectual disability” as defined in the Act. The most significant change from the old system is that the Master (in stead of the Court) will be able to appoint an administrator while the Court’s role is limited to that of supervisor of last resort. We already emphasised above that the Act contains no provision for supplementation of capacity as regards personal care and welfare.<sup>488</sup> We also indicated that it is envisaged that Regulations to be published under the Act will provide for proxy consent to medical treatment (other than treatment for mental illness) of “mental health care users” (i e persons receiving treatment and care in terms of the Act).<sup>489</sup>
- 6.20 The fundamental measure with regard to care and administration of property contained in the Act provides that the Master may appoint an administrator to care for and administer the property of a “mentally ill” person or person with “severe or profound intellectual disability”.<sup>490</sup> It should be noted that all persons falling within the ambit of these definitions (which we fully quoted in paragraph 2.2 and accompanying footnotes above) will be able to make use of the procedure provided for – the availability of the procedure is not limited to “mental health care users” (i e persons who are treated and cared for in terms of the Act). The Act makes certain practical requirements dealing with curators (as laid down in the Administration of Estates Act, 1965) applicable to the new system.<sup>491</sup> Reference to these requirements is included in the discussion below.

---

<sup>488</sup> See par 4.8 above and in particular fn 200 where we advanced possible reasons for this.

<sup>489</sup> See par 4.19 above.

<sup>490</sup> Sec 59(1).

<sup>491</sup> Sec 65 of the 2002 Act stipulates that the following provisions of the Administration of Estates Act are, with the necessary changes, applicable to the new system: sec 75 (notification of appointment of curator and of termination of terms of office); sec 78 (lodging of an inventory of property falling under his or her control); 79 (returns by Masters to deeds office of immovable property included in inventory); 83 (submission of annual account to Master); 84 (provisions regarding remuneration of curator); and 85 (application of certain other provisions of the Administration of Estates Act -

6.21 The appointment of an administrator is dependent on the following prescribed procedure having been followed.<sup>492</sup>

- ◆ Any person over 18 may apply to the Master for the appointment of an administrator. The application must be in writing, under oath or affirmation and a copy thereof must be submitted to the person in respect of whom the application is brought. The application must -<sup>493</sup>
  - \* set out the relationship of the applicant to the person concerned;
  - \* include all available mental health related medical certificates or reports relevant to the mental health status of the person and to his or her *incapability to manage his or her property* (our emphasis);<sup>494</sup>
  - \* set out the grounds on which the applicant believes that the person is *incapable of managing his or her property* (our emphasis);<sup>495</sup>
  - \* state that within seven days immediately before submitting the application, the applicant had seen the person;
  - \* state the particulars of the person and his or her estimated property value and annual income;
  - \* give the particulars of persons who may provide further information relating to the mental health status of the person.
- ◆ The Master must consider the application and may appoint an administrator forthwith if the estimated property value and annual income of the person is below a prescribed amount (currently this is envisaged to be a property value of R200 000 or annual income of R24 000);<sup>496</sup> and if he or she is satisfied that sufficient grounds exist to make the

---

including those with regard to the powers of the Court and the Master as regards removal of a curator from office).

<sup>492</sup> Sec 59(2).

<sup>493</sup> Sec 60(2).

<sup>494</sup> Sec 60(2)(b).

<sup>495</sup> Sec 60(2)(c).

<sup>496</sup> See reg 56 of the Draft Regulations published under Government Notice No R 233 in **Regulation Gazette No 7578** of 14 February 2003.

appointment.<sup>497</sup> Note that although *incapability to manage property* is not expressly indicated as a ground for appointment of an administrator, this requirement is implied in the nature of the information that must be submitted to the Master to enable him or her to come to a decision.<sup>498</sup>

- ◆ If the estimated property value and annual income is above the indicated amounts, an interim administrator must be appointed and the Master must cause an investigation into the merits of the application.<sup>499</sup> The investigation must be finalised within 30 days of receipt of the application and must be done by a suitably qualified person.<sup>500</sup>
- ◆ The person conducting the investigation must compile a report and submit it to the Master within 60 days of the investigation being instituted.<sup>501</sup> For the purposes of the investigation the investigator can summon any person to appear before him or her to provide information and documents relevant to the application.<sup>502</sup> The costs for conducting the investigation must be paid out of the estate of the person concerned, the amount of which must be determined by the Master after consultation with the person conducting the investigation.<sup>503</sup>
- ◆ The Master must consider the investigator's report, and within 14 days either appoint an administrator or decline to appoint an administrator; or refer the matter for consideration by a High Court Judge in chambers.<sup>504</sup> The applicant and the persons concerned must be informed in writing of the Master's decision and the reasons thereof and may within 30 days of

---

<sup>497</sup> Sec 60(4).

<sup>498</sup> See the requirements pertaining to the content of the application to be submitted to the Master in sec 60(2)(b) and (c) referred to.

<sup>499</sup> This must also be done if allegations in the application require confirmation or further information is required to support the application (sec 60(5)).

<sup>500</sup> Sec 60(7).

<sup>501</sup> The Master may however extend this period (sec 60(7)).

<sup>502</sup> Sec 60(6).

<sup>503</sup> Sec 60(14). If the Master or the Judge in chambers is of the view that the application was trivial or vexatious the costs must be paid out of the property of the applicant.

<sup>504</sup> Sec 60(8).

receipt of the decision appeal against the decision to a High Court Judge in chambers.<sup>505</sup>

- ◆ The Judge in chambers must within 30 days of receipt of the relevant documents consider the application (or the appeal), and make a written recommendation to the Master.<sup>506</sup>
- ◆ The Master must within 60 days of being notified of the recommendation cause an investigation to be conducted to determine a suitable candidate to be appointed as administrator for the person concerned and appoint the administrator.<sup>507</sup>

6.22 In addition to the above, the Act also provides that the High Court may initiate an investigation into whether a person is *incapable of managing his or her property* (our emphasis) during an enquiry in terms of the Act, or any legal proceedings, and may recommend to the Master that an administrator be appointed in respect of such person. The Master may appoint the administrator if the estimated property value and annual income of the person is below the prescribed amount referred to above.<sup>508</sup>

6.23 An appointment of an administrator is effective only from the date on which a Master signs an official notice of such appointment.<sup>509</sup> The Master must give notice of the appointment in the **Government Gazette** and in one or more news papers circulating in the district in which the person concerned is ordinarily resident.<sup>510</sup>

---

<sup>505</sup> Sec 60(9) and (10). If the Master referred the matter for consideration to a Judge in chambers, or if he or she receives a written notice of appeal against his or her decision from the applicant or the person concerned, the Master must supply the Judge with all the necessary information to enable him or her to consider the application or the appeal (sec 60(11)).

<sup>506</sup> Sec 60(12). It is not clear why the Court should make a recommendation only (in contradistinction to making a decision on the matter).

<sup>507</sup> Sec 60(13).

<sup>508</sup> Sec 61.

<sup>509</sup> Sec 62.

<sup>510</sup> Sec 65 of the 2002 Act read with sec 75 of the Administration of Estates Act, 1965.



- 6.24 The powers and duties of the administrator broadly correspond with the common law powers of a *curator bonis* as set out in paragraph 6.8 above.<sup>511</sup> Note that this includes lodging with the Master an inventory of all the property of the person concerned falling under the control of the administrator;<sup>512</sup> and submitting an annual account of administration to the Master on a date determined by the Master.<sup>513</sup> An administrator is also entitled to remuneration on the same basis as a curator.<sup>514</sup>
- 6.25 The care for and administration of a person's property by an administrator will (with the exception of an application for release from curatorship), terminate under the same circumstances described above in respect of curatorship.<sup>515</sup> The 2002 Act further expressly provides for the termination of the appointment of an administrator on application to the Master.<sup>516</sup> The application can be brought by the person in respect of whom the administrator was appointed, by the administrator, or by the person who brought the initial application for the appointment of the administrator. On consideration of the application the Master can terminate the appointment, decline the application or refer the matter for consideration by a High Court Judge in chambers. This must be done within 14 days of receipt of the application. The applicant is given the opportunity to appeal against a decision by the Master to a Judge in chambers, who must within a specified period of time consider the application or appeal and notify the appellant in writing of his or her decision.<sup>517</sup>

---

<sup>511</sup> See the powers, functions and duties set out in sec 63 read with sec 65 of the 2002 Act.

<sup>512</sup> Sec 65 of the 2002 Act read with sec 78 of the Administration of Estates Act, 1965.

<sup>513</sup> Sec 65 of the 2002 Act read with sec 83 of the Administration of Estates Act, 1965.

<sup>514</sup> Sec 65 of the 2002 Act read with sec 84 of the Administration of Estates Act, 1965. See par 6.8 and fn 452 above for detail about the curator's remuneration.

<sup>515</sup> Sec 65 of the 2002 Act read with sec 85 of the Administration of Estates Act, 1965.

<sup>516</sup> Sec 64.

<sup>517</sup> Ibid.

### *National Health Bill, 2003*

- 6.26 We indicated in Chapter 4 that the National Health Bill, 2003 will bring relief specifically with regard to supplementing capacity in respect of decisions about medical treatment. We discussed the relevant measures in detail in that Chapter and summarise them below for the sake of convenience.<sup>518</sup>
- 6.27 The Bill makes it clear that informed consent is necessary for medical treatment but allows (or disallows) proxy consent under certain circumstances:
- ◆ Consent to the provision of treatment can be given on behalf of a person who is unable to consent by –
    - \* a person mandated in writing to give consent; or
    - \* where no person is mandated, by certain persons from a list of nearest relatives in priority order.
  - ◆ Proxy consent for research or experimentation on a living person is not allowed.
  - ◆ Proxy consent in respect of the removal of tissue from a living person (eg for purposes of transplantation) is not allowed.
  - ◆ Proxy consent in respect of the removal of tissue from a dead body is allowed and can be granted after the deceased's death by an enumerated list of nearest relatives, or if none of them can be located, by the Director General of the Department of Health - if the deceased has not prior to his or her death forbidden it. Note that proxy consent to organ donation on behalf of an incompetent deceased who never had the mental capacity to forbid organ donation would probably not be allowed.<sup>519</sup> The deceased can also grant the necessary consent in a written document before his or her death. The person granting consent would have to be legally capable of granting such consent.

---

<sup>518</sup> For more detail see par 4.15 et seq.

<sup>519</sup> Note our remarks in this regard in par 4.21 above.

- ◆ The Bill does not deal with consent to withdrawal of treatment in ending life.<sup>520</sup>

## Relevance of current measures in respect of lack of decision-making capacity in specific areas

6.28 The common law and statutory measures set out above find application in the different areas of decision-making incapacity in the following way:

- ◆ ***Supplementation of incapacity in respect of decisions related to financial affairs:*** The following possibilities are available:
  - \* Application to the High Court for the appointment of a *curator bonis* under common law in respect of a person who is mentally ill and/or unable to manage his or her financial and property affairs.
  - \* Application to the Master for the appointment of an administrator for care and administration of property in terms of the Mental Health Care Act, 2002. This measure will be available (when the Act comes into operation) only in respect of persons who are “mentally ill” or with “severe or profound intellectual disability” as defined in the Act.
- ◆ ***Supplementation of incapacity in respect of decisions related to personal welfare:*** The only possibility currently available is to apply to the High Court for the appointment of a *curator personae* under common law. We indicated above that the Mental Health Care Act, 2002 does not provide for supplementation of capacity with regard to personal welfare (probably because the whole object of care and treatment under mental health legislation is to ensure that the person’s personal needs are adequately provided for).<sup>521</sup>

---

<sup>520</sup> See the discussion in par 4.22-4.24 above.

<sup>521</sup> See par 4.8 (fn 200) above.

- ♦ ***Supplementation of incapacity in respect of decisions related to medical treatment:*** The following possibilities are (or could become) available:
  - \* Application to the High Court for the appointment of a *curator personae* under common law specifically for this purpose. The person concerned will have to be mentally ill and/or unable to manage his or her personal affairs.
  - \* Proxy consent for medical treatment as described in paragraph 6.27 above in terms of the National Health Bill, 2003.
  - \* Proxy consent by an enumerated list of nearest relatives (or the head of the establishment where the person resides) for treatment of illness other than mental illness in respect of “mental health care users” (i.e. persons cared for and treated under mental health legislation) in terms of the Mental Health Care Act, 2002. Note that we are not concerned in this Paper with consent for mental health treatment of the mentally ill. This is regulated by mental health legislation.

## CRITICISM OF THE CURRENT POSITION

- 6.29 Criticism of the current position is mainly aimed at the curatorship system.
- 6.30 South African legal experts, practitioners or commentators expressing themselves on this issue hold the view that the curatorship system is suffering from a number of serious and frustrating difficulties stemming mainly from its high costs, rigid and prolonged procedure, its paternalistic nature, and its potential for abuse.<sup>522</sup>
- ♦ They draw attention to the fact that the appointment of a curator in almost all instances involves a High Court application which can be expensive and prolonged.

<sup>522</sup>

Cf Neumann 1998 **De Rebus** 61-64; Barker 1996 **De Rebus** 259-260; Van Dokkum 1997 **Southern African Journal of Gerontology** Vol 6(1) 17-20.

- ◆ They express the opinion is expressed that the paternalistic nature of the current system deters many from utilising it: In this regard it is argued that the incapacitated person invariably has very little say in the choice of curator since, at the stage of such appointment, the person may have reached such a state of incapacity that he or she is likely not to be considered capable of expressing an informed view as to the choice of curator.
- ◆ They submit that although there are many safeguards and controls of the curator's functions through the Master's Office and the Court there remains, as with any fiduciary relationship, the potential for abuse, neglect or maladministration.<sup>523</sup>

From the curator's point of view the following factors add to the difficulties experienced:

- ◆ The time-consuming process of preparing the required annual account that must be submitted by the curator to the Master often does not warrant the curator's statutory fee.<sup>524</sup>
- ◆ A *curator bonis*, in spite of being limited to administering the property of the person with incapacity, cannot avoid also becoming involved in time-consuming activities relating to the day-to-day personal needs of the person concerned which are financially related. In practice the curator, often being an attorney, is invariably called upon by family members for guidance and reassurance.

6.31 The Commission in Issue Paper 18 departed from the premise that the curatorship system is probably not utilised to any great extent. Comments were requested on the reasons for this in order to identify problems that need to be addressed through law reform. Some members of the legal fraternity however questioned this premise. For purposes of this Discussion Paper we have approached the different Masters Offices throughout the country to supply us with statistics on the number of curators appointed for persons who are incapable

---

<sup>523</sup> See the safeguards described in par 6.7-6.8 above.

<sup>524</sup> See par 6.8 above for information on the required account.

of managing their affairs.<sup>525</sup> However, the exact number of curators appointed for such persons is at this stage not readily available. In the majority of Offices of the Master of the High Court the number of *curators bonis* and *personae* appointed is currently included in statistics relating to letters of curatorship and tutorship granted by the Masters under the Administration of Estates Act, 1965.<sup>526</sup> This would not only include curators appointed to adults with impaired decision-making capacity as discussed in this Paper, but also tutors and other curators appointed in terms of the law (including for instance tutors and curators nominated by will or by the Court to administer the persons or property of minors; and curators appointed under the Prevention of Organised Crime Act, 1998 to keep in custody or administer property confiscated under this Act). For the reasons referred to, the figures supplied to us do not take the matter further and are thus not included here.

## Comment on Issue Paper 18

- 6.32 Respondents to Issue Paper 18 (in particular family and carers of persons with incapacity) were outspoken in their criticism of the curatorship system. The Issue Paper specifically invited comment on the reasons why the curatorship system is not utilised; and on the practical problems experienced in the context of the current position. The general response on these questions is reflected below.

### *Reasons advanced for non-utilisation of curatorship system*

- 6.33 The costs involved in a High Court application to have a curator appointed (which is beyond the reach of most people) is believed to be the main reason why the curatorship system (whether for the appointment of *curator personae* or *bonis*) is not used. However, according to respondents, all the following factors to some extent play a part in non-utilisation of the available common law measures:

---

<sup>525</sup> We made the request through Ms Margaret Meyer, Senior Lecturer Justice College.

<sup>526</sup> See sec 72 of the Act.

- ◆ The complexity and cumbersomeness of the prescribed procedure – it is intimidating and too sophisticated.
- ◆ The procedure is not known – especially in rural and black communities.
- ◆ Fear of a heartless, beaurocratic and unsympathetic system.
- ◆ The procedure is time-consuming while assistance is immediately needed.
- ◆ Mistrust of the curatorship system: curators are perceived to be strangers who have no personal interest in the well-being of the person concerned; and there is a general ignorance and suspicion as to whether the Court will appoint a family member to act as curator. Family members of persons with incapacity believe that they are best suited to fulfill the role of substitute decision-makers and resent the appointment of strangers.
- ◆ Awareness of the dangers of the relative irrevocability of erosion of personal rights implied in the appointment of a curator.
- ◆ Fear of invasion of privacy and fear of abuse by curators.

6.34 Specific reasons advanced for reluctance to have a *curator personae* appointed include the following:

- ◆ In practice families and carers take care of decisions relating to personal care and welfare of persons with incapacity (without knowing that they do not have legal authority to act).
- ◆ Reluctance and antagonism on the part of family and carers to institute a procedure that will have far-reaching effects as regards the status of the person concerned. Application for the appointment of a curator is generally regarded as a step that involves trauma for all concerned.

6.35 Specific reasons advanced for reluctance to have a *curator bonis* appointed include the following:

- ◆ The procedure is not suitable for small estates (i.e. the lack of assets does not justify the cumbersome procedure and costs to have a *curator bonis* appointed).

- ◆ In the case of small estates (eg where a state pension is the only income) family or carers in practice administer the financial affairs of an incapable adult.
- ◆ Even in the case of large estates, where there is a harmonious family setting with goodwill towards the person concerned, a standard power of attorney is invoked which becomes “enduring” when necessary (even though the agent is not legally authorised to act).

*Practical problems currently experienced that need to be addressed*

6.36 The information supplied by respondents indicates that needs in respect of personal welfare and financial affairs overlap to a great extent. However, the following problems were specifically highlighted in respect of personal welfare:

- ◆ There is a public perception that the current system strips the person with incapacity of decision-making power. The law should clearly recognise the necessity for a more flexible system which allows for the least restrictive intervention. The law should thus truly recognise the concept of “assisted” decision-making.
- ◆ The person appointed as *curator personae* frequently do not have the knowledge to ascertain the personal and healthcare needs of the person with incapacity. *Curators personae* or substitute decision-makers should be familiar with the nature of the disability of the person concerned to be able to make realistic decisions.
- ◆ Where family members are appointed as *curators personae*, they might not always have the knowledge to take specific decisions. A system of additional support or assistance should be available to them.
- ◆ *Curators personae* take decisions which are in conflict with the wishes of the person with incapacity.
- ◆ The law should address the need for a simple and informal system of substitute decision-making as far as personal care and welfare is concerned.



- ◆ Abuse and exploitation of the person with incapacity by the *curator personae*.

6.37 The following problems were specifically noted by respondents with respect to management of financial affairs:

- ◆ The scope for abuse and exploitation in the case of management of financial affairs are perceived to be even greater than in the case of decisions regarding personal care and welfare. The need for proper control measures would thus be imperative.
- ◆ Overzealous curators who are overcautious in their administration of the assets to the detriment of the person with incapacity cause problems – especially if it is a family member who stands to inherit.

## NEED FOR ALTERNATIVES

6.38 We indicated at the beginning of this Paper that a legitimate expectation of the law is that it should establish a structure within which appropriate autonomy and self-determination is recognised and protected; and that such a structure should provide appropriate substituted decision-making devices and the necessary protection from abuse, neglect and exploitation to persons with incapacity.<sup>527</sup>

6.39 It is clear from the discussion of the current legal position in the preceding paragraphs and from the comments received on Issue Paper 18 that the curatorship system does not fulfil all the expectation for a suitable structure of substitute decision-making. We submit that the major reasons for this are the following:

- ◆ Most significantly, it does not sufficiently recognise the constitutional right to bodily and psychological integrity conferred in section 12(2) of the Constitution that embraces ideas of self-determination and autonomy with

---

<sup>527</sup>

Par 2.5 above.

regard to body as well as mind against interference by the state and others.<sup>528</sup> This alone would be sufficient imperative for reform.

- ◆ The curatorship system reflects a paternalistic approach and gives little recognition to the principles which we indicated in Chapter 3 should be fundamental to any substitute decision-making system.
- ◆ Curatorship provides a very limited choice of decision-maker in providing for the mainly long-term appointment of a single person to deal with the affairs of a person with incapacity.
- ◆ Curatorship is also extremely inflexible as regards the extent of the decision-making powers conferred upon the curator. One of the reasons why people are reluctant to use the system is because the powers to be conferred on the curator is often far wider than is needed to meet the needs of the person concerned.
- ◆ Inherent in the current procedure is that it requires an application to be made to the High Court. Although the purpose of this is to protect the person with incapacity, the disadvantages in terms of costs, inaccessibility, prolonged procedure, formality and potential for intimidation and trauma can outweigh the intended advantage.

## POSSIBLE OPTIONS FOR REFORM

- 6.40 We develop possible options for reform below with reference to the comment received on Issue Paper 18, and examples from other jurisdictions dealing with similar problems.

---

<sup>528</sup>

See the discussion on constitutional considerations in par 3.13-3.19 above.

## **Guidelines emerging from comments on Issue Paper 18**

- 6.41 Issue Paper 18 only very broadly canvassed the views of the public on possibilities for reform. We indicated in Chapter 3 above that there was relative consensus that the curatorship system should be retained, as it could still be appropriate under certain circumstances (for instance, where complete control over a large and complex estate is desired). It should however not be retained as the only avenue for substitute decision-making. Alternatives should be developed alongside it to cater for its shortcomings. (Note that we are not concerned in this Chapter with the alternative of introducing the concept of enduring power of attorney. There was overwhelming support for this alternative and we recommend in Chapter 7 that it should be introduced into our law.)
- 6.42 We also indicated in Chapter 3 that there were differences of opinion on the nature and extent of an alternative/s to be developed. As for the specific method/s of substitute decision-making to be developed there was no consensus among respondents. They were divided on the possibilities submitted to them (including designated decision-making procedures where legislation identifies substitute decision-makers; decision-making by a multi-disciplinary committee or tribunal; and advocacy). No clear guidelines emerged from the comments in this regard except that the differences of opinion might possibly indicate that different methods are needed to deal with different circumstances. In spite of these differences of opinion, the following common needs emerged from the comments and would have to be addressed in an alternative system:
- ◆ It should be cheaper, simpler, more informal and more accessible than the curatorship system.
  - ◆ It should place more emphasis on the need for assistance to make legally effective decisions in the area of personal welfare. In this regard the role of family and carers should be formalised and the role of professional social workers should be recognised.
  - ◆ Strong control measures should, in spite of the desire for informality, still be part of the process.

- ◆ There is a definite need for an arrangement that will serve as default to legalise informal day-to-day decisions taken by family and carers on behalf of persons with incapacity.

## **Examples from other jurisdictions**

- 6.43 Different methods have been used in other jurisdictions to address problems similar to those identified above. These differ vastly in approach and detail. We broadly and briefly discuss the methods developed in England, Scotland, Queensland (Australia) and the Netherlands.
- 6.44 The legislation (or proposed legislation) in England and Scotland represent some of the most comprehensive and recent reform done in the area under discussion; the proposals for reform in Queensland represent innovative practical methods for surrogate decision-making not used in England and Scotland; and the Netherlands position is interesting and relevant as alternatives were developed to operate within an existing legislative framework without abolishing or replacing the latter (as was done in the other three jurisdictions). In England, Scotland and Queensland the change was brought about through a single comprehensive piece of legislation. In all three these systems new measures included provision for decision-making in the areas of financial affairs, personal welfare and medical treatment. In England and Scotland the latter included provision for end-of-life decisions. In all three jurisdictions introducing the concept of enduring power of attorney (or expanding and refining it if previously introduced) formed part of this single step. The method followed in the Netherlands differs in that a system alternative to the existing curatele (more or less similar to our curatorship) was developed alongside it without abolishing curatele. The new measures also operate within the existing legal framework regarding proxy decision-making for medical treatment (which is regulated separately); proxy decision-making in respect of the mentally ill (which is also regulated separately); and volmag (power of attorney) which is also regulated separately.

6.45 In England the methods proposed by the Law Commission for surrogate decision-making consist of the following:<sup>529</sup>

- ◆ Providing for a **general authority to act reasonably**. This is intended to validate acts undertaken for the personal welfare or health care of a person who is without capacity or reasonably believed to be without capacity. (This will typically operate as default arrangement where no enduring power has been granted and where the other measures provided for in the legislation has not been made use of.) The legislation places certain restrictions on the general authority to act (eg in respect of deciding about specified medical treatment).<sup>530</sup>
- ◆ Extensively providing for **surrogate decision-making in respect of medical treatment** (including the regulation of decisions regarding, sensitive treatments, taking part in medical research, and refusal and withdrawal of treatment).<sup>531</sup>
- ◆ Extensively providing for the concept of **enduring power of attorney** by extending it from its previous area of operation which was limited to “property and affairs” to also cover personal welfare and health care.<sup>532</sup>
- ◆ Providing for **decision-making by the Court** in the areas of financial affairs, personal welfare and health care.<sup>533</sup> A new Court (the Court of Protection) is created for this purpose with specific jurisdiction extending to the following:
  - \* Making **“one-off” decisions** on behalf of persons with incapacity under certain circumstances.
  - \* **Appointing a manager** with substitute decision-making powers in relation to a person with incapacity. The proposals for draft legislation indicate that the making of a “one-off” order is to be preferred to the appointment of a manager. The powers of a manager will be specified by the Court and no appointment should

---

<sup>529</sup> The Commission's recommendations have not been implemented yet.

<sup>530</sup> English Law Commission **Report No 231** 1995 (Summary) par 1.6 – 1.11.

<sup>531</sup> Ibid par 1.12- 1.24.

<sup>532</sup> Ibid par 1.25- 1.33.

<sup>533</sup> Ibid par 1.34- 1.41.

last for more than five years. A specific public office (the Public Trustee) fulfils a supervisory role in respect of managers – eg by submitting reports to the Trustee. The Trustee itself may also be appointed as manager.

- \* ***Resolving disputes*** regarding the three areas of decision-making.

6.46 In Scotland the Adults with Incapacity (Scotland) Act 2000 (which followed on recommendations by the Scottish Law Commission) creates a graded system of proxy decision-making ranging from introducing enduring powers of attorney, giving carers or professionals authority to act, to the appointment by the Court of a short term intervener or a longer term guardian.<sup>534</sup> As in the English example, extensive provision is made for proxy decisions regarding medical treatment (including regulation of surrogate decisions in respect of sensitive treatment and medical research, but avoiding the issue of withdrawal of treatment). The system created is surrounded by monitoring, complaints and appeals procedures, involving various regulatory bodies including the Mental Welfare Commission, local authorities and health boards and a new office of Public Guardian which lies within the Supreme Courts. The Public Guardian will, amongst others, keep register of Court appointments of surrogate decision-makers and enduring powers of attorney, supervise and monitor financial powers of surrogate decision-makers and investigate complaints relating to their management of finances.<sup>535</sup> In general the sheriff Court (a lower Court) will authorise interventions in the welfare and financial affairs of persons with incapacity. Certain matters relating to consent for medical treatment will only be given by the higher Courts. Broadly, the methods created consist of the following:

- ◆ Providing for the concept of ***enduring power of attorney*** in respect of financial affairs and personal welfare (which includes all but the most sensitive health care matters).<sup>536</sup>

---

<sup>534</sup> See in general Scottish Executive **Making the Right Moves** 1999 6-10.

<sup>535</sup> Ibid.

<sup>536</sup> Ibid 11-12.

- ◆ Providing for **access to funds** by making it possible for carers and certain other individuals to apply to the Public Guardian for authorisation of payments for a time-limited period from an individual or organisation (such as a bank holding the funds of the person with incapacity).<sup>537</sup> The withdrawal scheme will not be possible where another person (such as an agent under an enduring power of attorney or an appointed guardian) has powers over the account. This is intended to meet the need for a simple system to allow cash withdrawals or to make payments from bank accounts of persons with incapacity. The Public Guardian will monitor these arrangements.
- ◆ Providing for **management of resident's funds and property by private care establishments**. This is intended to meet the need of many persons with small estates which do not justify the appointment of a guardian (see below) who are cared for in establishments and who have no one else to act on their behalf. The care establishment will be required to register with the local authority to be able to exercise this power and the latter will also monitor the performance of care establishments. Safeguards are built into the process to limit abuse.<sup>538</sup>
- ◆ Extensively **regulating consent to medical treatment** of adults with incapacity by introducing a general authority to treat but excluding from this certain forms of treatment.<sup>539</sup> Regulations will define treatments in respect of which a second opinion is needed before treatment is given, or which requires the consent of the Court.
- ◆ Providing for one-off **intervention orders** (to be made by the sheriff Court) dealing with specific matters in the financial and welfare field that do not require the appointment of a guardian (see next paragraph).<sup>540</sup> This method will deal with practical day to day situations where continuous management of the affairs of the person concerned is not necessary. Any person with an interest, including the adult with

---

<sup>537</sup> Ibid 13-15.

<sup>538</sup> Ibid 16-20.

<sup>539</sup> Ibid 21-23.

<sup>540</sup> Ibid 24-28.

incapacity, can apply to the Court for an intervention order when it is necessary. The local authority is under a duty to apply where no application has been made by anyone else.

- ◆ Providing for a ***single form of guardian*** (managing the affairs of a person with incapacity over an extended period of time) who may exercise any combination of financial and personal welfare powers.<sup>541</sup> The guardian will be appointed by the sheriff Court for an initial period of 3 years which will be renewable for 5 years. It is envisaged that guardians will normally be members of the family of the person with incapacity. The sheriff Court will define the guardian's powers in accordance with limitations provided for in the Act. Various safeguards (broadly similar to that in respect of South African curatorship) are built into the process to prevent abuse (eg requiring security to be furnished, and regular accounting).

6.47 In Queensland (Australia) the Law Commission in 1996 recommended a scheme of proxy decision-making based on differentiating between “assisted” decision-making (involving someone *assisting* an adult to make the adult's own decisions), and “substituted” decision-making (involving someone *making* a decision for an adult); and differentiating between certain types of decisions (including personal welfare, health care, financial, and legal decisions as well as certain “excluded decisions” or “special consent decisions” which are respectively excluded from decision-making by others or requires consent by a tribunal). “Substitute decision-makers” are of three kinds: a chosen substitute (authorised under an enduring power of attorney); a statutorily authorised substitute; and an appointed substitute. The type of decision dictates the level of assistance or substitution allowed by the proposed legislation. The recommendations provided that a multi-disciplinary tribunal be created to supervise the scheme. The recommended scheme provided for the following:<sup>542</sup>

- ◆ Appointment by the tribunal of a person (an “***assistant***”) to assist an adult to make his or her own decisions.

---

<sup>541</sup> Ibid.

<sup>542</sup> Queensland law Reform Commission **Report No 49** 1996 Vol 2 23-24.



- ◆ Allowing an adult with the required capacity to choose a substitute decision-maker by granting an **enduring power of attorney** which may authorise personal welfare, financial, and health care decisions but not certain sensitive health care decisions and end-of life decisions.
- ◆ Allowing an adult with the required capacity to make an **advance health care directive** in which he or she deals with specific decisions related to health care (including decisions about sensitive treatments but excluding end-of-life decisions); or appoints a chosen decision-maker specifically for health care decisions (excluding sensitive health care decisions and end-of-life decisions).
- ◆ Allowing a family member (from an enumerated list) or close friend to make health care decisions (excluding consent to sensitive treatments) on behalf of the adult under a **statutorily default arrangement**. Note that these statutorily authorised decision-makers' decision-making powers do not extend to financial decisions.
- ◆ **Appointment** by the tribunal of a **substitute decision-maker** for an adult who may make any decision on behalf of the adult except sensitive health care decisions.
- ◆ Allowing the tribunal to make certain **sensitive health care decisions** (in circumstances where an advanced directive for health care was not executed – again excluding end-of-life decisions).

6.48 In the Netherlands two mechanisms for lower level substitute decision-making were created by legislation alongside a system of curatele (which broadly corresponds with our curatorship system). These mechanisms provide for management of financial affairs (*beskermingsbewind*) and management of personal welfare (*mentorschap*) respectively. They can be instituted by order by a *kantonrechter* (a magistrate in the South African context) on application by the person with incapacity or his or her relatives. The *kantonrechter* has the power to decide whether the person concerned should not rather be placed under *curatele* (if total supervision of the person and/or his or her affairs is necessary). The test for the appointment of a *bewindvoerder* or *mentor* is whether the person concerned “is incapable of managing his or her affairs”. The major difference between the effect of *curatele*, *bewind*, and *mentorschap* is that under *curatele*

the person concerned is completely deprived of legal capacity and may not independently perform juristic acts; under *bewindstelling* the person concerned may not independently take decisions about his or her financial affairs (but retains the capacity to take personal decisions); and under *mentorschap* the person concerned may not independently take decisions about personal care and medical treatment. It is interesting to note that *bewind* is publicly registered while *mentorschap* is not required to be publicly disclosed.<sup>543</sup>

- ◆ ***Bewind*** can be instituted where an adult is, as a result of his or her physical or mental condition, either temporarily or permanently incapable of managing his or her financial interests. The choice of person to be appointed follows the expressed preference of the person concerned. It is expressly provided that in respect of certain decisions, the *bewindvoerder* must obtain consent from the person with incapacity or, if he or she is unable to consent or oppose the *bewindvoerder*, the *kantonrechter* must take the decision. The decisions requiring such consent include eg decisions relating to disposal of property; accepting gifts to which liabilities or conditions are attached, and lending money. The *bewindvoerder* must submit regular accounts to the person with incapacity in the presence of the *kantonrechter* (or to the *kantonrechter* if the person is unfit to receive such accounts). The *Kantonrechter* may call the *bewindvoerder* to account at any stage of the duration of his or her *bewind*.<sup>544</sup>
- ◆ ***Mentorschap*** can be instituted where a person, due to his or her physical or mental condition, is temporarily or permanently unable to take proper care of him/herself or his or her interests other than those involving property. In the case of *mentorschap* any person in charge of an institution in which the person affected is permanently cared for, can also make the application for appointment of a *mentor*. If the person with incapacity has already been placed under *bewind*, it is preferable that the same person acts as *bewindvoerder* and *mentor*. Juristic persons are excluded from being appointed as *mentors*. The *mentor* gives advice on

---

<sup>543</sup> See in general Oomens and Van Zutphen 2-7.

<sup>544</sup> Civil Code Title 19, article 431. See also Alzheimer Europe **Lawnet National Report: The Netherlands** 15-17.

non-financial matters and tries to involve the person in the performance of his or her duties. He or she can allow the person with incapacity to act independently and is in fact compelled to do so where the person is capable of reasonably appreciating the consequences of his or her acts. The *kantonrechter* may at any time call upon the mentor to submit a report regarding his or her activities.<sup>545</sup>

- ◆ ***Consent to medical treatment*** is regulated separately.<sup>546</sup> Substitute decision-making is possible in respect of practically all forms of medical treatment (by the legally appointed curator or mentor) even in respect of sensitive treatment. However, if the will of the person concerned is known (eg by way of an advance directive) substitute decision-making becomes practically impossible.<sup>547</sup>

## SUGGESTIONS FOR THE DEVELOPMENT OF AN ALTERNATIVE SYSTEM

6.49 With the information supplied in this Chapter as background and in particular with regard to the needs reflected in the comments on Issue Paper 18, the Commission on a preliminary basis suggests a multi-level system, containing the following broad elements, as alternative for the curatorship system:

- ◆ An arrangement legalising the informal day-to-day decisions made on behalf of adults with incapacity by their family members and carers. This arrangement should serve as “default” where none of the other measures we propose (or any of the existing common law or statutory measures) has been utilised. Borrowing from the English Law Commission’s model described in paragraph 6.45 above, we will refer to it below as a “general

---

<sup>545</sup> Civil Code Title 20, article 450. See also Alzheimer Europe **Lawnet National Report: The Netherlands** 17-19.

<sup>546</sup> Wet op de Geneeskundige Behandelingsovereenkomst (WGBO) Civil Code Title 7, article 446-468.

<sup>547</sup> See also Alzheimer Europe **Lawnet National Report: The Netherlands** 23.

authority” to act on behalf of an adult with incapacity. We propose that the “general authority” should be developed on the basis of the following:

- \* Its content should be developed on the model of the common law concept of *negotiorum gestio* (as set out in paragraphs 6.11 to 6.16 above).
- \* The arrangement should enable “anyone” (and not only “nearest relatives” or “family”) to act on behalf of a person with incapacity. The reason for this being that one of our main aims would be to also make provision for substitute decision-making measures for adults with incapacity who have no family or in respect of whom family is unwilling or unavailable to make decisions.
- \* It should be restricted to assistance with regard to personal welfare. We submit that, since any action taken on behalf of an adult with incapacity under a general authority will by its very nature be unsupervised, it would be undesirable to extend such authority to decision-making with regard to financial affairs because of the obvious danger of misuse and abuse of the authority.
- \* It should allow for run-of-the-mill expenses to be incurred and paid for on behalf of the adult with incapacity concerned.
- \* It should allow for a person who has signing powers in respect of a banking account of his or her spouse who becomes incapacitated to retain this power after the incapacity of the spouse. Safeguards must be built into the process to protect the interests of the spouse with incapacity (eg by requiring that the signing power must have existed at the time of incapacity and that the power can be used only for specific limited purposes such as payment of reasonable living expenses of the adult with incapacity.)
- \* It should clarify the position of parents as surrogate decision-makers for their major children with incapacity (especially those with intellectual disabilities). It is suggested that this could be done by granting such parents “automatic” appointment as manager or mentor under certain circumstances.

- \* It should cover situations where a statutory substitute decision-maker has not been appointed as well as where an enduring power of attorney has not been granted.
- \* The proposed measures should be carefully and exactly drafted to allow surrogate decision-making only under clearly defined circumstances.
- ◆ A short term measure aimed at one-off decisions to be made on behalf of adults with incapacity based on the models provided for by both the English and Scottish Law Commissions as referred to in paragraphs 6.45 and 6.46 above. We will refer to this measure as a “specific intervention order”. We suggest that legislation should allow the Master or any suitable person to make such one-off decision in respect of the personal welfare or financial affairs of the adult concerned. We further suggest that a one-off appointment of a substitute, or a decision by the Master, to render assistance to an adult with incapacity when necessary, should be preferable to the longer term options suggested below.
- ◆ Longer term measures to specifically serve as alternatives to the common law measures of *curator bonis* and *curator personae*. In this regard we suggest that legislation should make it possible to appoint a “manager” to care for and manage the property of an adult with incapacity; and a “mentor” to take care of the personal welfare of an adult with incapacity. The Master should however always have the discretion to refer the matter to a Court for the appointment of a *curator*. We suggest that the powers and duties of the manager and mentor, supervisory measures (for instance the submission of accounts or reports), restrictions on their authority, and termination of their appointment be developed on the basis of current requirements in respect of curators as set out in Chapter 4 of the Administration of Estates Act, 1965. As regards authority to consent to medical treatment on behalf of an adult with incapacity, we suggest that a mentor should be able to give consent in accordance with the provisions of the National Health Bill, 2003 as set out in paragraphs 4.15, 4.18 and 4.21. It should be noted that the Bill does not provide for surrogate consent to refuse the carrying out or continuation of life-sustaining treatment.

- ◆ A suitable supervisory framework (within which the respective substitute-decision-makers will have to operate) and suitable safeguards to sufficiently protect the interests of adults with incapacity. It is suggested that the existing supervisory framework for curators (i.e. the Master of the High Court, with recourse to the High Court as a last resort) be utilised rather than creating new frameworks that might complicate implementation of the proposed legislation.

6.50 In embodying the above proposals in legislation one of the major questions that arose was how to deal with any overlap between draft legislation containing our proposals and the Mental Health Care Act, 2002. As indicated in paragraphs 6.19-6.25 above, the Mental Health Care Act already provides for the appointment of an administrator to care for and administer the property of the “mentally ill” and persons with “severe or profound intellectual disability” as defined in that Act.<sup>548</sup> Because of the wide definition of “incapacity” in our proposed draft legislation<sup>549</sup> the measures proposed in this Chapter (in particular those with relation to the appointment of a manager to care for and manage the property of an adult with incapacity) will be available to such persons.<sup>550</sup> What should the relationship between the two pieces of legislation be? Should an overlap be avoided? Should our proposed draft legislation be excluded from applying to persons who are “mentally ill” and who suffer from “severe or profound intellectual disability”? If we expressly exclude our proposed Bill from applying to the “client base” of the Mental Health Care Act, the Master (who also fulfils the supervisory role in applications for the appointment of an administrator under that Act) will have to decide in respect of every application for appointment of a manager under our proposed legislation whether the adult concerned does not belong to the “client base” of the Mental Health Care Act - and if so, the provisions of our proposed legislation would not apply. We foresee difficulty with such an approach especially in view of the complex definitions of “mental illness” and “severe or profound intellectual disability” in the Mental Health Care Act. We

---

<sup>548</sup> See the definitions in footnotes 18 and 20 above.

<sup>549</sup> See par 4.38 for the recommendation which is embodied in clause 4 of the draft Bill in Chapter 8.

<sup>550</sup> See the discussion of the relevant provisions in par 6.19-6.25 above.

submit on a preliminary basis that the two pieces of legislation could exist alongside each other, and that the legislator could in time consider whether a uniform arrangement (possibly in the form of the wider, simpler and more accessible approach proposed by the Commission) would suffice.

- 6.51 One of our main aims in providing for the proposed measures is to keep them as simple and accessible as possible. With this in mind we suggest that the same procedure should be prescribed for applications for the appointment of persons to act in terms of specific intervention orders and applications for the appointment of managers and mentors. Because of the obvious similarities in purpose, we considered modelling our proposed application procedure on that prescribed for the appointment of an administrator under sections 59-64 of the Mental Health Care Act, 2002. We however rejected this procedure as unnecessarily complicated.<sup>551</sup> On the basis of informal discussions with a representative of the Masters Office we developed the application procedure contained in our proposed draft Bill on the model of section 56A of the current Mental Health Act, 1973 (which procedure has not been included in the new Mental Health Care Act).<sup>552</sup> This procedure is generally regarded as fulfilling the requirements of simplicity, practicality, accessibility and cheapness.

#### **PRELIMINARY RECOMMENDATION**

- 6.52 **We propose that a multi-level system of substitute decision-making as broadly set out in paragraph 6.49 be introduced by legislation as alternative to the curatorship system.**
- 6.53 The detail of our proposal is reflected in Chapters 2 (Default authority to act on behalf of adult with incapacity), 3 (Specific intervention orders), 4 (Management of property), 5 (Care for personal welfare) and 7 (Supplementary powers of the Master and the Court) of the Draft Bill contained in Chapter 8 of this Paper.

---

<sup>551</sup> The procedures referred to are set out in detail in par 6.21.

<sup>552</sup> This procedure basically involves an application to the Master without the need for the involvement of lawyers, and the submission of the minimum amount of documentation to enable the Master to exercise his or her discretion as to whether to make an appointment. See also par 3.28 above.

# 7

## Representation through power of attorney

### INTRODUCTION

- 7.1 Representation is the phenomenon whereby one person (an agent) concludes a juristic act (an act whereby legal relationships are created and which has legal consequences) on behalf of or in the name of another (the principal).<sup>553</sup> A power of attorney is a formal document by which the principal empowers or authorises the agent to act on his or her behalf.<sup>554</sup>
- 7.2 Under common law a power of attorney terminates once the principal becomes mentally incapacitated.<sup>555</sup> A power of attorney may therefore be of little value to someone who fears that their mental capacity is weakening or may be weakened who wants someone to act on their behalf if and when that situation arises. Frequently family and caregivers of incapacitated persons are under the

---

<sup>553</sup> De Wet in **LAWSA Vol 1** par 100-101; Joubert 1-3; De Villiers and Macintosh 1, 38-41; Kerr 3-4. The general concept of representation must not be confused with the contract of agency. The concept of representation is not a contract but the legal institution by which one person takes the place of another and acts for him or her in juristic acts. The contract of agency (a contract of mandate) is a normal contract which regulates the relationship between principal and agent and which can create rights and duties for the principal and the agent. Although as one of its consequences the agent may be empowered to act as the representative of the principal, the relationship remains contractual and should not be confused with cases of purely juristic representation - eg that of parent and minor child (De Villiers and Macintosh 13-15). From a theoretical point of view it should be noted that there are two different approaches to the treatment of the law of agency by South African legal authorities: The one approach is to combine the treatment of the rules relating to the contract of mandate with the rules relating to representation and considering them all as falling under the "contract of agency" (as eg by De Villiers and Macintosh). The other approach (adopted by De Wet) is to treat separately those rules of agency which are rules of the contract of mandate on the one hand, and representation and authority on the other hand (De Villiers and Macintosh 13-15; Kerr 6-10; De Wet in **LAWSA Vol 1** par 100). This does not affect the applicable legal principles discussed in this chapter. Where necessary reference will nevertheless be made to the difference in approach in the footnotes.

<sup>554</sup> See the discussion of the common law in par 7.6 below.

<sup>555</sup> See par 7.24 below.



impression that the power of attorney signed by a person in their care will be effective until that person dies and they continue to act on behalf of such person.

- 7.3 The problems caused by the common law rule that a power of attorney terminates on incapacity have led to the development of a mechanism that survives the subsequent mental incapacity of the principal - the enduring power of attorney (in some legal systems referred to as a “durable” or “continuing” power of attorney).<sup>556</sup> The impetus for this development in many jurisdictions was the introduction, in the 1950s, of legislation on enduring powers of attorney in Virginia, United States of America and the enactment in 1964 of a United States Model Act in this regard.<sup>557</sup> This was followed by the United States Uniform Probate Code, 1969 which contained a blueprint for enduring power legislation.<sup>558</sup> Enduring powers of attorney legislation, based on these models, exist in all 50 states and Washington DC in the United States of America.<sup>559</sup> These developments were followed by a spate of recommendations by law reform bodies in Australia, England and Canada.<sup>560</sup> One of the most developed schemes is found in Britain<sup>561</sup> with simpler approaches in Ontario (Canada)<sup>562</sup>

---

<sup>556</sup> Van Dokkum 1997 **Southern African Journal of Gerontology** 17 et seq; Barker 1996 **De Rebus** 259 et seq; Neuman 1998 **De Rebus** 63-64.

<sup>557</sup> The Special Power of Attorney for Small Property Interests Act (Creyke 1991 **Western Australian Law Review** 123).

<sup>558</sup> The main future of the Uniform Probate Code as far as it concerned enduring powers of attorney, was that it provided for survival after incompetence if the language of the instrument indicated this to be the principal's intent. The popularity of the single subject of enduring powers led to a separate Uniform Durable Power of Attorney Act which in 1979 replaced and amended the relevant provisions of the Uniform Probate Code (sec 5-501 to 5-505). The latter Act polished the concept in regulating the relationship between a later Court appointed trustee or other fiduciary; and allowing the agent to exercise the power on the death of the principal if its exercise is in good faith and without knowledge of the death. The Uniform Durable Power of Attorney Act is currently under amendment (according to draft amendments that have been published in April 2003) (Creyke 1991 **Western Australian Law Review** 123; Alberta Law Reform Institute **Report for Discussion No 7** 1990 10; National Conference of Commissioners on Uniform State Laws [Internet]; Amendments to Uniform Durable Power of Attorneys Act 1979 [Internet]).

<sup>559</sup> Schlesinger and Scheiner 1992 **Trusts and Estates** 38.

<sup>560</sup> Creyke 1991 **Western Australian Law Review** 123-124.

<sup>561</sup> Cf the Powers of Attorney Act 1985.

<sup>562</sup> Cf the Powers of Attorney Act 1979.

and Victoria (Australia).<sup>563</sup> Different models vary depending upon the view taken of the need for safeguards to protect the interests of the principal.<sup>564</sup>

- 7.4 As indicated in Chapter 3, the Commission recommended in 1988 that the enduring power of attorney (covering financial and property-related decisions and including the possibility to grant a conditional power of attorney)<sup>565</sup> should be introduced in our law. The government has not implemented these recommendations.
- 7.5 Information on the current law regarding powers of attorney in South Africa; the concept of enduring powers of attorney as developed in comparable jurisdictions; and the Commission's 1988 recommendations are included in the discussion below as basis for the development of preliminary recommendations to introduce the concept of the enduring power in our law.

## CURRENT SOUTH AFRICAN LAW REGARDING POWERS OF ATTORNEY

### Introduction

- 7.6 No person is by nature endowed to conclude juristic acts on behalf of another - he or she must have the necessary authority.<sup>566</sup> The most common source of authority is authorisation by the principal.<sup>567</sup> Authorisation is not in itself a contract but rather a unilateral juristic act - an expression of will by the principal that the agent shall have the power to conclude juristic acts on his or her behalf.

---

<sup>563</sup> Cf the Instruments (Enduring Powers of Attorney) Act 1981.

<sup>564</sup> Atkin 1988 **New Zealand Law Journal** 368.

<sup>565</sup> See par 7.41 et seq below on the conditional power of attorney.

<sup>566</sup> De Wet in **LAWSA Vol 1** par 112; De Villiers and Macintosh 2-3, 15, 38-39; Joubert 90 et seq; Kerr 69, 92 et seq. Lack of authority may however in appropriate circumstances be cured by ratification (see par 7.21 below).

<sup>567</sup> De Wet in **LAWSA Vol 1** par 113; Kerr 69 et seq.

Through authorisation the principal not only empowers the agent to act, but also indicates to third parties his or her will to be bound by acts performed by the agent.<sup>568</sup>

7.7 Authorisation can be made in any manner in which a person can declare his or her will to another - that is by spoken or written word and even tacitly by conduct.<sup>569</sup> When authorisation takes place by written document it is usually referred to as a power of attorney. A power of attorney is a declaration in writing by one person that another shall have the power to perform on his or her behalf such acts as are set out in the written document.<sup>570</sup> Generally speaking, the practical purpose of a power of attorney is to furnish the agent with a document setting out the agent's powers for production as authority to third parties with whom the agent is to deal, though, it is often also the document in which those powers originate.<sup>571</sup> The document evidencing a power of attorney is normally held by the agent so that it may be produced when required as evidence of authority to act.<sup>572</sup>

7.8 Authorisation can also come about by operation of law. This is the case, for instance, where the Court appoints a curator to the person or property of another.<sup>573</sup> The curator does not derive his or her authority from the will of the incapacitated person, but from an appointment.<sup>574</sup> The difference between an agent acting under a power of attorney and a person acting as curator through an appointment by the Court is that the agent is authorised to act in the name of the

---

<sup>568</sup> De Wet in **LAWSA Vol 1** par 113-114; Joubert 90-94; Hutchison in **Wille's Principles of South African Law** 596 et seq; Kerr 6 et seq.

<sup>569</sup> Ibid. Whether tacit authority exists or not is a question of fact dependent on the intention of the principal, which is to be inferred from his or her words and conduct and from admissible evidence of the surrounding circumstances.

<sup>570</sup> De Wet in **LAWSA Vol 1** par 116; Joubert 98; Kerr 70. See also De Villiers and Macintosh 133-135; Van Dokkum 1997 **Southern African Journal of Gerontology** 17 et seq; Barker 1996 **De Rebus** 259 et seq; Neuman 1998 **De Rebus** 63-64.

<sup>571</sup> De Wet in **LAWSA Vol 1** par 114; Joubert 168-169; Kerr 70; Josling 8.

<sup>572</sup> Josling 30.

<sup>573</sup> De Wet in **LAWSA Vol 1** par 113; Hutchison in **Wille's Principles of South African Law** 597-598; Joubert 10, 99. Cf also the discussion on the curatorship system in par 6.3 et seq above.

<sup>574</sup> Ibid.

principal, whereas the curator acts in his or her own name for the benefit of another - usually an incompetent person.<sup>575</sup>

## Requirements

- 7.9 The requirements for a valid power of attorney may be summarised as follows:<sup>576</sup>
- ◆ The principal must, when granting the power, have contractual capacity or be properly assisted (eg in the case of a minor).
  - ◆ Execution of the power must be physically possible (a power which cannot be executed is meaningless and thus void).
  - ◆ Execution of the power must be juridically possible (i.e. only lawful acts can be made the object of a valid power of attorney).
  - ◆ Any prescribed formalities must be complied with.
  - ◆ Any suspensive condition, to which execution of the power has been made subject, must be fulfilled. A power of attorney may therefore be granted with the intention that it will become legally effective only when a future condition is fulfilled.<sup>577</sup>
  - ◆ The agent must be legally competent to act as agent.

## Requisite capacity of the parties

### *The principal*

- 7.10 As authorisation (i.e. creating or granting a power of attorney) is a juristic act, a person who has no capacity to conclude juristic acts cannot authorise another to conclude juristic acts on his or her behalf. The test is whether the person is “capable of understanding the nature and consequences of the particular act”. It

---

<sup>575</sup> Ibid. See also Van Dokkum 1997 **Southern African Journal of Gerontology** 17.

<sup>576</sup> Joubert 94 et seq; De Villiers and Macintosh 48 et seq.

<sup>577</sup> Joubert 102.

follows that a person who is unable to understand the nature and consequences of granting a power of attorney cannot validly execute such a power.<sup>578</sup>

- 7.11 Whether the person granting the power of attorney was mentally capable of doing so at the time, is a question of fact, to be determined by the circumstances of the particular case.<sup>579</sup> Generally persons are presumed mentally capable until the contrary is proved, so that the onus of proving that a transaction is vitiated for want of mental capacity normally rests on the party alleging it.<sup>580</sup> When executed by someone lacking capacity, a power of attorney is completely void (not just voidable) - i.e. no contract ever came into existence, and all transactions entered into under it are treated as nullities.<sup>581</sup>

### *The agent*

- 7.12 As an agent is someone who concludes a juristic act on behalf of another, a person who has *no* capacity to conclude juristic acts can no more conclude a juristic act for another than for him- or herself.<sup>582</sup> The agent does not bind him or

---

<sup>578</sup> ***Pheasant v Warne*** 1922 AD 481 with reference to ***Molyneux v Natal Land Company*** 1905 AC 555. It has been held for instance that a power of attorney cannot be granted by someone who, because her mental faculties have been impaired by old age, had not been in a position to understand what the particular legal proceedings instituted against her were about (***Vermeulen v Oberholzer*** 1965 (1) SA PH F14 (GW)). See also Joubert 96; De Wet in **LAWSA Vol 1** par 115; De Villiers and Macintosh 57 et seq; Heaton in **Boberg's Law of Persons and the Family** 105-106; Josling 43; Munday 1998 **New Zealand Universities Law Review** 254. Refer also to the discussion on capacity in par 4.1 and 4.6 et seq above.

<sup>579</sup> ***Pienaar v Pienaar's Curator*** 1930 OPD 171 at 174-175. See also Heaton in **Boberg's Law of Persons and the Family** 107; Christie 282-285; De Villiers and Macintosh 57-59. Refer also to the discussion on capacity in par 4.1 and 4.6 et seq above.

<sup>580</sup> ***Pheasant v Warne*** 1922 AD 481. See also Heaton in **Boberg's Law of Persons and the Family** 107; Christie 282-285; De Villiers and Macintosh 57-59. Refer also to the discussion on capacity in par 4.1 and 4.6 et seq above.

<sup>581</sup> ***Phil Morkel Bpk v Niemand*** 1970(3) SA 455 (C) at 456F-G. See also Heaton in **Boberg's Law of Persons and the Family** 106; Christie 282-285; De Villiers and Macintosh 57-59. Refer also to the discussion on the effect of mental incapacity on contractual capacity in par 4.9 et seq above.

<sup>582</sup> De Wet in **LAWSA Vol 1** par 104; De Villiers and Macintosh 65 et seq; Joubert 102; Kerr 55, 255.

herself but the principal. Thus, a person of limited capacity (such as a minor) can act as agent.<sup>583</sup>

- 7.13 A person acting as an agent need not be a lawyer, and is usually a family member, partner or close friend. A juristic person (an entity other than an individual human being upon which the law confers legal personality) could also be appointed as agent under certain circumstances.<sup>584</sup> A juristic person can however act through its members only, the result of such action being that only the juristic person acquires rights and incurs duties and not its members in their personal capacity. Examples of juristic persons are companies, banks, co-operatives and voluntary associations.<sup>585</sup>
- 7.14 A principal can together appoint two (or more) persons as agents to execute the same transaction.<sup>586</sup> If it is intended that they should act in concert in performing the mandate their authority is “joint”, and only by their joint action can they bind the principal. If it is intended that one of them shall have the power to perform the mandate singly, their authority is said to be “joint and several” and the act of one will bind the principal. Whether the authority is joint, or joint and several, is a matter of construction dependent upon the terms of the power of attorney and the circumstances of the case in question.<sup>587</sup> In case of doubt it is presumed that the authority is joint.<sup>588</sup>

---

<sup>583</sup> Ibid. The agent must have sufficient understanding to act on behalf of the principal. However, as he or she is not bound by the juristic act concluded on behalf of the principal the agent need not have capacity to act and to litigate.

<sup>584</sup> A juristic person has the same capacity to contract and to acquire, hold and dispose of rights as an individual, so far as is compatible with its nature, within any general or special rules defining its powers, and within the objects and terms of its particular constitution (cf Lee and Honoré 10).

<sup>585</sup> See in general on the nature and legal capacity of juristic persons **Wille's Principles of South African Law** 55, 241-246; Cronjé in **LAWSA Vol 20** Part 1 par 341-342; de Villiers and Macintosh 63; Sinclair in **Boberg's Law of Persons and the Family** 4-6.

<sup>586</sup> Joubert 103-10; De Villiers and Macintosh 120-123.

<sup>587</sup> Ibid.

<sup>588</sup> Joubert 104.

## Types of powers of attorney

7.15 Powers of attorney can be either general or special:<sup>589</sup>

- ♦ A general power of attorney is one in which the agent is authorised to act on behalf of the principal generally (i e in all matters where the principal can be represented);<sup>590</sup> or generally in transactions of a particular kind; or generally in relation to some particular business. A general power usually involves some measure of continuity of service.<sup>591</sup> It also implies that the agent have authority, within reasonable limits, to do whatever is normally incidental to executing his or her mandate.<sup>592</sup>
- ♦ A special power of attorney expressly authorises an agent to perform a specified act or acts or to represent the principal in one or more specified transactions but not involving any continuity of service.<sup>593</sup> Normally the authority to act under a special power is limited to the precise terms in which it is given.<sup>594</sup>

## Formalities

7.16 A power of attorney is by nature and form a written document. Although in this sense a power of attorney can be described as a formal document, there is no general law prescribing formalities for powers of attorney as such. There are however formal requirements for powers of attorney used for specific purposes (e g powers of attorney for the performance of acts in a deeds registry and

---

<sup>589</sup> De Wet in **LAWSA Vol 1** par 116; Joubert 104 et seq; De Villiers and Macintosh 143-146; Hutchison in **Wille's Principles of South African Law** 594; Kerr 71; Van Dokkum 1997 **Southern African Journal of Gerontology** 17.

<sup>590</sup> Note that, as indicated in par 7.19 below, there are certain matters which do not admit to representation.

<sup>591</sup> De Villiers and Macintosh 144.

<sup>592</sup> **Nel v SAR & H** 1924 AD 30.

<sup>593</sup> De Villiers and Macintosh 144.

<sup>594</sup> **Nel v SAR & H** 1924 AD 30.

powers of attorney used in connection with legal proceedings).<sup>595</sup> Formalities required in these instances include signing and witnessing of the power, and filing of the power with the Registrar of the High Court.<sup>596</sup>

- 7.17 Powers of attorney used to be subject to stamp duty.<sup>597</sup> Since 1999 this is no longer required.<sup>598</sup>

## Scope and extent of agent's authority

- 7.18 The scope and extent of the agent's authority are determined by the authorisation (where applicable, the terms of the power of attorney).<sup>599</sup> The terms of a power have to be construed in accordance with the rules governing the interpretation of juristic acts in general as there are no rules of construction that apply only to authorisations.<sup>600</sup> Broadly speaking this would imply that where the terms are clear the ambit of the agent's authority is restricted to powers expressly conferred or necessarily incidental to the due performance of the mandate.<sup>601</sup>

---

<sup>595</sup> Joubert 98; De Wet in **LAWSA** Vol 1 par 118; Hutchison in **Wille's Principles of South African Law** 596-597; De Villiers and Macintosh 98-99; Kerr 58, 163. See eg the requirements in secs 20 and 50 of the Deeds Registries Act 47 of 1937 requiring that a conveyancer shall not execute a deed of transfer or mortgage bond before the Registrar of Deeds unless he or she is authorised by power of attorney to act (see the discussion by West 1997 **De Rebus** 107 et seq); and Rule 7 of the Uniform Rules of Court requiring an attorney to be authorised by a power of attorney to set down a civil appeal on behalf of his or her client (see the discussion by LJ Gering et al in **LAWSA Vol 3** Part 1 211).

<sup>596</sup> See eg sec 95 of the Deeds Registries Act 47 of 1937 which requires witnessing of a power of attorney that authorises acts pertaining to immovable property; and rule 7 of the Uniform Rules of Court requiring that the power of attorney in question must be signed and duly executed and filed with the Registrar of the High Court.

<sup>597</sup> Sec 3 read with Sch 1(19) of the Stamp Duties Act 77 of 1968.

<sup>598</sup> Sec 14(1) of the Taxation Laws Amendment Act 32 of 1999.

<sup>599</sup> **Measrock v Liquidator, New Scotland Land Co Ltd** 1922 AD 237. Joubert 104-105; De Wet in **LAWSA Vol 1** par 120; De Villiers and Macintosh 126.

<sup>600</sup> De Wet in **LAWSA Vol 1** par 120; Kerr 71 et seq. For the specific rules of interpretation and the case law governing them see the discussions by De Wet in **LAWSA Vol 1** par 120; and Joubert 104-106. These rules include, amongst others, the following: a power to do something includes the power to do it according to established custom regarding similar transactions; the greater includes the lesser; where there is express authority, a wider, implied authority is not readily inferred; and in any juristic act, an ambiguous statement is interpreted against the person who formulated it.

<sup>601</sup> **Nel v SAR & H** 1924 AD 30. See also De Villiers and Macintosh 133; Joubert 104-106; Kerr 77 et seq.



Where more than one possible meaning can be attached to the wording of the power, the reasonable (and not the restrictive) interpretation will be adopted.<sup>602</sup>

7.19 In general, all types of juristic acts can be concluded by an agent on behalf of a principal except where the law requires that the principal acts in person. The following are examples of specific exceptions:<sup>603</sup>

- ◆ Where the act is of a personal nature in the sense that the identity and personal attributes of the performer of the act are of material importance to another who has a legal interest in its performance (for instance, no valid marriage can be contracted by means of a representative;<sup>604</sup> and an agent cannot make a will on behalf of a principal<sup>605</sup>).
- ◆ Where an individual is required by his office or by statute to perform the act in person (for instance, the right of a citizen to vote at a public election cannot be delegated through a power of attorney<sup>606</sup>).

## Legal effect of representation through a power of attorney: Position vis-à-vis third parties

7.20 When an agent concludes a juristic act (eg enters into a contract) on behalf of a principal, the rights and duties arising from that contract are those of the principal and not of the agent - although the act itself is concluded by the agent.<sup>607</sup> In other words, assuming that the agent has the requisite authority, it is the principal and not the agent who is a party to that contract. A properly authorised agent

---

<sup>602</sup> **Mahomed v Padayachy** 1948 (1) SA 772 (AD) at 778-779. See also De Villiers and Macintosh 133-134; Joubert 105; Kerr 73.

<sup>603</sup> De Villiers and Macintosh 68-74; De Wet in **LAWSA Vol 1** par 105; Joubert 4, 96-98; Kerr 55-56.

<sup>604</sup> Sec 29(4) of the Marriage Act 25 of 1961.

<sup>605</sup> Sec 2(1)(a)(i) and (v) of the Wills Act 7 of 1953. Cf also sec 4 of the Act providing that any person aged 16 or more years may make a will unless he or she is mentally incapable of appreciating the nature and effect of his or her act; and that the burden of proving that the person was mentally incapable rests on the person who alleges it.

<sup>606</sup> Sec 38(2), 39 and 88 (a) and (b) of the Electoral Act 73 of 1998.

<sup>607</sup> De Wet in **LAWSA Vol 1** par 101; Joubert 1-3, 26; De Villiers and Macintosh 1; Kerr 299; Van Dokum 1997 **Southern African Journal of Gerontology** 17.

who validly enters into a contract on behalf of another is therefore protected from any liability arising from that contract.<sup>608</sup>

- 7.21 If the agent has no authority to act (as will be the case where the authority ceased as a result of the principal's incapacity) the principal acquires no rights and incurs no duties unless he or she subsequently ratifies (i.e. validates)<sup>609</sup> the act done on his or her behalf.<sup>610</sup> However, as ratification is a juristic act, a person who has no capacity to conclude juristic acts cannot validly ratify an act concluded on his or her behalf.<sup>611</sup>
- 7.22 Where an agent purports to be authorised to enter into a contract but acts without the requisite authority (for instance where the principal is incapacitated), the other party to the contract can hold that agent liable for breach of "warranty of authority".<sup>612</sup> The extent of the agent's liability depends on various factors.<sup>613</sup>

---

<sup>608</sup> **Blower v Van Noorden** 1909 TS 890. See also De Wet in **LAWSA Vol 1** par 101; Joubert 76; De Villiers and Macintosh 558 et seq; and the authorities and case law quoted by the authors.

<sup>609</sup> "Where one person does an act professedly as agent on behalf of another, but without authority, and that other confirms and adopts that act, he is said to have ratified it thereby clothing it with authority and bringing into existence the consequences of a duly authorised act" (De Villiers and Macintosh 282).

<sup>610</sup> **Wright v Williams** (1891) 8 SC 166; **Pakes v Thrupp & Co** 1906 TS 741. See also De Wet in **LAWSA Vol 1** par 119, 125-126, 138-142; De Villiers and Macintosh 282 et seq; Joubert 163; Hutchison in **Wille's Principles of South African Law** 598; Van Dokkum 1997 **Southern African Journal of Gerontology** 17.

<sup>611</sup> De Wet in **LAWSA Vol 1** par 127; Joubert 155, 157.

<sup>612</sup> **Blower v Van Noorden** 1909 TS 890; De Wet in **LAWSA Vol 1** par 138-140; De Villiers and Macintosh 584-586; Kerr 302 et seq; Van Dokkum 1997 **Southern African Journal of Gerontology** 17. "Warranty of authority" refers to a promise or guarantee, or *implied* promise or guarantee, by the agent that he or she has authority to represent the principal (De Wet in **LAWSA Vol 1** par 138-140). Two scenarios can arise in this regard: Where the agent knows (or should know) of the principal's incapacity; and where the agent does not know of the incapacity:

\* If the agent knows of the incapacity he or she will be liable - subject however to the rule as to equal knowledge on the side of the third party and subject to the rule that there is no liability for an incorrect representation of law. I.e. where the third party knows all the facts which are known to the agent and is in as good a position as the agent to draw the proper inferences as to the agent's authority, then no *implied* warranty arises (**Hamed v African Mutual Trust** 1930 AD 333). Likewise, if the agent made a representation of law which was incorrect (eg if the agent states that his principal, although mentally ill, can enter into a specific contract) the agent incurs no liability because an opinion as to the law put forward by an agent can not as a general rule found an action, even if false, because both parties are presumed to know the law (**Sampson v Liquidators Union & Rhodesia Wholesale, Ltd** 1929 AD 468).

Alternatively, the third party can prevent a principal (on whose behalf the agent purported to act) from denying liability on that contract. In the latter instance the principal would then have an action against the agent for acting without authority.<sup>614</sup>

## Termination of authority

7.23 An agent's authority to act under a power of attorney can come to and end in a number of ways including the following:<sup>615</sup>

- ◆ If authority was granted to conclude a specific act, the authority lapses with conclusion of the act.
- ◆ If authority was granted for a specified period of time only, the authority lapses with expiry of such period.
- ◆ Authority lapses on the death or change of status of the agent; and also on the death or change of status of the principal.
- ◆ Authority may be terminated by revocation by the principal, or by renunciation by the agent.

Change of status of the principal and revocation by the principal are of special relevance and are discussed in more detail:

---

\* If the agent has no reason to know of the principal's incapacity, is he or she taken to warrant the capacity? It has been submitted that even in this instance the agent will be liable if the incapacity is of such a nature that the principal is incapable of giving valid authority to the agent to make the contract. Where the principal's incapacity is not an incapacity to make the contract, but merely an incapacity to perform some incident of the contract, then the agent will not be liable (*De Villiers v Macintosh* 586).

<sup>613</sup> The agent will have to make good to the other party the damages resulting from the implied warranty (*Blower v van Noorden* 1909 TS 890).

<sup>614</sup> De Wet in **LAWSA** 116; Van Dokkum 1997 **Southern African Journal of Gerontology** 17.

<sup>615</sup> De Wet in **LAWSA** 118-123; Joubert 131-140; De Villiers and Macintosh 611 et seq; Kerr 239 et seq; and the authorities and case law quoted by the authors.

### *Change of status of the principal*

- 7.24 As indicated in par 7.10 above, for a power of attorney to be valid, the person granting the power must have contractual capacity. Under common law the authority of the agent is terminated by any change of status of the principal affecting his or her contractual capacity.<sup>616</sup> The reason for this stems from the nature of the principal/agent relationship. This relationship is essentially one of agency, and as an agent can have no more authority to act than the principal has, it follows that if the principal has lost the ability to enter into transactions, then the agent will likewise have lost that ability.<sup>617</sup>
- 7.25 There is little modern law on this issue. Current South African legal experts attribute the common law rule largely to the 1957 decision in *Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz*<sup>618</sup> and the views of Voet<sup>619</sup> and Pothier.<sup>620</sup>

---

<sup>616</sup> See in general the discussions by De Wet in **LAWSA** Vol 1 par 122; Joubert 96, 133; De Villiers and Macintosh 611, 627-633; Lee and Honoré 163; Kerr 255; van Dokkum 1997 **Southern African Journal of Gerontology** 17 et seq; Barker 1996 **De Rebus** 259 et seq; Neuman 1998 **De Rebus** 63-64. See also SALC Report on **Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 27-29.

<sup>617</sup> Ibid. Cf also Atkin 1988 **New Zealand Law Journal** 368.

<sup>618</sup> 1957(4) SA 354 (W) at 356-357. See also De Wet in **LAWSA Vol 1** par 119; De Villiers and Macintosh 628; Joubert 133; Lee and Honoré 163.

<sup>619</sup> According to Voet mandate (which was the equivalent in Roman law of the modern power of attorney [Joubert 92]) is ended by revocation. Revocation can happen under certain circumstances and "(s)ometimes too revocation is presumed to have taken place as when one who had given a mandate for payment has changed his condition or status by becoming a slave instead of a free man, a person permanently banished instead of a citizen, or a free man instead of a slave ... Nay again if a person has gone bankrupt it seems that we should say that a mandate is deemed to have been revoked by that very fact ..." (**The Selective Voet** translated by Gane Vol 3 p 212). Although Voet does not expressly refer to insanity, this passage has been referred to as authority for termination of agency by way of insanity by Joubert (133) and De Villiers and Macintosh (628). The Appeal Court in *Tucker's* case could also find nothing wrong with counsel for the respondent relying on this passage (at 511). Counsel for the respondent argued that "the authority of an agent is revoked by any change in the status of the principal, such as insolvency, death and marriage of a female principal. This is so because the principle applies that where a change of this nature occurs in the principal he can no longer act for himself. The agent, whom he has appointed can similarly no longer act for him; see ... Voet 17.1.17. ... Insanity and prodigality constitute a change in status of this description" (counsel's argument recorded on p 508 of the reported case).

<sup>620</sup> According to Rogers and De Wet's translation of Pothier's **Traité Du Contrat De Mandat** (par 111) Pothier held the view that "[A] change in circumstances affecting the person of the mandant, before the mandatory has executed the mandate, terminates the mandate no less than if the mandant had died. This happens for the same reason as for his death. For example, if the mandant is a woman, and if ...; or if the person has, since the mandate, been formally certified insane and come under the authority of a keeper; then these persons, because of their changed circumstances, have

- 7.26 In Tucker's case (which was confirmed on appeal)<sup>621</sup> it was decided that a notarial bond executed by a woman married in community of property to her mentally ill husband, and subject to his marital power,<sup>622</sup> as assisted by herself in her capacity as his curatrix, was invalid. Williamson, J regarded the wife in such a marriage as a kind of agent where she is continuously in a position, as a public trader, to render the joint estate liable for any claims in the course of her business. She therefore requires her husband's express or implied authority to enter into business transactions, especially since his half share in the joint estate is involved. According to Williamson, J that authority is revoked upon the husband's mental illness:

In this case there was no actual revocation. But mandate or agency is also revoked impliedly by certain circumstances: one is of course death. But it is stated in De Villiers & Macintosh, ... that a change of status also impliedly revokes the authority of an agent ... It seems to me here that the general proposition that a change of status, for instance, a declaration of insolvency or declaration of insanity or anything of that nature, terminates an agency, and that general proposition does apply also to the quasi agency position of a wife, and that thus when the wife in this case continued to conduct her business as a public trader, after her husband's change of status, she did so without his authority inasmuch as her agency to bind the joint estate had been revoked.<sup>623</sup>

On appeal, Hoexter, J A confirmed this view:

The second legal proposition advanced by appellant's counsel was that the consent of the husband which is required by a wife to enable her to carry on business as a public trader, if the consent is given before the husband's insanity, continues to be effective after his insanity. Counsel

---

become incapable of prosecuting the business with which they entrusted their respective mandataries, without the authority of the husband or the keeper; and it follows that the mandataries are no longer in a position to carry out their business on their behalf and in their place, until such time as the act of procuration is renewed either by the husband or by the keeper" (**Pothier's Treatise on the Contract of Mandate** translated by Rogers and De Wet 64-65). See also for reliance on this passage Lee and Honoré 163; and the discussion in **SALC Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 26-27.

<sup>621</sup> 1958(1) SA 505 (A) at 511.

<sup>622</sup> Mental illness of the husband does not abolish his marital power (at 356). The position is of course different in respect of a marriage contracted after 1 November 1984. Section 11 of the Matrimonial Property Act 88 of 1984 abolished the husband's common law marital power in regard to his spouse's capacity to contract and to litigate.

<sup>623</sup> 1957(4) SA 354 (W) at 356-357.

rightly admitted that when a sane husband permits his wife to carry on business as a public trader, his consent is a continuing one which he may, however revoke at any time, and he was quite unable to persuade us that an insane husband could continue such consent. Nor were we able to find any fault with the statement of WILLIAMSON J that the wife, in carrying on business as a public trader, was acting as the agent of her husband ... and that her agency was terminated by the insanity of her husband.<sup>624</sup>

- 7.27 Although Pothier<sup>625</sup> (and Williams, J in the passage quoted from Tucker's case in the previous paragraph) refer to a "declaration of insanity" such declaration is no prerequisite for the termination of a power of attorney: "It is the fact of becoming mentally ill and not a declaration of mental illness which has this effect".<sup>626</sup> This view is in accordance with accepted law that a judicial declaration that a person is mentally ill is not decisive of whether a person's intellectual capacity is sufficiently afflicted to warrant the deprivation of his or her legal capacity.<sup>627</sup> As discussed in paragraph 4.11 above, the fact of mental illness will have to be answered according to the circumstances of the particular case and the onus of proving that a transaction is vitiated for want of mental capacity normally rests on the party alleging it.

### *Revocation*

- 7.28 The general rule in South African law is that a power of attorney is revocable. An agreement between a principal and an agent to the effect that the power will be irrevocable does thus not deprive the principal of his right to withdraw the power

---

<sup>624</sup> 1958(1) SA 505 at 511.

<sup>625</sup> See the quoted passage in footnote 620 above.

<sup>626</sup> Joubert 133 (our translation from the Afrikaans text).

<sup>627</sup> **Molyneux v Natal Land & Colonization Co Ltd** 1905 Ac 55 (PC) at 561; **Pheasant v Warne** 1922 AD 481 at 490; **Lange v Lange** 1945 AD 322; **Raulstone v Radebe** 1956 (2) PH F85 (N). See also Heaton in **Boberg's Law of Persons and the Family** 106-107; De Wet in **LAWSA Vol 1** 118; Joubert 133; Cronjé and Heaton **South African Law of Persons** 113-115.

of attorney at any time.<sup>628</sup> To revoke the power the principal must be able to conclude a juristic act, i.e. be mentally competent.<sup>629</sup>

7.29 The view of some South African authorities that there are certain exceptions where a power of attorney may be granted irrevocably,<sup>630</sup> lead to the Commission raising the possibility in its 1988 Report that there might already be provision in our law for granting an enduring power.<sup>631</sup> In considering this question, the Commission pointed to conflicting opinions<sup>632</sup> on whether authority can be given irrevocably and concluded that -

“... whatever the position may be, our law does recognise ... [certain] exceptions [where a power of attorney may be granted irrevocably], but they are regarded as ‘exceptional phenomena which occur casuistically in specific cases’.<sup>633</sup>

---

<sup>628</sup> **Clover v Bothma** 1948 (1) SA 611(W); **Ward v Barret** 1962 (4) SA 732 (N) at 737.

<sup>629</sup> A mandate is in generally revocable at the principal's will (De Villiers and Macintosh 616).

<sup>630</sup> De Villiers and Macintosh 614-619 and the cases cited by the authors; Kerr 246 et seq; Joubert 136-140 and the cases cited by the author. The exceptions are said to include the following:

- \* Where the power was granted for the purpose of protecting or securing some interest of the agent or was given by way of security (**Ward v Barrett** 1962 (4) SA 732 (N) at 737).
- \* Where the power is part of a contract between principal and agent (**Ward v Barrett** supra at 737).
- \* Where the power was given to secure the performance of a promise made by the principal to the agent (**Koch v Mair** 1894 11 SC 71 at 83; **Natal Bank Ltd v Natorp and Registrar of Deeds** 1908 TS 1016).

Cf however De Wet in **LAWSA Vol 1** 120-123 who does not agree with these exceptions and expresses the view that they have developed under the influence of concepts of English law, namely that where “an authority is coupled with an interest ... or where it is part of a security” the power is irrevocable. Although Voet (17.1.17) argues that a *procuratio in rem suam* coupled with cession is irrevocable, De Wet holds the opinion that such an act does not constitute an authorised act of representation but mere cession - the cessionary (agent) acquires the cedent's right to certain personal rights.

<sup>631</sup> Cf the discussion in SALC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 29-30.

<sup>632</sup> The Commission referred to the views of on the one hand Van Jaarsveld (**Suid-Afrikaanse Handelsreg** Vol 1 Second Edition Johannesburg: Lex Patria 1984 201) recognising such exceptions; and on the other hand De Wet and Yeats (JC De Wet and AH Van Wyk **Kontraktereg en Handelsreg** Fourth Edition Durban: Butterworths 1978 107) criticising these exceptions as having been developed under the influence of concepts in English law.

<sup>633</sup> Referring to Joubert 140. See also Joubert 137.

## THE CONCEPT OF ENDURING POWER OF ATTORNEY

### Introduction

- 7.30 In the late 1980s few subjects elicited as much attention from other law reform bodies as the enduring power of attorney. This attention was the result of similar problems with regard to lack of substitute decision-making devices as are currently experienced in South Africa. Since then, these developments have been taken further and initial legislation introducing the concept has been revisited and refined.<sup>634</sup> The refinement in many jurisdictions resulted in additional safeguards being built into the process to protect the principal; and extending the concept to cover not only financial affairs but also personal welfare and health care matters. In our discussion below we deal with the extension of the concept to personal welfare and health care matters separately (see paragraph 7.167 et seq). Much of what is set out before is however of a general nature and is thus also relevant in respect of a personal welfare and health care type of enduring power.
- 7.31 The information supplied below is based on development of the concept of the enduring power in England, Scotland, Australia, Canada, New Zealand and some of the states in the United States. As the fundamental principles regarding powers of attorney in these countries basically correspond with those of South African law, the Commission is in the fortunate position to be guided by the reform done there.
- 7.32 Different terms are used in different jurisdictions for the concept of enduring power, the different types of enduring power, and the persons granting and executing the power. In the discussion below we use “enduring power of attorney” for the instrument; “principal” for the person granting the power; and

---

<sup>634</sup> See Alberta Law Reform Institute **Final Report No 88** 2003 37 et seq for a summary of measures adopted in respect of enduring powers in the Canadian and Australian jurisdictions, England, Scotland, Northern Ireland, New Zealand and California.



“agent” for the person executing the power. (The latter two in accordance with South African common law terminology.) As regards the different types of power, we are not consistent and use the terminology of the jurisdictions we refer to. At the end of the discussion, in paragraph 7.199 et seq, we address the issue of terminology and make preliminary recommendations in this regard.

## Advantages and disadvantages of the enduring power

7.33 There are several reasons for the growth in popularity of enduring powers of attorney and the response in jurisdictions that have considered its introduction has been swift.<sup>635</sup> The most important reason for this is that the enduring power provides a means to legitimising community practice: There seems to be a commonly held belief among family and carers of persons with incapacity that they are entitled to continue to operate an ordinary power of attorney despite the mental incapacity of the principal. Another major advantage is that the endurance of the power overcomes the problem of delay associated with Court proceedings for the appointment of a curator or similar mechanism (if a power was executed beforehand). An agent can act immediately upon disability to handle emergency needs without awaiting Court authorisation. Other advantages of the enduring power include the following:

- ♦ It is a device that has the virtues of privacy, simplicity and cheapness - in contradistinction to the complex, cumbersome and expensive Court procedure to have a curator appointed. It is especially useful in situations where the extent and value of the incapacitated person's assets do not warrant the greater expense associated with other mechanisms such as curatorships and trusts. Because of its relative simplicity, and the possibility of the availability of a standard form, the preparation and

<sup>635</sup>

The advantages and disadvantages of enduring powers of attorney have been recorded extensively in legal literature and in the publications of other law reform bodies. See eg van Dokkum 1997 **Southern African Journal of Gerontology** 17 et seq; Barker 1996 **De Rebus** 259 et seq; Neuman 1998 **De Rebus** 63-64; Creyke 1991 **Western Australian Law Review** 122 et seq; Schlesinger and Scheiner 1992 **Trusts and Estates** 41; Scottish Law Commission **Discussion Paper 94** 1991 247 et seq.

execution of an enduring power of attorney can generally be accomplished at minimal cost.

- ◆ It is a convenient mechanism. An agent, who has for example been managing the affairs of an elderly relative, is familiar with the affairs of the principal, is presumably trusted by the principal, and is therefore in the best position to continue the management role after the onset of incapacity.
- ◆ It is a flexible mechanism in that it can be tailored to the individual needs and wishes of the principal.
- ◆ It allows the principal to plan for the future. When a person has the foresight to make arrangements for his or her impending incapacity, it is most unsatisfactory if the law frustrates that planning. The enduring power provides a mechanism whereby a person can plan in advance for possible incapacity. The need for this concept is particularly pressing in a graying population.
- ◆ It acknowledges and emphasises the right to autonomy in allowing the principal to choose who is to manage his or her affairs. It is in fact the only way in which a person may nominate his or her own substitute decision-maker.
- ◆ It is often difficult to determine at what point a principal becomes incapable. An elderly person, with Alzheimer's disease for instance, will have periods of lucidity and periods of confusion. This can continue for years. Permitting an agent, who has been appointed with this possibility in mind, to continue to operate the power whether the principal is competent or not, avoids the need to determine when the person would be classed as legally incapable.<sup>636</sup>
- ◆ It avoids the stigma of the principal having to be declared incapable (which is often a prerequisite of other mechanisms).
- ◆ It would reduce the pressure on any alternative mechanism already in place (eg the curatorship system), or any other alternative to be

---

<sup>636</sup>

Cf however the position with regard to conditional powers discussed in par 7.41 et seq below.

developed in that it would reduce the workload of the Courts and public offices which would administer and supervise such mechanisms.

- ◆ If a suitably informal but sufficiently monitored system of enduring power of attorney could be put in place, it could encourage family and carers of persons with incapacity, who have been intimidated by the more complex curatorship system, to undertake the formal care of the principal. If this is achieved the enduring power of attorney would fulfill a social role which reflects the needs of time.

7.34 There are however also some criticism against the concept.<sup>637</sup>

- ◆ The most obvious being that legal decision-making is an ongoing and dynamic process which requires competence and capacity at the time of making a decision and that the idea of an enduring power is thus misconceived.<sup>638</sup> In this regard it is argued that there is no certainty whether the power granted still reflects the intention of the principal at the time when the power has to be executed. Opponents further point out that once a person's mental faculties are impaired to an extent that he or she no longer has legal capacity, the powers conferred in the enduring power are essentially irrevocable (since only a person who has legal capacity can revoke authority given to another to act on his or her behalf).<sup>639</sup> Although a High Court will on application by an interested party be able to annul the power if abused, it will be very difficult to know on what legal basis these powers can be revoked by the Court if the agent in good faith followed the directions set out in the power.<sup>640</sup> Proponents however argue that because the enduring power is at least a formal statement of the *past* wishes of the incapacitated person, it is less likely to be at odds with what the person would have wished to occur with

---

<sup>637</sup> See also par 7.38 below.

<sup>638</sup> Van Dokkum 1997 **Southern African Journal of Gerontology** 19; Carney 1999 **New Zealand Universities Law Review** 485.

<sup>639</sup> Van Dokkum 1997 **Southern African Journal of Gerontology** 19. See also par 7.28 et seq above on revocation.

<sup>640</sup> Van Dokkum 1997 **Southern African Journal of Gerontology** 19.

the benefit of hindsight, and that in this sense the enduring power indeed provide fidelity to values of personal choice and autonomy.<sup>641</sup> Moreover, problems related to the irrevocability of the enduring power can be dealt with to a certain extent by providing the Court or other supervisory with powers to cancel or withdraw the power under certain circumstances.<sup>642</sup> Proponents also point out that the disadvantage discussed here does not distract from the fact that the concept could provide persons with incapacity (particularly those who cannot afford the expensive procedure of a High Court application to have a curator appointed), with an inexpensive and effective means of carrying out their wishes once they have lost the capacity to do so themselves.<sup>643</sup>

- ◆ The second main objection against the concept is that current law regarding powers of attorney requires no formalities to act as safeguard once the power has been executed. In the case of the enduring power - where the principal might lack the competence to even comprehend that the agent is either exceeding or abusing his or her mandate - this could provide ample opportunity for abuse and exploitation of incapacitated principals.<sup>644</sup> This problem is however not unique to enduring powers and is also a consideration in the appointment of a curator.<sup>645</sup> Moreover, abuses are not the fault of the law but the consequences of human nature. In legal systems where the enduring power has been introduced, various effective and accessible mechanisms have been provided for in

---

<sup>641</sup> Carney 1999 **New Zealand Universities Law Review** 485.

<sup>642</sup> See par 7.138 et seq below.

<sup>643</sup> Van Dokkum 1997 **Southern African Journal of Gerontology** 19. See also the related advantages listed in par 7.33 above.

<sup>644</sup> Van Dokkum 1997 **Southern African Journal of Gerontology** 18-19. Research done in Australia in 1994 found, for instance, that of 100 applications for review (by tribunal) of enduring powers only 1 in 5 were found to be free of abuse; nearly 30% were found to have been signed by persons lacking capacity at the time; and an equivalent group were found to have been signed by a person with capacity, but were no longer being administered in the interests of that person and were thus revoked by the tribunal. Reasons for this state of affairs did not only include abuse, but also lack of adequate legislative procedures and lack of knowledge of the prescribed procedures on the side of legal practitioners and others advising persons on the execution of enduring powers (Carney **New Zealand Universities Law Review** 494).

<sup>645</sup> Van Dokkum 1997 **Southern African Journal of Gerontology** 18-19.

order to prevent or address abuse.<sup>646</sup> Experience in other systems has shown that the main remedies for abuse of enduring powers could lie in the correct choice of supervisory regime<sup>647</sup> and education of professionals involved with enduring powers.<sup>648</sup> Other remedies could include providing for proper requirements with regard to witnessing of the power; to testing of the principal for competence before executing the power; and with regard to the conduct and accountability of the agent.<sup>649</sup>

- ◆ Thirdly, the enduring power will, generally speaking, be of use only to those who can plan ahead to a time when their level of competency is severely lowered. Those who are already unable to manage their own affairs will not be able to take advantage of the concept and will probably have to fall back on existing procedures (or alternatives to be developed).<sup>650</sup> The concept will also not provide a solution in respect of those persons who postpone the granting of such power until it is too late, and those who are not prepared to leave their personal affairs in the hands of others.<sup>651</sup> Its application would therefore be limited. Proponents however submit that these arguments are not sufficient reason to deny persons with incapacity to whom this concept might be useful, with a solution. They moreover point out that advanced medical technology has lead to diagnosis of dementia taking place earlier and earlier. This has resulted in a vastly increasing need for the development of legal mechanisms to enable those who indeed wish to plan in advance to do so.<sup>652</sup>

---

<sup>646</sup> Cf the safeguards discussed in par 7.48 et seq below.

<sup>647</sup> A tribunal with guardianship as well as financial management adjudicative powers is suggested by some as being the ideal (Carney 1999 **New Zealand Universities Law Review** 494).

<sup>648</sup> Carney 1999 **New Zealand Universities Law Review** 494-495.

<sup>649</sup> Ibid.

<sup>650</sup> Atken 1988 **New Zealand Law Journal** 372; Schlesinger and Scheiner 1992 **Trusts and Estates** 38.

<sup>651</sup> Cf Carney 1999 **New Zealand Universities Law Review** 487.

<sup>652</sup> Cf par 3.9 et seq above.

- 7.35 The second and third points of criticism recorded above were also raised against the Commission's 1988 proposals for the introduction of the enduring power.<sup>653</sup>

## THE NEED TO INTRODUCE THE ENDURING POWER IN SOUTH AFRICAN LAW

- 7.36 Responses on Issue Paper 18 provided overwhelming support for the introduction of the enduring power of attorney in general. The majority of commentators submitted that it would bring welcome relief to many. Several respondents pointed out that introducing the concept in our law would in fact legalise what is in any event taking place in practice, as it is not generally known that a power of attorney ceases on incapacity. Formally introducing it would provide legal certainty and an opportunity to properly regulate the concept to protect adults with incapacity. Support for the introduction of the enduring power was however given subject to it being properly controlled by legislation to prevent the potential for abuse. Comments in this regard are further referred to under the discussion on suitable safeguards in paragraph 7.53 below.
- 7.37 There were no consensus among respondents on how broad the authority to be given to agents under an enduring power should be and whether it should be possible to grant an agent authority to decide about personal welfare and health related issues. We discuss this issue separately, at the end of this Chapter.<sup>654</sup> The preceding information and discussions are however also relevant as the form and requirements developed in other jurisdictions for the financial power and the personal welfare power are generally the same. Including personal welfare and health related matters impacts in particular on the nature and extent of the safeguards built into the process - additional safeguards are concerned to

---

<sup>653</sup> See par 3.28 above.

<sup>654</sup> See par 7.167 et seq.

be necessary to curb misuse and abuse in the case of the personal welfare power.

- 7.38 Respondents emphasised that introduction of the enduring power would not solve all problems of adults with incapacity (since it will not offer a solution to those who have suffered from mental incapacity or intellectual disability since childhood or those who postpone the granting of such power until it is too late) and cautioned against the perception that its introduction would sufficiently deal with the range of problems experienced by persons with incapacity, their families and carers. Respondents on the whole believed that the introduction of the enduring power should form part of a broader system of alternative decision-making options provided for by the law.
- 7.39 As indicated in paragraph 3.34 above, the current need and support for the enduring power is overwhelming – even more so than in 1988 when the Commission made out a strong case for introducing the concept. The concept has been in place in several other jurisdictions for the past decade or more and its proven advantages by far outweigh the perceived disadvantages. Of particular significance (and this was confirmed by the response on Issue Paper 18 and through consultation and discussions with members of the public thus far) is that introduction of the concept will legitimise community practice. The fact that family and carers currently handle the affairs of persons with incapacity notwithstanding their lack of lawful authority to do so, and thus expose themselves to personal liability, is entirely unacceptable. The Commission however shares the real concerns expressed by the public for the possibility of abuse that might be inherent in the concept. The experience of reform in other jurisdictions shows that proper safeguards could minimise this. Options for safeguards to be included in any proposed legislation are discussed at length below. The Commission will grant ample opportunity for comment, discussion and debate of possibilities in this regard before formulating its final recommendations.

#### 7.40 PRELIMINARY RECOMMENDATION

**Legislation should be enacted to enable a power of attorney to be granted which will continue notwithstanding any mental incapacity of the principal.**

### TIME FROM WHICH THE ENDURING POWER IS EFFECTIVE

- 7.41 Authorisation is a unilateral juristic act and it is generally accepted that an ordinary power of attorney is effective once the principal has brought his or her intention (that the agent must represent the principal) to the knowledge of the agent.<sup>655</sup> Although under common law a power of attorney could also be granted subject to a suspensive condition (that it will be effective only on the occurrence of an uncertain future event), most powers of attorney that are given are effective immediately upon execution by the principal.<sup>656</sup>
- 7.42 In cases where the principal is still fully able to handle his or her affairs there is no need for the agent to have immediate authority, and the principal might also be reluctant to grant another person full power with immediate effect. To deal with this several jurisdictions expressly created a mechanism permitting an enduring power to be drafted so that it becomes effective only on the occurrence of a specified contingency – usually the principal's incapacity or disability. This is referred to as a conditional (or “springing”) power of attorney.<sup>657</sup> Although the common law in many jurisdictions allowed a power of attorney to be granted

---

<sup>655</sup> Joubert 94 where the author explains that acceptance (by the agent) of the principal's intention is only relevant with regard to the question whether there is a contract between the principal and agent that regulates their relationship.

<sup>656</sup> Cf Joubert 93-94, 102; Schlesinger and Scheiner 1992 **Trusts and Estates** 40.

<sup>657</sup> Schlesinger and Scheiner 1992 **Trusts and Estates** 40; Frolik and Kaplan 257 et seq; Meyers 53 et seq; Alberta Law Reform Institute **Report for Discussion No 7** 1990 80-81; Queensland Law Reform Commission **Draft Report 1995** 100 et seq.

Frolik and Kaplan (at 257) point out that although other arrangements – such as limiting the scope of the enduring power, naming co-agents, or having different agents control different assets – can also mollify a principal's apprehension about the wide-ranging scope of power that an enduring power typically conveys, the conditional power most directly acknowledges that there is no present need for the agent's services.



subject to a suspensive condition, enduring power legislation usually contains express provision in this regard to remove any doubt.<sup>658</sup>

- 7.43 The major *advantage* of a conditional power is obviously that it can be executed by competent principals who still want to make their own decisions but are looking ahead and planning for the time when they might become incompetent. Such a power would become effective only when needed (i.e. with the onset of incapacity).<sup>659</sup> Because a determination of incapacity needs to be made before the power may be used, a conditional power might be used less casually than the usual enduring power – regarded by some as an additional advantage.<sup>660</sup>
- 7.44 The primary *disadvantage* of the conditional power is that it is unclear when it *does* take effect.<sup>661</sup> Because its operation is triggered by incapacity, that event may have to be conclusively established to a third person in order to induce such person to accept the authority of the agent.<sup>662</sup> The whole purpose of an enduring power is to facilitate management of an incapacitated individual's affairs with a minimum of hassle. Third parties (particularly financial institutions) may be uncertain that a conditional power has become effective without documentation that the triggering event in question has occurred. Disgruntled claimants might challenge an agent's actions by asserting that the conditional power has not yet taken effect. The result can be the very public exposure and humiliation of the principal that the enduring power was intended to avoid.<sup>663</sup> This problem could however be overcome by providing for additional safeguards in the relevant legislation, or by the creativity of the drafter of a conditional power: Typical

---

<sup>658</sup> See eg Alberta Law Reform Institute **Report for Discussion No 7** 1990 79-81; Queensland Law Reform Commission **Draft Report** 1995 101.

<sup>659</sup> Schlesinger and Scheiner 1992 **Trusts and Estates** 40; Meyers 53-55; Frolik and Kaplan 256-257; Alberta Law Reform Institute **Report for Discussion No 7** 1990 80-81; Queensland Law Reform Commission **Draft Report** 1995 100 et seq.

<sup>660</sup> Schlesinger and Schreiner 1992 **Trusts and Estates** 41.

<sup>661</sup> Ibid; Meyers 53-55; Frolik and Kaplan 257 et seq; Alberta Law Reform Institute **Report for Discussion No 7** 1990 80-81; Queensland Law Reform Commission **Draft Report** 1995 100 et seq.

<sup>662</sup> Ibid.

<sup>663</sup> Schlesinger and Scheiner 1992 **Trusts and Estates** 41; Meyers 53-55; Frolik and Kaplan 257 et seq; Creyke 1991 **Western Australian Law Review** 141.

formulations in this regard often involve requiring testimonials from one or more medical practitioners, sometimes practitioners who are named in the power itself.<sup>664</sup> These safeguards are discussed in paragraph 7.87 et seq below.

7.45 Some submit that an alternative to the conditional power (that also addresses a principal's hesitance in granting immediate authority to an agent) could be to delay delivery of the enduring power. This practice does not involve the creation of a conditional power. The instrument is a conventional enduring power, which takes effect immediately upon execution. Its operation is postponed by the simple device of depriving the agent of possession of the instrument until the principal becomes incapacitated. This arrangement relies on the practical reality that third parties might not be willing to deal with agents who cannot furnish written evidence of their authority.<sup>665</sup> Typically, the person who prepared the power (usually a legal practitioner) will hold it in safekeeping until such time as he or she determines that it is needed.<sup>666</sup> Although this alternative obviates the need for third parties to satisfy themselves that the power they see is in effect, it is also not free of pitfalls.<sup>667</sup> First, it is necessary to involve an additional person to retain custody of the written instrument while the power is suspended. Second, that person must, moreover, make a determination when it is appropriate to give the agent possession of the instrument, and the same difficulties will arise as those described above in respect of determination on incapacity in the case of a conditional power.

7.46 The Commission is of the opinion that the concept of the conditional power in particular constitutes a useful and practical method of managing one's affairs. The purpose of an enduring power is exactly to allow people to plan for the possibility of future incapacity. The execution of a power does not necessarily

---

<sup>664</sup> Frolik and Kaplan 258. Cf also Alberta Law Reform Institute **Report for Discussion No 7** 1990 85-90; Queensland Law Reform Commission **Draft Report** 1995 100 et seq.

<sup>665</sup> Frolik and Kaplan 258; Alberta Law Reform Institute **Report for Discussion No 7** 1990 79-80; Law Reform Commission of British Columbia **Report on the Enduring Power of Attorney** 1990 11-12.

<sup>666</sup> Ibid.

<sup>667</sup> Law Reform Commission of British Columbia **Report on the Enduring Power of Attorney** 1990 12.

mean that the principal is ready to hand authority to the agent immediately. The principal may wish to retain full control over his or her own affairs for as long as he or she is able to do so. The underlying concept of the conditional power is recognised by common law and there seems to be no in principle reason why it should not be permitted in legislation dealing with enduring powers of attorney. Moreover, draft legislation prepared by the Commission in 1988 for the introduction of the enduring power included the option of a conditional power being granted by a principal.<sup>668</sup> It is clear that legislation enabling a conditional power should also make provision for determining when the contingency has occurred. Possibilities in this regard are further discussed under triggering event safeguards in paragraph 7.88 et seq below. The Commission does not believe that the alternative of delaying delivery of the power should be regulated by legislation – principals should be free to use this alternative if they choose. It should be noted however that in law the power would exist, notwithstanding the fact that it has not been delivered – in law the fact that the power is in a person's possession is irrelevant. In other jurisdictions it seems to be accepted that principals will prefer the more formalised option of the conditional power if it is made available.<sup>669</sup>

#### **7.47 PRELIMINARY RECOMMENDATION**

**Legislation should make it possible that a power of attorney may provide that it takes effect at some future date on the occurrence of the incapacity of the principal.**

---

<sup>668</sup> Clause 2 of the proposed draft Bill (SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 52).

<sup>669</sup> Cf Alberta Law Reform Institute **Report for Discussion No 7** 1990 80.

## SAFEGUARDS

7.48 In jurisdictions where the enduring power of attorney has been introduced by legislation its specific characteristics have usually been developed and refined with regard to the need for safeguards to protect the principal against abuse.

7.49 Control and safeguards are important: Their purpose is considered to be fourfold.<sup>670</sup>

- ◆ First, to provide sufficient evidence that an enduring power has been granted.
- ◆ Second, to protect the principal against fraud and undue influence when signing the enduring power. Because a person may execute an enduring power while in a vulnerable state, measures must be provided for to protect the principal from pressure to appoint a self-interested agent.
- ◆ Third, to ensure that principals granting enduring powers properly understand the full implications of granting such powers. Lack of knowledge and understanding of the effect of an enduring power is apparently one of the greatest problems faced by other jurisdictions with regard to enduring powers.
- ◆ Fourth, to deal with the risk of mismanagement (whether negligent or fraudulent) by the agent after the principal has become incapacitated. Unlike the position under an ordinary power of attorney, the principal under an enduring power can no longer supervise decision-making by the agent and scrutinise the actions of the agent in the way that a person with full capacity can. Protective devices are thus necessary to guard against exploitation.

7.50 The nature and extent of safeguards provided for differ from jurisdiction to jurisdiction and are influenced not only by social circumstances but also by the

---

<sup>670</sup>

Alberta Law Reform Institute Report for Discussion No 7 1990 28-29, 35-36; Creyke 1991 *Western Australian Law Review* 126; Atken 1988 *New Zealand Law Journal* 368.

characteristics of the specific type of enduring power. Increased possibilities for abuse in the case of powers enabling an agent to act in respect of financial as well as personal welfare matters, and in the case of conditional powers have led legislators frequently to provide for additional safeguards. The law reform bodies of New Zealand and Alberta (Canada) both recently investigated misuse of enduring powers after the concept was introduced in both jurisdictions more than a decade ago. Both bodies indicated that misuse of enduring powers is most commonly financially related and is likely to involve the misappropriation or misapplication of money or property of the principal by the agent.<sup>671</sup> In both jurisdictions the advantages of the enduring power were realised in the majority of cases. Research however showed that agents do in fact abuse their powers in some instances. This, and the fact that under the existing systems in these jurisdictions abuse was *possible*, led both bodies to recommend the introduction of additional safeguards.<sup>672</sup>

- 7.51 As a general approach the extent of the safeguards needed is weighed against the possible influence such safeguards could have on the efficiency of the enduring power.<sup>673</sup> As indicated previously, the major factor motivating the introduction of the concept is the need for a simple and cost-effective device enabling principals to have their affairs managed by a person of their choice without professional or institutional interference. Safeguards against abuse should thus be provided but should not be so onerous that they will unduly inhibit the use of enduring powers. In Alberta (Canada), where a system of enduring powers of attorney (dealing property matters) has been in practice since 1991, the Law Reform Institute in its recent investigation on the need for additional safeguards remarked as follows:

“It is necessary to recognize that, short of a comprehensive and completely state-guaranteed system of administration of the property of incapacitated persons, there is no way to give a 100% guarantee that no

---

<sup>671</sup> Alberta Law Reform Institute **Final Report No 88** 2003 6; New Zealand Law Commission **Preliminary Paper 40** 2000 5.

<sup>672</sup> Alberta Law Reform Institute **Issues Paper No 5** 2002 3-4 and **Final Report No 88** 2003 x-xi; New Zealand Law Commission **Preliminary Paper 40** 2000 4-8.

<sup>673</sup> Alberta Law Reform Institute **Final Report No 88** 2003 6.

person who administers the affairs of an incapacitated person, including an attorney [i.e. agent] appointed by an EPA [enduring power of attorney], will abuse the powers given to that person. Reasonable safeguards against abuse should be provided, but piling safeguard upon safeguard in the hope of marginally reducing the number of cases of abuse will reduce or destroy the utility of a useful device that is highly beneficial in the great majority of cases in which it is utilized.”<sup>674</sup>

In concert with this view it seems that, broadly speaking, legislation dealing with enduring powers in other jurisdictions tend to favour simplicity over formality.<sup>675</sup>

7.52 Protection of the principal is usually obtained through introducing safeguards with regard to execution of the power; the event triggering onset of the power (in particular in the case of conditional powers); and supervision of the agent (usually by the Court or a relevant official body). In other jurisdictions the following legislative measures have been regarded as *minimum* standards in this regard.<sup>676</sup>

- ◆ Express prescription in legislation of the capacity required of the principal to execute an enduring power.
- ◆ Requiring attestation of the power by two witnesses not related to either the principal or agent.
- ◆ Requiring a statement of intention by the principal that the enduring power is to survive the principal's incapacity.
- ◆ Provision for the possibility to terminate the enduring power or to have it supervised by a Court or some other official body.
- ◆ Renunciation of authority by the agent to be impossible without notification of an official body or a Court.
- ◆ Broad standing provisions for objections to an enduring power; and
- ◆ Requiring that agents keep records which they may be called upon at any time to produce to a Court or official body - a requirement which is often

---

<sup>674</sup> Ibid 6-7.

<sup>675</sup> Cf Alberta Law Reform Institute Report **for Discussion No 7** 1990 35.

<sup>676</sup> Creyke 1991 **Western Australian Law Review** 146; Atken 1988 **New Zealand Law Journal** 368; Schlesinger and Scheiner 1992 **Trusts and Estates** 38.

spelt out in detail in informational notes accompanying the enduring power or the relevant legislation.

- 7.53 Typical safeguards, their advantages and disadvantages or standard motivation for introducing them are discussed below with reference to the development of the enduring power in other jurisdictions,<sup>677</sup> the Commission's 1988 proposals, and the comments received on Issue Paper 18. Note however that the question of safeguards was broadly and generally discussed in Issue Paper 18 - more with regard to its need and general form as with regard to preference for specific safeguards. As indicated above, respondents in general strongly emphasised the importance of building safeguards into any process introducing the concept of the enduring power in our law. Many indicated that a variety of different control measures (such as, for instance, some execution formalities; registration of the power; requiring a certain standard of behaviour from the agent; provision for termination of the power; and provision for control of the agent) would be necessary. There were however also relative consensus that control procedures should be kept as simple as possible and that the aim should be to obtain a balance between the need for protection and providing for a simple and accessible procedure. Comments by representatives of the Office of the Master of the High Court in general reflected support for the Commission's recommendations for execution safeguards in its 1988 Report. These recommendations (in particular those with regard to signing and witnessing of an enduring power) relied heavily on the formalities required in the execution of a will in terms of the Wills Act, 1953.

---

<sup>677</sup>

See eg the work done in this regard in Scotland, England, Australia, Canada and New Zealand (Scottish Law Commission **Discussion Paper 94** 1991 247 et seq; Scottish Law Commission **Report No 151** 1995 28 et seq; English Law Commission **Consultation Paper 128** 83 et seq; New Zealand Law Commission **Preliminary Paper 40** 2000 3 et seq; Alberta Law Reform Institute **Final Report No 88** 2003 4 et seq. The information below is recorded mainly with reference to a summary of the in principle position in Canada, Australia, the United Kingdom and New Zealand supplied in a recent Final Report on Safeguards Against Abuse by the Alberta Law Reform Institute dated February 2003 (Alberta Law Reform Institute **Final Report No 88** 2003 Appendix C).

### *Execution safeguards*

- 7.54 Execution safeguards are mainly aimed at ensuring that the principal has the necessary capacity to grant the enduring power; that the principal understands that the document executed will endure beyond incapacity; and that the decision to grant the power is made free from the influence of the agent.<sup>678</sup>
- 7.55 Practice regarding execution formalities in other jurisdictions varies considerably. Most commonly it requires that the enduring power must be in writing and that the principal's signature must be witnessed. Additional measures frequently include express requirements regarding the capacity of the principal to execute an enduring power (often including a lawyer's certificate); and requiring the enduring power to be in a prescribed form and/or to include explanatory information for the benefit of the principal and the agent.
- 7.56 The execution safeguards in respect of an enduring power and a conditional power generally do not differ.

### **Express requirements regarding capacity of the principal**

- 7.57 In comparable jurisdictions the generally accepted test for the capacity required of a principal to validly execute an enduring power of attorney is his or her ability to understand the nature and effect of the instrument (i.e. the ability to understand what an enduring power is and what, in a general sense, it could be used for).<sup>679</sup> This is similar to the common law test for executing an ordinary power of attorney.<sup>680</sup> Initially, in most jurisdictions this test was implied in legislation

---

<sup>678</sup> Cf Alberta Law Reform Institute **Final Report No 88** 2003 7.

<sup>679</sup> Cf Creyke 1991 **Western Australian Law Review** 131; Alberta Law Reform Institute **Report for Discussion No 7** 1990 57-59.

<sup>680</sup> Cf also the basic requirement in South African law regarding the capacity of the principal (par 7.10 et seq above) which is similar.



dealing with enduring powers.<sup>681</sup> Experience however showed that it is preferable to codify the common law principle to make it clear that, although the legislation permits an enduring power to survive the mental incapacity of the principal, it does not change the common law rule that the principal must have capacity when the instrument is executed.<sup>682</sup> It would also clear up any uncertainty that might exist on what the common law requirement for granting a power of attorney in fact is.<sup>683</sup>

- 7.58 The uncertainty in particular concerned the question whether a higher standard of capacity is not required of a principal executing a power of attorney (and thus an enduring power). Proponents of a higher standard submitted that the principal must in fact have sufficient understanding to comprehend *all* the activities that the agent might undertake when using the power - i e a more restrictive test is applied than the common law test to execute a juristic act.<sup>684</sup> Opponents however argued that the less stringent test will enable a greater number of principals (who might not qualify under the more onerous standard) to execute an enduring power.<sup>685</sup> The less stringent test (i e whether the principal is capable of understanding the nature and effect of the instrument) as confirmed in the English case ***Re K***<sup>686</sup> is now commonly accepted in comparable jurisdictions as the true test of capacity in the case of enduring powers.<sup>687</sup> The Court in this case held that the principal does not have to be capable of understanding the nature

---

<sup>681</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 57.

<sup>682</sup> Ibid.

<sup>683</sup> Ibid 57-59; Atkin 1988 **New Zealand Law Journal** 372.

<sup>684</sup> As in New South Wales, for instance, where the requirements were not set out in legislation and the Court adopted the more restrictive test (***Ranclaud v Cabban (1988) NSW ConvR*** par 55-385, 57, 548 referred to by Creyke 1991 **Western Australian Law Review** 131).

<sup>685</sup> Creyke 1991 **Western Australian Law Review** 131.

<sup>686</sup> 1988 1 *All ER* 358.

<sup>687</sup> Cf Creyke 1991 **Western Australian Law Review** 131; Alberta Law Reform Institute **Report for Discussion No 7** 1990 58. The Australian Law Reform Commission even recommended that because of doubt Australian Capitol Territory legislation should expressly spell out the test set out in ***Re K*** as the standard test (Creyke 1991 **Western Australian Law Review** 131).

and effect of all the acts the agent is authorised to perform. Rather it was sufficient if it could be said that the principal understood that –<sup>688</sup>

- ♦ the agent would be able to assume complete authority over the principal's affairs, subject to any limitation in the power itself;
- ♦ the agent would be able to do anything with the principal's property which the latter could have done;
- ♦ the agent's authority would continue even if the principal became mentally incapacitated; and
- ♦ the enduring power would become effectively irrevocable once the principal had become incapacitated.

In comment on this decision it was said that the test enunciated in the decision is consistent with the fundamental principle that legal capacity is task specific; and that incapacity in one area does not necessarily mean incapacity in another. Thus the mere fact that a person is incapable of managing his or her own affairs does not necessarily mean that the person lacks the capacity to grant a valid enduring power. The correct approach is to focus on the person's capacity to understand the specific juristic act in question: i.e. is the person capable of understanding the nature and effect of granting an enduring power?<sup>689</sup>

7.59 In fine-tuning the concept of enduring power, many jurisdictions however came to realise that in addition to expressly legislating what the required capacity of the principal is, further safeguards are needed to ensure that principals indeed have the necessary capacity when executing an enduring power. Different approaches reflected in examples from other jurisdictions include the following:

- ♦ *Expressly defining competence:* In some systems the relevant legislation contains a definition of "competence" and prescribes that only a competent person may execute an enduring power.<sup>690</sup> This could include

---

<sup>688</sup> Creyke 1991 **Western Australian Law Review** 131; Alberta Law Reform Institute **Report for Discussion No 7** 1990 58.

<sup>689</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 58-59.

<sup>690</sup> See eg the legislation proposed by the Law Reform Commission of Victoria in its **Report No 35** 1990 8-9. The relevant definition provides as follows:

"An individual is competent if he or she is at least 16 and understands the general nature and effect of an enduring power".

that the principal is required to know and understand specific listed things, including the possibility that the agent could misuse his or her authority.<sup>691</sup> To define “capacity” or “incapacity” in legislation pertaining to enduring powers is however very rare.<sup>692</sup>

- ◆ *Requiring an informational statement by the principal:* According to this practice the principal is required to certify that he or she has read the explanatory notes on enduring powers of attorney included in the enduring power (where such notes are indeed prescribed as discussed in paragraph 7.78 below).<sup>693</sup> Opponents to this practice submit that people who usually sign documents without fully understanding them, will in all likelihood not take the trouble to read any explanatory notes included in an enduring power either and will simply sign the document.<sup>694</sup>
- ◆ *Requiring a lawyer’s certificate:* Under this practice legislation usually require a lawyer to certify -
  - \* that he or she has explained the effect of the power to the principal,<sup>695</sup> and/or
  - \* that the principal understood the effect of creating the enduring power and that no fraud or undue pressure was involved in granting the power.<sup>696</sup>

In some cases the lawyer must also certify that he or she interviewed the principal.<sup>697</sup> Opponents of this practice submit that lawyers, as part of their professional duties towards their clients, ensure that clients understand the nature and effect of any legal document they are asked to sign. Wills, contracts and other complex documents of great importance

---

<sup>691</sup> As in Ontario, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 37).

<sup>692</sup> In the USA for instance, this practice is apparently followed only in New Jersey (Schlesinger and Scheiner 1992 **Trusts and Estates** 41).

<sup>693</sup> This is eg the position in England under the Enduring Powers of Attorney (prescribed Forms) Regulations 1987 (Scottish Law Commission Discussion **Paper No 94** 1991) 256.

<sup>694</sup> Cf Scottish Law Commission Discussion **Paper No 94** 1991 256-257.

<sup>695</sup> As in New South Wales (Scottish Law Commission Discussion **Paper No 94** 1991 256).

<sup>696</sup> Cf the position in Scotland, the Republic of Ireland and the proposals of the Alberta Law Reform Institute (Alberta Law Reform Institute **Final Report No 88** 2003 (x), 40).

<sup>697</sup> As in the Republic of Ireland (Alberta Law Reform Institute **Final Report No 88** 2003 40).

to clients are routinely signed without any certificate of explanation having been attached.<sup>698</sup>

- ◆ *Requiring a physician's certificate:* A registered medical practitioner is required to certify that the principal had the capacity to understand the effect of creating the enduring power and that there is no reason to suspect fraud.<sup>699</sup> Opponents of this practice submit that a medical certificate would not prevent later challenge unless it was made conclusive - which seems too extreme; that understanding the legal effects of an enduring power might not primarily be a medical issue and that an opinion in this regard should rather be expressed by a lawyer; and that requiring a medical certificate could add considerably to the expense of executing an enduring power.<sup>700</sup>
- ◆ *Requiring certification by witnesses:* In some jurisdictions witnesses to the power are required to certify that, in their opinion, at the time of signing the power the principal understood the nature and effect of the power.<sup>701</sup> Some argue that a lawyer's certificate will give better quality control than will a witness's affidavit, especially as the principal is likely to get useful advice when appearing before a lawyer.<sup>702</sup> However, providing for both alternatives would give the principal a choice.<sup>703</sup>

7.60 Commentators on Issue Paper 18 were divided on what standard of capacity should be required of a principal to validly execute an enduring power. From the perspective of the social services professions the more stringent requirement was generally favoured. The legal fraternity in general preferred that the principal should meet the requirements of legal capacity that pertain to any other juristic act. Accordingly the person should understand the consequences of entering into the enduring power of attorney and also comprehend in broad terms

---

<sup>698</sup> Cf Scottish Law Commission Discussion **Paper No 94** 1991 257.

<sup>699</sup> As in the Republic of Ireland (Alberta Law Reform Institute **Final Report No 88** 2003 40).

<sup>700</sup> Cf Scottish Law Commission Discussion **Paper No 94** 1991 258.

<sup>701</sup> Cf Alberta Law Reform Institute **Final Report No 88** 2003 37.

<sup>702</sup> Ibid 8.

<sup>703</sup> Ibid.

the activities that the agent might undertake when using the power i.e the principal must be able to comprehend the act of granting the power of attorney. We agree with the latter view. We are not aware of any justification to depart from the premise which we emphasise throughout this Paper, namely that capacity should be task specific.

- 7.61 Respondents' views were not canvassed on the measures necessary to ensure that the principal indeed had the required capacity at the time of executing the power. The Commission believes that, in accordance with the experience in other jurisdictions and with respondents' call for adequate protection of principals, a safeguard in this regard is necessary. Without the benefit of public comment at this stage, a suitable and viable option seems to require certification of capacity by a commissioner of oaths (who must be one of the witnesses to the power). Commissioners of oath will be available at police stations, magistrate's offices, post offices and various other government departments and institutions. We moreover recommend that if the power is signed by someone else on behalf of the principal, or by the principal by making a mark or putting his or her thumb print on the power, a commissioner of oaths must be involved in execution of the document.<sup>704</sup> This same commissioner could then certify as to the capacity of the principal. Attorneys are commissioners of oath and where a principal makes use of an attorney to draft the power, his or her services could be used for the necessary certification. In the interests of accessibility we debated whether certification by two competent witnesses (which could be the same persons witnessing the power) would not suffice. We however believe that the threshold of responsibility of "competent witnesses" might be too low to protect a principal against abuse in view of the fact that we provide that a competent witness could be someone of 14 years of age.<sup>705</sup> An affidavit by a commissioner of oaths will provide assurance of the facts set out in it. It goes without saying that the certificate must be attached to the power at the time of its execution.

---

<sup>704</sup> See clauses 72 and 73 of the proposed draft Bill in Chapter 8.

<sup>705</sup> See the definition of "competent witness" in clause 72 of the proposed draft Bill. This definition corresponds with that of "competent witness" in the Wills Act 17 of 1953 (sec 1). See also par 7.68 et seq below on this issue.

## 7.62 PRELIMINARY RECOMMENDATION

**Legislation should provide that for an enduring or conditional power of attorney to be valid the principal must, at the time of executing the power, understand its nature and effect. Confirmation that the principal had the required capacity must be provided by a commissioner of oaths (who must be one of the witnesses referred to in paragraph 7.73) whose certificate in this regard must be attached to the power at the time of its execution.**

### **The enduring power to be in writing and signed**

7.63 That an enduring power should be created by a written document and be signed by the principal (except where he or she is incapable of signing) are regarded in every jurisdiction we examined as absolute minimum requirements.<sup>706</sup> Apart from the fact that a written document would provide important evidence from the view of both the principal and the agent, a written document would be essential, practically speaking, if third parties are to rely on the agent's authority. Except for helping to avoid false claims that a principal has granted an enduring power, this requirement will however not be a significant safeguard against abuse.<sup>707</sup>

7.64 To avoid discrimination against principals who are incapable of signing, other jurisdictions generally allow an enduring power to be signed on behalf of a principal in his or her presence and under his or her direction.<sup>708</sup> Instances where the principal is incapable of signing will be rare as it could refer only to a principal who is mentally capable of understanding the nature and effect of executing a power of attorney while being physically incapable to sign it. To decrease the risk of abuse, it has been suggested that signing by proxy should be expressly limited in legislation to those exceptional circumstances where it is

---

<sup>706</sup> Cf also Alberta Law Reform Institute **Report for Discussion No 7** 1990 36-38.

<sup>707</sup> Ibid 4.

<sup>708</sup> Ibid 4, 36-38.

in fact justified in practice – i.e. where the donor is physically incapable of signing the instrument.<sup>709</sup> A further safeguard would be to require that the proxy be someone other than the agent, a witness to the enduring power or the spouse or partner of such agent or witness.<sup>710</sup>

7.65 Because of the important implications of an enduring power for an agent, some jurisdictions require the agent to acknowledge the appointment by signing the instrument; or by executing a prescribed form of acceptance (usually setting out the duties of the agent) which is then attached to the power.<sup>711</sup> Opponents of this practice however submit that it would be inappropriate to invalidate an enduring power simply because the agent omitted to sign or acknowledge it – especially in cases of inadvertent non-compliance with such a requirement.<sup>712</sup> They moreover submit that additional problems and complexities could arise where, for instance, more than one agent were appointed and one of them omitted to sign the power as it is unsure what effect this would have on the validity of the power.<sup>713</sup>

7.66 The justification for an enduring power to be in writing and signed by the principal is self-evident. Persons who cannot sign because of physical disability or who for some or other reason (eg illiteracy) can sign only by making a mark on the document should however not be discriminated against and granting an enduring power of attorney should also be accessible to them. Given the potential for abuse, we however believe that certain restrictions should apply in respect of who may sign on behalf of a principal. We in addition submit that allowing a principal to put his or her thumb print on the document would supply additional protection in cases where the principal is illiterate and can only sign by making a mark. We do not believe that there is sufficient justification for requiring that the agent sign the power. Creating a procedure with inherently potential problems

---

<sup>709</sup> Ibid 36-38.

<sup>710</sup> Ibid.

<sup>711</sup> Ibid.

<sup>712</sup> Ibid.

<sup>713</sup> Ibid.

such as those pointed out above would moreover not be in accordance with our aim to create measures that are as simple and accessible as possible.

#### 7.67 **PRELIMINARY RECOMMENDATION**

**Legislation should provide that an enduring power of attorney must be in writing and signed by the principal, or by someone else in his or her presence acting on the direction of the principal if he or she is physically incapable of signing it. The person signing on behalf of the principal must be a person other than the agent, a witness, or the spouse or partner of such agent or witness at the time of executing the power. “Sign” should include the making of initials and only in the case of a principal, the making of a mark or placing his or her thumb print on the document.**

#### **Witnessing**

7.68 Witnessing is a universal requirement for executing a valid enduring power of attorney. Motivation for witnessing usually given is that it confirms the identity of the principal and the absence of physical coercion; minimises the risk of forgery; impresses upon the principal the seriousness of the proposed action; and provides evidence of authenticity to third parties relying on the power.<sup>714</sup>

7.69 Different witnessing practices exist in different jurisdictions. The most common practice is that two independent witnesses must witness the principal’s signature. Doubt has on occasion been expressed on whether two witnesses would deter fraud more than one witness would and in some jurisdictions legislation requires witnessing by a single witness only.<sup>715</sup> In jurisdictions where more stringent measures are required, some or a combination of the following additional measures are used:

---

<sup>714</sup> Ibid 40.

<sup>715</sup> Ibid 41.



- ◆ *Excluding certain classes of persons:* Almost every jurisdiction excludes certain people from acting as a witness to the execution of an enduring power. The most common approach is to exclude the agent and his or her spouse or partner.<sup>716</sup> Some jurisdictions also exclude the spouse of the principal and of any person signing on behalf of the principal<sup>717</sup> and the children of the principal.<sup>718</sup> In a few jurisdictions the class of ineligible witnesses is much broader and the exclusion extends, for instance, to “all relatives” of the principal and the agent;<sup>719</sup> or to “close relatives” of the agent.<sup>720</sup>
- ◆ *Requiring witnesses to be from a prescribed class:* Measures in this regard usually refer to the judiciary or some legally related profession (eg a police officer; lawyer; justice of the peace or peace officer;<sup>721</sup> a person authorised to take an affidavit; or even a High Court judge).<sup>722</sup> In some jurisdictions this class of witness is also required to certify that he or she explained the effect of the enduring power to the principal before its

---

<sup>716</sup> Ibid 41-42.

<sup>717</sup> As in most jurisdictions in Canada (Alberta Law Reform Institute **Final Report No 88** 2003 37).

<sup>718</sup> As in Ontario, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 37).

<sup>719</sup> As in the Australian Capital Territory (Alberta Law Reform Institute **Final Report No 88** 2003 41).

<sup>720</sup> As in Northern Australia (Alberta Law Reform Institute **Final Report No 88** 2003 41).

<sup>721</sup> In South Africa “justices of the peace” are appointed by the Minister of Justice in terms of sec 1 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. Holders of certain offices (including certain officers of the South African Police Service, the Department of Justice and the Department of Correctional Services; magistrates; and certain officials attached to Parliament) are ex officio justices of the peace (sec 4 read with the First Schedule of the Act). Their powers include, amongst others, performing such duties as are conferred upon justices of the peace by any law (sec 3 of the Act).

“Peace officers” include justices of the peace, magistrates, police officials, and certain officials of the Department of Correctional Services. It also refers to persons who, by virtue of their office, fall within a category defined by the Minister of Justice by notice in the *Government Gazette* for purposes of exercising specific powers (sec 334 of the Criminal Procedure Act 51 of 1977). A wide variety of officials concerned with the administration of justice under a variety of Acts have been declared peace officers by the Minister of Justice (including eg city police officers, security officers, nature conservation officers etc). The powers conferred on them mainly relate to the commitment of statutory offences (eg the power to arrest or issue a notice to a member of the public in relation to the commission of such offence) (cf Government Notice R209 in *Government Gazette* 23143 of 19 February 2002).

<sup>722</sup> As in Manitoba, Canada; South Australia; and Western Australia (Alberta Law Reform Institute **Final Report No 88** 2003 37, 42);

execution, or that the principal has the required capacity to execute the power.<sup>723</sup>

- ◆ *Requiring attestation by a notary:* According to this practice the principal is required to sign the enduring power before a notary (who will in practice be an attorney) who must also sign the power.<sup>724</sup> Although this is an unusual requirement, it has been suggested that it will, in addition to serving as protection against abuse, serve to authenticate the signature (and possibly the authority) of the agent to a third party to whom the power is presented.<sup>725</sup>
- ◆ *Requiring a lawyer's certificate:* In some jurisdictions the witnesses (or one of them) are also required to certify to the principal's capacity. Frequently this witness is required to be a lawyer. The lawyer is usually required to certify that the principal appeared before him or her; is an adult; that the enduring power was signed by the principal on a specified date in the lawyer's presence separate and apart from the agent; and that the principal appeared to understand the enduring power. Alternatively, a witness (who is not a lawyer) is required to give an affidavit to the same effect.<sup>726</sup> Where a lawyer's certificate is required, it is usually required that the certificate must be attached to the power before the agent acts upon it at a time when the principal is incapacitated.<sup>727</sup>

7.70 Each of the above options has its advantages and disadvantages.<sup>728</sup>

- ◆ Use of legal practitioners may provide added protection to the principal – especially to the elderly who might be pressured into granting enduring powers in favour of family members or carers. But this is at the expense

---

<sup>723</sup> As in New South Wales and Queensland, Australia respectively (Alberta Law Reform Institute **Final Report No 88** 2003 41).

<sup>724</sup> As in some states in the United States (Shlesinger and Scheiner 1992 **Trusts and Estates** 43).

<sup>725</sup> Schlesinger and Schreiner 1992 **Trusts and Estates** 43.

<sup>726</sup> See the recommendations of the Alberta Law Reform Institute (Alberta Law Reform Institute **Final Report No 88** 2003 (x)).

<sup>727</sup> Ibid (xiii).

<sup>728</sup> Creyke 1991 **Western Australian Law Review** 134-135.

of administrative simplicity which is seen as one of the principal advantages of an enduring power.<sup>729</sup>

- ◆ Use of justices of the peace or similar officials avoids any significant expense, but if those officials are not easily available that degree of formality might have the effect of inhibiting the use of enduring powers. Moreover, this class of witness would not necessarily have the necessary knowledge of the law to be in a position to give a helpful explanation to the principal of the nature and consequences of an enduring power. If it is further not required that they ensure that the principal understands the enduring power, there would be no use in adopting this alternative.
- ◆ The requirement for unrelated witnesses might provide independent witnesses without increasing practical difficulties or complicating the procedure.

7.71 The Commission's 1988 recommendations reflected that it believed that the witnessing practice with regard to an enduring power should be similar to that of executing a valid will as prescribed in the Wills Act, 1953. As indicated above, representatives of the Masters' Offices generally support this view. Relevant requirements in the Wills Act (as applied to the context of the enduring power) would require the following:

- ◆ *If the power is signed by the principal or by someone else in his or her presence and by his or her direction:* The power should be witnessed by two (or more)<sup>730</sup> competent witnesses present at the same time. Such witnesses must sign the power in the presence of the principal and of each other.<sup>731</sup> (A "competent witness" is someone above the age of 14 years who is not incompetent to give evidence in a Court of law.<sup>732</sup>)

---

<sup>729</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 43.

<sup>730</sup> The Commission's 1988 proposals required two witnesses.

<sup>731</sup> The Wills Act, 1953 sec 2(1)(i), (ii), and (iii).

<sup>732</sup> Ibid sec 1.

- ♦ *If the power is signed by the principal by making a mark,<sup>733</sup> or by someone else in his or her presence and by his or her direction:* In addition to the requirements stated in the previous paragraph, a commissioner of oaths must certify that he or she is satisfied as to the identity of the principal. (The Commission's 1988 proposals required that the certification must be done by a magistrate, justice of the peace, commissioner of oaths or notary.<sup>734</sup>) The power must be signed in the presence of the commissioner of oaths and the certificate must be made as soon as possible after the power has been signed.<sup>735</sup> (It is interesting to note that the measures in the other jurisdictions referred to do not include additional requirements where someone else sign on behalf of the principal.)
- ♦ The agent and his or her spouse (or partner) would be disqualified from acting as witnesses. (According to the Wills Act a witness, or a person who signs a will on behalf of the testator, and the spouse of such witness or proxy is disqualified from benefiting from that will.<sup>736</sup>)

As indicated, representatives of the Masters' Offices who commented favoured these formalities. One of them also pointed out that should the supervisory function with regard to enduring powers be given to the Masters of the High Court, requiring execution formalities similar to those in respect of a will would have the added benefit that most officials in the Masters' Offices are familiar with the Wills Act and that it would thus not create a too heavy additional workload for these Offices.<sup>737</sup>

7.72 The Commission believes that mandatory requirements relating to attestation by a notary, or witnesses belonging to a specified class would be too cumbersome

---

<sup>733</sup> Note that we suggested in par 7.66 above that it should be required that the principal should be able to sign by making a mark or by putting his or her thumb print on the document.

<sup>734</sup> SALRC Report **on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 53.

<sup>735</sup> The Wills Act, 1953 sec 2(1)(v).

<sup>736</sup> Ibid sec 4A(1).

<sup>737</sup> See eg the comments of the Deputy Master of the High Court, Cape Town.

and are not viable in the South African context where the legislation proposed should aim to make new procedures as accessible as possible. Even requirements similar to that of the Wills Act could be cumbersome – although we acknowledge the advantages of these requirements. The absolute minimum witnessing requirement that could be imposed seems to us to be to require witnessing by a single independent witness. This approach was apparently followed in some jurisdictions in the earliest enduring power legislation.<sup>738</sup> Subsequent developments aimed at curbing abuse however frequently introduced more stringent measures. Requiring the bare minimum thus seems to be inadequate. A compromise between simplicity and protection could be to require witnessing in accordance with the Wills Act, 1953 as set out in the previous paragraph.

#### 7.73 **PRELIMINARY RECOMMENDATION**

**Legislation should require that witnessing of an enduring power should be in accordance with the witnessing requirements for the execution of a valid will. These requirements are set out in paragraph 7.71 above and basically requires witnessing by two independent competent witnesses. A “competent witness” is a person of fourteen years or over who at the time of witnessing the enduring power is not incompetent to give evidence in a Court of law. (Note that we recommend in paragraph 7.62 above that one of these witnesses must certify that the principal had the required mental capacity to execute the power. We suggest that this witness must be a commissioner of oaths.)**

#### **Statement of intent**

- 7.74 An enduring power usually contains an express statement of intention either that it is *to continue* notwithstanding any later mental incapacity of the principal (in the

---

<sup>738</sup>

See eg the proposals of the Newfoundland Law Reform Commission (Newfoundland Law Reform Commission **Report on Enduring Powers of Attorney** 1988 75); and sec 95 of the New Zealand Protection of Personal and Property Rights Act, 1988

case of an ordinary enduring power), or that it is *to take effect* on the mental incapacity of the principal (in the case of a conditional power).<sup>739</sup> An alternative approach – which is adopted in some states in the United States - would be to regard every power of attorney as an enduring power unless the principal indicates a contrary intention.<sup>740</sup> In some jurisdictions the exact form of the statement is prescribed, while in others it is provided that the enduring power should contain a clause “to the effect that” it is to continue notwithstanding incapacity.

7.75 Motivation for requiring a statement of intent is that it may imprint on a principal the extreme nature of the enduring power (i.e. that it will operate when the principal is not able to supervise its use); and will make the enduring nature of the power apparent to third parties from the face of the instrument.<sup>741</sup> This requirement is however not regarded as a very effective safeguard against abuse.<sup>742</sup>

7.76 Requiring a statement of intent is not onerous. It neither detracts from the simplicity of the enduring power concept. It is moreover regarded as one of the minimum formal requirements for the validity of an enduring power. The Commission therefore recommends that it be included in enduring power legislation.

#### 7.77 PRELIMINARY RECOMMENDATION

**Legislation should require that an enduring power of attorney contain a statement to the effect that it is to remain in force notwithstanding the subsequent incapacity of the principal or that it is to take effect on the incapacity of the principal.**

---

<sup>739</sup> Alberta Law Reform Institute **Final Report No 88** 2003 4; Schlesinger and Scheiner 1992 **Trusts and Estates** 40; Adults with Incapacity (Scotland) Act 2000 sec 15(3)(b). See par 7.41 et seq above for the position regarding the conditional power.

<sup>740</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 44.

<sup>741</sup> Ibid.

<sup>742</sup> Ibid; Alberta Law Reform Institute **Final Report No 88** 2003 4; Schlesinger and Scheiner 1992 **Trusts and Estates** 38.

**Prescribed form of enduring power and explanatory information to the principal and agent**

- 7.78 Practice in this regard varies from jurisdiction to jurisdiction: In some jurisdictions requiring that the enduring power must be in a specific prescribed (i e mandatory) form is regarded as an added execution safeguard. Proponents of this practice argue that a properly drafted prescribed form could reduce misuse and abuse by making clear to the donor and third parties the powers granted to an agent. It could moreover increase accessibility by making an enduring power easier to use – rather than having a power drafted, principals could purchase the prescribed form or copy a form printed in the legislation. This would especially be true about a pre-printed, fill-in-the-blank form.<sup>743</sup>
- 7.79 Opponents of this practice however point out that the rigidity implied in it militates against the very purpose of the concept of the enduring power: It is intended to be a flexible instrument which can be designed to meet a variety of different situations.<sup>744</sup> Moreover, drafting a prescribed form that is sufficiently adaptable, yet at the same time not too vague as to be meaningless, may well prove exceptionally difficult.<sup>745</sup> Finally, a mandatory prescribed form might also reduce accessibility in cases where individuals from rural areas might find it difficult to obtain the form.<sup>746</sup> Some jurisdictions dealt with the criticism by providing for an enduring power to *substantially be* in the prescribed form (i e it must contain at least the information in the prescribed form), or not making its use mandatory.<sup>747</sup>
- 7.80 Whether an exact form is prescribed or not, several jurisdictions require that prescribed explanatory information to the principal (and in some instances the

---

<sup>743</sup> Manitoba Law Reform Commission **Report 83** 1994 8.

<sup>744</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 48; Manitoba Law Reform Commission **Report No 83** 1994 8.

<sup>745</sup> Ibid.

<sup>746</sup> Manitoba Law Reform Commission **Report No 83** 1994 8.

<sup>747</sup> See eg the Western Australian scheme (Creyke 1991 **Western Australian Law Review** 138).

agent) should be included in the enduring power.<sup>748</sup> The purpose of this is to explain to the layperson the basic nature and effect of an enduring power.<sup>749</sup> Some jurisdictions prefer to keep these notes to a minimum, as simple as possible, and covering only issues of importance to the principal.<sup>750</sup> Others prefer the notes to be more detailed and covering a wider range of issues.<sup>751</sup> An example of explanatory notes where the information is kept to a minimum (i.e. where it is primarily for the benefit of the principal) includes the following:<sup>752</sup>

- ◆ Explaining the basic purpose of a power of attorney.
- ◆ Emphasising the extent of the agent's authority and the need to restrict that authority if necessary.
- ◆ Explaining the implications of granting an *enduring* power.
- ◆ Explaining the concept of the conditional power and giving information on granting such a power.
- ◆ Informing principals of their right to revoke the power before becoming mentally incapacitated.
- ◆ Advising principals on the necessity of obtaining the agent's consent to the appointment.<sup>753</sup>

Where the form of the enduring power is prescribed by legislation the explanatory information is usually included in the prescribed format.<sup>754</sup>

---

<sup>748</sup> See eg the recommended position in England where the Law Commission suggested that the form of the enduring power should be prescribed and include prescribed explanatory information (English Law Commission **Report No 231** 1995 115).

<sup>749</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 47-51.

<sup>750</sup> See eg the recommendations of the Alberta Law Reform Institute (Alberta Law Reform Institute **Report for Discussion No 7** 1990 49-50).

<sup>751</sup> See eg the position in England and Northern Ireland where the notes also aim to summarise the registration requirements contained in the legislation, the issue of appointment of joint agents and the agent's right to claim remuneration and reimbursement of expenses (Alberta Law Reform Institute **Report for Discussion No 7** 1990 49-50).

<sup>752</sup> See eg the proposals of the Alberta Law Reform Institute (Alberta Law Reform Institute **Report for Discussion No 7** 1990 50).

<sup>753</sup> Cf New Zealand Law Commission **Preliminary Paper 40** 2000 16-17.

<sup>754</sup> See eg the Western Australian scheme (Creyke 1991 **Western Australian Law Review** 138). Also in England and Northern Ireland explanatory information to be included in the enduring power is prescribed by regulation (Alberta Law Reform Institute **Final Report No 88** 2003 39-40).



7.81 In view of the need expressed in Issue Paper 18 for accessible and affordable measures, the Commission believes that a prescribed form should at least be made available through legislation for those persons who do not have the means to make use of legal or other expert advice to assist them to draft an enduring power. Its use should however not be mandatory. For the same reason we believe that the prescribed form should include simple and easily understandable explanatory notes. We believe however, that explanatory notes should not be linked exclusively to the prescribed form of enduring power but that every enduring power (whether in the prescribed form or not) should be required to include prescribed explanatory notes setting out the essential nature and effect of the instrument.<sup>755</sup> We believe that these notes should contain basic information primarily for the benefit of the principal. In view of our recommendation in paragraph 7.66 above that an agent need not sign the enduring power, we submit that it will serve no purpose to include notes on the agent's responsibilities in explanatory notes attached to the power. More expansive information (including information for the benefit of the agent) could be made available informally to the public by the Department of Justice.

7.82 **PRELIMINARY RECOMMENDATION**

**Legislation should require that for an enduring power of attorney to be valid it must –**

- ♦ **be in the prescribed form or substantially in the prescribed form;  
and**
- ♦ **include, at the time of its execution by the principal, the prescribed explanatory information.**

---

<sup>755</sup>

Cf eg Alberta Law Reform Institute **Report for Discussion No 7** 1990 48.

### **Non-compliance with formalities**

- 7.83 A particular difficulty with regard to execution formalities is that, unless some form of relief is provided, an ignorant or inadvertent failure to comply with a specific formality will defeat the intentions of a principal who has the necessary capacity, who understands the enduring power and who wants to appoint an agent in terms of the power.<sup>756</sup>
- 7.84 In some jurisdictions it has been suggested that an enduring power should not be invalid by reason of non-compliance with any formalities prescribed other than the requirements of writing and signature. It is believed that a Court should have the power to “cure” technical defects in a document by looking at the intention of the principal rather than at the document itself.<sup>757</sup> It has, for instance, been recommended by law reform bodies that an enduring power should not be invalid under these circumstances if the Court is satisfied “by clear and convincing evidence that the agent signed and understood the power”;<sup>758</sup> or “that the persons executing it intended it to create an enduring power”.<sup>759</sup>
- 7.85 The Commission agrees that pure technical grounds should not in itself invalidate an enduring power. It may be that the principal will have suffered irreversible loss of capacity by the time the defects are discovered (or the power is rejected if registration is, for instance, required as a triggering event in the case of a conditional power). In such a case a valid enduring power can no longer be executed.

---

<sup>756</sup> Alberta Law Reform Institute **Final Report No 88** 2003 8.

<sup>757</sup> English Law Commission **Report No 231** 1995 127.

<sup>758</sup> Alberta Law Reform Institute **Final Report No 88** 2003 8.

<sup>759</sup> English Law Commission Report **No 231** 1995 127.

## 7.86 PRELIMINARY RECOMMENDATION

Legislation should provide the Court with the power to declare that a document not in the prescribed form shall be valid if the Court is satisfied that the persons executing it intended it to create an enduring power.

### *Triggering event safeguards*

- 7.87 Triggering event safeguards are aimed at conclusively establishing or indicating when the agent may start validly acting under an enduring power. They are particularly relevant in the case of conditional powers. As indicated previously, a conditional power comes into force only when the contingency provided for in the enduring power - usually the incapacity of the principal - occurs.<sup>760</sup> The practices listed below are examples of mechanisms used (individually or in combination) as triggering event safeguards in other systems. Our preliminary recommendations are given after discussing all three possibilities.

### **A declaration of occurrence of event**

- 7.88 This method usually consists of requiring testimonials from certain persons on the state of the principal's capacity, for instance:
- ◆ Requiring a written declaration from a *person or persons named* in the power for this purpose (usually a person whom the principal trusts) that the incapacity of the principal has occurred.<sup>761</sup> Where this is done it might be advisable to provide for naming alternate individuals (as the person might not be called upon to act for many years after the instrument is drafted, and might not be available any longer); and to provide that the

---

<sup>760</sup> See par 7.41 et seq above.

<sup>761</sup> As in Alberta, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 5).

same person may not certify incompetence and act as agent because of a possible conflict of interest.<sup>762</sup>

- ◆ Requiring concurring written declarations from *two medical practitioners* that the incapacity of the principal has occurred. Often this requirement is used as an alternative to the former (i.e. where no person is named in the power to declare that the triggering event has occurred, or where the person named has died or is unable to act, the principal is protected against unwarranted declarations of incapacity by the requirement that two medical practitioners must concur in the decision before the power can take effect).<sup>763</sup> This requirement is considered by some as the easiest and most conclusive manner by which to establish the incompetence of the principal.<sup>764</sup>
- ◆ Requiring positive assessment of the principal's incapacity from an "assessor" (who is of a class prescribed by regulation).<sup>765</sup>
- ◆ Requiring a *Court order* - on application by a relevant public office, nearest relative or interested person - that the triggering event has occurred.<sup>766</sup>
- ◆ Requiring a certificate of incapacity under *mental health legislation*.<sup>767</sup>

7.89 It should be noted that the effect of the declaration-mechanism (whichever of the above is used) is that the power will come into effect upon the written declaration of the named person or body, and will not depend on whether such person or body has made a "correct" determination that the contingency has occurred. The principal in effect would be delegating to another person (or body) the power to make the power of attorney effective. Third parties would not have to be concerned with questions such as whether the principal was "really competent".

---

<sup>762</sup> Cf Schlesinger and Scheiner 1992 **Trusts and Estates** 41.

<sup>763</sup> As in Alberta, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 5).

<sup>764</sup> Cf Schlesinger and Scheiner 1992 **Trusts and Estates** 41, 43.

<sup>765</sup> As in Ontario, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 5).

<sup>766</sup> As in Manitoba, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 38); Schlesinger and Scheiner 1992 **Trusts and Estates** 41.

<sup>767</sup> Ibid.

The true position is clearly set out by the Law Reform Commission of British Columbia in its analysis of this type of legislation.<sup>768</sup>

“It is not the occurrence of the triggering event that causes the power of attorney to take effect – it is the proof of that event in a particular fashion. If the person named in the instrument declared in writing that the contingency has occurred then the power of attorney takes effect whether or not the declaration was correct. It is the declaration that is critical.”

- 7.90 In deciding on an appropriate declaration mechanism two competing considerations have to be kept in mind: First, the need to protect the principal against an unwarranted declaration of incapacity and consequent loss of power to manage his or her affairs – which suggests the need for strong safeguards. And second, the need to protect the principal against his or her own incompetence, which may result in mismanagement or dissipation of such principal's property – which suggests that procedures causing unnecessary delays should be avoided.<sup>769</sup>

### **Registration of the enduring power**

- 7.91 According to this practice the agent is usually required to register the enduring power with the Court (or a tribunal or public office) (sometimes with notice to the principal and certain prescribed persons), with provision for objection on grounds of prematurity, fraud, or unsuitability of the agent.<sup>770</sup> Application for registration can usually be made only when the principal is or is becoming incapable and the Court usually has broad powers to make orders or determine questions regarding the enduring power.<sup>771</sup> In the latter sense registration could also fulfill a supervisory purpose.<sup>772</sup>

---

<sup>768</sup> Law Reform Commission of British Columbia **Report on the Enduring Power of Attorney** 1990 17.

<sup>769</sup> Cf the Alberta Law Reform Institute's reasoning in its **Final Report No 88** 2003 20.

<sup>770</sup> As eg in England (Alberta Law Reform Institute **Final Report No 88** 2003 39).

<sup>771</sup> As eg in England, Scotland, the Republic of Ireland and Northern Australia (Alberta Law Reform Institute **Final Report No 88** 2003 39-41).

<sup>772</sup> See the discussion in par 7.115 et seq below.

7.92 The requirement of registration usually implies that the agent has very limited or no powers prior to registration and gains *full* authority only when the application for registration has been accepted by the Court or a relevant official office.<sup>773</sup> It could further entail that the principal thereafter has no capacity - even though he or she may in fact have capacity.<sup>774</sup> Registration in this sense thus fails to take into account the likelihood of partial or fluctuating incapacity. The principal losing all capacity on registration may however give certainty to third parties.

7.93 Arguments for registration include the following:

- ◆ Registration of an enduring power brings the document into the public domain. The advantage of this is that it might discourage agents from abusing their powers – especially those agents who would have abused their powers had such powers remained in the private domain.<sup>775</sup>
- ◆ Registration serves to provide a point of reference for those persons who have queries or concerns about the status of a particular document. As registration in this sense serves to enable proof of the power and establishes its validity, certain jurisdictions where registration has been rejected require the enduring power to be filed in a Court office or recorded in a specific public office.<sup>776</sup> Experts suggest that if no provision is made for the power to be registered or filed, alternative measures should be available to enable proof of the power.<sup>777</sup> Related to this is the argument that registration can serve as a point of departure from which allegations regarding misuse could be based: If there is no record of an

---

<sup>773</sup> Cf Atken 1988 **New Zealand Law Journal** 368.

<sup>774</sup> Cf the British model before recommendations for reform as discussed in the English Law Commission **Consultation Paper No 128** 86 et seq.

<sup>775</sup> Cf English Law Commission **Report No 231** 1995 117; comments of Ms Margaret Meyer submitted to the Project Committee at its meeting on 1 December 2003.

<sup>776</sup> The United States Model Act (see par 7.3 above) for instance requires filing of an enduring power (Creyke 1991 **Western Australian Law Review** 128).

<sup>777</sup> Cf Josling 31-32.

enduring power of attorney how would the supervisory authority deal with alleged misuse of enduring powers of attorney?<sup>778</sup>

- ◆ Registration distinguishes enduring powers of attorney from ordinary powers of attorney (as no formalities are required for ordinary powers of attorney) and ensures that the requirements for enduring powers of attorney are in fact complied with.<sup>779</sup> This argument is based on the premise that an enduring power of attorney should at least be required to comply with more stringent execution formalities than an ordinary power of attorney because of its implications after the principal has become incapacitated. If there is no registration requirement there will be no control over whether the prescribed execution formalities (eg that the enduring power must be signed and witnessed in a prescribed way) have been complied with.
- ◆ Finally, registration deals with the practical problems that can arise where the principal grants several enduring powers: Although a principal can make as many powers as he or she wishes, different agents might be given the power to deal with the same matters. In the case of ordinary powers of attorney the only brake on such practice is the good sense of the principal or caution on the part of agents. As some enduring powers will be executed by principals when they face a decline in their faculties, good sense may be lacking. It is also a time when unscrupulous people might seek to take advantage of a principal's lack of competence.<sup>780</sup>

#### 7.94 Arguments against registration include the following:

- ◆ In jurisdictions where registration was required, the numbers who registered enduring powers were low. People either did not go to the trouble of registering, or, where the power was registered, third parties

---

<sup>778</sup> Comments of Ms Margaret Meyer submitted to the Project Committee at its meeting on 1 December 2003.

<sup>779</sup> Ibid. Cf the requirements for an ordinary power of attorney as discussed in par 7.16 above.

<sup>780</sup> Creyke 1991 **Western Australian Law Review** 128.

failed to check the register. It is therefore regarded by some as a waste of time and resources.<sup>781</sup>

- ◆ Failure to register (if it were a requirement) would irrevocably invalidate the power and frustrate the expressed intention of the principal. This would create considerable risks for an incompetent principal.<sup>782</sup>
- ◆ Registration is problematic because of its formality and possible cost - which might deter the public from utilising enduring powers.<sup>783</sup>
- ◆ Where registration implies recording of the enduring power in a public registry, objections to registration requirements might be expected on grounds of privacy infringement. The requirement would therefore have to be shaped so that it would convey sufficient information to those who need to know, while protecting the essential privacy of the principal and other persons involved.<sup>784</sup>
- ◆ In several jurisdictions where registration was rejected, enduring powers of attorney schemes appear to be working satisfactorily without this additional safeguard.<sup>785</sup>

7.95 It would seem that, generally speaking, registration is not a popular requirement (except as regards the well-established requirement for the registration of enduring powers of attorney when dealing with the transfer of land).<sup>786</sup> In some jurisdictions where the registration requirement has been rejected, less onerous protective mechanisms have been adopted. These include focusing on defining and explaining the standards of behaviour of agents in prescribed explanatory

---

<sup>781</sup> Ibid 129.

<sup>782</sup> Ibid.

<sup>783</sup> Carney 1999 **New Zealand Universities Law Review** 491.

<sup>784</sup> Cf Alberta Law Reform Institute **Final Report No 88** 2003 21.

<sup>785</sup> Eg in Ontario and Manitoba, Canada (Creyke 1991 **Western Australian Law Review** 129).

<sup>786</sup> In several legal systems, law reform bodies did recommend registration but it was not implemented in subsequent legislation (eg in Ontario and Manitoba, Canada; Tasmania and Victoria, Australia) (Creyke 1991 **Western Australian Law Review** 128). However, in both England and Scotland where reform has been effected recently, the requirement of registration has been retained (English Law Commission **Report No 231** 1995 119; Adults with Incapacity (Scotland) Act 2000 sec 19).



notes attached to the enduring power and supplementing this with giving a relevant official body (rather than a Court), an advisory and supervisory role.<sup>787</sup>

7.96 It is interesting to note that in the course of the law reform on curbing abuse of enduring powers of attorney recently done in Alberta (Canada) and New Zealand (to which we refer in paragraph 7.50 above), both jurisdictions refrained from introducing registration as additional safeguard. The reasons advanced for this were mainly the following:<sup>788</sup>

- ◆ The possible costs inherent in registration (departing from the premise that a registration free will be payable for spot audits to be done by a public registry).
- ◆ The possible intrusion into privacy which registration might entail.
- ◆ Lack of effectiveness of a registration requirement if it is not in addition ensured that registration *indeed takes place* (eg by providing that no one is entitled to deal with an agent unless the enduring power of attorney bears a stamp of registration).
- ◆ Registration's possible inhibiting effect (which was considered not to justify its possible benefits).

In contradistinction to this, registration was retained as a requirement and introduced as a requirement in recent law reform on enduring powers of attorney done in England and Scotland respectively. The reasons advanced for retaining and introducing it were mainly the following:<sup>789</sup>

- ◆ Registration of an enduring power will bring the document into the public domain.
- ◆ It will provide a point of reference for those who have queries or concerns about the status of a particular document.
- ◆ It will distinguish enduring powers form ordinary powers of attorney.

---

<sup>787</sup> As suggested eg by the Australian Law Reform Commission in 1988 for introduction in the Australian Capitol Territory (Creyke 1991 **Western Australian Law Review** 130).

<sup>788</sup> Alberta Law Reform Institute **Final Report No 88** 2003 22; see also New Zealand Law Commission **Preliminary Paper 40** 2000 7-8.

<sup>789</sup> English Law Commission Report **No 231** 1995 117; Scottish Law Commission **Report No 151** 1995 34-36.

The English Law Commission moreover emphasised that the registration requirement proposed is directed only towards those principals who need it (i.e. registration is required to take place only once the principal becomes incapacitated). An agent may thus act under an enduring power of attorney while the principal is still mentally capable without having the power registered.<sup>790</sup> Both law reform bodies also emphasised that the registration requirement proposed by them is a simple and straightforward procedure.<sup>791</sup>

### **Notice by the agent of intention to act**

- 7.97 In some systems requiring the agent to give notice of his or her intention to act under the power has been introduced as alternative to registration; or as additional safeguard (in addition to registration) against abuse in the case of both conditional and continuing powers.<sup>792</sup>
- 7.98 This practice entails that *when the principal becomes incapacitated* and the agent intends to act under the power (in the case of a conditional power), or continue to act (in the case of a continuing power), he or she is required to give notice of this intention to specified persons designated by the power to receive the notice.<sup>793</sup> The notice must be given within a prescribed time.<sup>794</sup> Examples of requirements regarding the persons to receive the notice are the following:
- ◆ Notice should be given to at least a specific minimum number of people some or which must include specified family members.<sup>795</sup>

---

<sup>790</sup> English Law Commission Report **No 231** 1995 118.

<sup>791</sup> Ibid 117; Scottish Law Commission **Report No 151** 1995 34.

<sup>792</sup> Cf the proposals of the Alberta Law Reform Institute, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 (x)).

<sup>793</sup> Ibid (xiv).

<sup>794</sup> In Alberta, Canada it was recommended that the agent must give the notice before or within 30 days after exercising any power under the enduring power (Alberta Law Reform Institute **Final Report No 88** 2003 (xiv)).

<sup>795</sup> In the Republic of Ireland it is required that notice should be given to at least two people, including the living-together spouse or, if none, to a child or alternatively another relative of the principal (Alberta Law Reform Institute **Final Report No 88** 2003 40).

- ◆ Notice should be given to every family member whose whereabouts are, or ought reasonably to be known to the agent; as well as to any person designated in the enduring power to receive such notice. In this instance “family member” includes a spouse, adult interdependent partner or parent of the principal, or an adult child, brother or sister of the principal.<sup>796</sup>

7.99 Certain jurisdictions recognise that not all families are united and thus allow the principal to in the enduring power exclude a specific family member/s from receiving the notice (in particular where it is required that *all* family members be notified). In Alberta, Canada the Law Reform Institute recommended that where the principal excludes *all* family members without appointing another person or persons to receive the notice, the proposed safeguard will not be operative (thus acknowledging the autonomy of the principal, in spite of the possibility that an agent may persuade a principal to exclude all family members). Where a principal does not have any family members to perform protective functions, another person can be named. Also in this regard, the Institute considered it unduly intrusive to compel such a principal to indeed name another person.<sup>797</sup>

7.100 The Commission in 1988 recommended a combination of the first two methods referred to above (registration of the enduring power subject to a declaration of occurrence of event) before an agent may validly act under an enduring power. The Commission specifically recommended the following.<sup>798</sup>

- ◆ After having gained knowledge of the principal's incapacity, the agent may not continue to act upon the power (or commence to act in the case of a conditional power) if it has not been filed for registration with the Master of the High Court, and been endorsed by the Master.

---

<sup>796</sup> As proposed by the Alberta Law Reform Institute (Alberta Law Reform Institute **Final Report No 88** 2003 14-15).

<sup>797</sup> Ibid 13.

<sup>798</sup> SALRC **Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 53-54.

- ◆ Together with the power the agent must file an affidavit (stating that the principal is in the agent's opinion incapable of managing his or her affairs and referring to the facts on which this opinion is based); and a report of at least one medical practitioner (dated no more than seven days before the filing) dealing with the mental condition of the principal and the probable duration of that condition.
- ◆ The Master may before registering the power call for further evidence regarding the principal's mental condition.

These recommendations formed the basis of the supervisory framework established in the 1988 recommendations as it was further recommended that the Court (as well as the Master) has the power to withdraw and cancel the registration of the power under certain circumstances.<sup>799</sup>

7.101 Issue Paper 18 did not canvass respondents' views on specific triggering event safeguards. Some representatives of the Masters' Offices and a few members of the legal fraternity however offered support for the Commission's 1988 recommendations for registration set out in the previous paragraph.<sup>800</sup> A single commentator from the legal fraternity however expressed the view that a proper finding that the principal is incapacitated should act as triggering mechanism and that this should be followed by a formal appointment of the agent under an enduring power.<sup>801</sup> Where views were indeed expressed by the general public and representatives of the social and medical professions it echoed the need for procedures to be as simple and as accessible as possible. Those from the legal fraternity who were in favour of registration however pointed out that although the enduring power is intended as a simplified procedure, the broad public has a general interest in the existence of such a power and it should therefore be registered.

---

<sup>799</sup> Ibid 53-57.

<sup>800</sup> See eg the comments of Ms Margaret Meyer; the Deputy Master of the High Court, Cape Town; and the Johannesburg Bar Council.

<sup>801</sup> Comments of the General Council of the Bar of South Africa.

7.102 Not having canvassed views on this aspect previously, and in view of the support for its previous recommendations referred to above, the Commission at this stage tends to abide in principle by the proposals in its 1988 report. We believe that the arguments for registration referred to in paragraph 7.93 above provide strong motivation for introducing registration. We expect that there will be persons and bodies who do not agree with us, but submit that neither the execution formalities nor the registration requirement we propose impacts on the independence of the agent or the autonomy of the principal after registration. After registration the agent can operate without interference as it is clear from what follows that we do not propose obligatory submission of accounts or any further obligatory requirements or formalities. The registration requirement proposed is moreover fairly straightforward and simple and does not involve registration with a Court of law. We propose in addition, that the affidavit required in respect of the mental condition of the principal should be by a person named in the power or alternatively by a medical practitioner. This proposed practice would be in line with emphasising the principal's right to autonomy (by naming a person to indicate the stage at which the power could become effective) while at the same time providing for circumstances where such person (eg the relatives or carer of the principal) is unable or unwilling to declare that the principal has become incapacitated. Moreover, minimal (or no) costs would probably be involved in registration with the Master of the High Court. We believe that registration would be useful: it would publicly record the existence of an enduring power and would publicly identify the agent. The latter, especially, is important for the protection of both the principal as well as the agent. However, strong views have been expressed in other jurisdictions by law reform bodies that these reasons are not sufficient to make registration mandatory.<sup>802</sup> In some jurisdictions where registration was rejected, notice by the agent to specified persons is required as the alternative triggering event safeguard.<sup>803</sup> In others where more stringent methods are preferred, registration as well as notice to

---

<sup>802</sup> See eg Alberta Law Reform Institute **Report for Discussion No 7** 1990 534 et seq.

<sup>803</sup> See eg the recommendations of the Alberta Law Reform Institute in its latest report on the matter (**Final Report No 88** 2003 11).

specified persons is required.<sup>804</sup> At this stage we believe that the latter might be too cumbersome, whereas the former might be too informal. We would welcome comment on our preliminary recommendation below.

#### 7.103 **PRELIMINARY RECOMMENDATION**

**Legislation should provide that after having gained knowledge of the principal's incapacity, the agent may not continue to act upon an enduring power or commence to act on a conditional power if it has not been filed for registration with the Master of the High Court, and been endorsed by the Master. Together with the power the agent must file -**

- ♦ **an affidavit by a person named in the power (which person may be the agent) dated not more than seven days before the filing of the power stating that the principal is in the opinion of such person incapacitated in accordance with the definition proposed in paragraph 4.28 (clause 4 of the proposed draft Bill). The affidavit must refer to the facts on which the opinion is based; or**
- ♦ **alternatively, the agent can file a report by a medical practitioner to the same effect.**

**The Master should be enabled to, before registering the power, call for further evidence regarding the principal's mental condition.**

### ***Supervisory and accounting safeguards***

7.104 The advantage of an enduring power is that it enables an honest agent to look after the affairs of the principal efficiently. The downside could be that it enables a dishonest agent to misuse and abuse his or her powers – which of course apply to any device under which one person has control of money or property of

---

<sup>804</sup>

See eg the recommendations of the English Law Commission (English Law Commission **Report No 231** 119-120); and the Adults with Incapacity (Scotland) Act 2000 sec 19.

another.<sup>805</sup> Supervisory safeguards are aimed at generally ensuring that agents will not abuse their powers.

7.105 In many jurisdictions a specific public office or administrative tribunal is given powers of supervision and control of agents acting under powers of attorney.<sup>806</sup> In others the supervision and control is left to the Courts.<sup>807</sup> In both instances typical supervisory powers relate to termination of the power; variation or substitution of the terms of the power; the appointment of substitute agents; review of particular decisions of the agent; and providing the agent with advice and directions in general.<sup>808</sup> In both instances provision is usually made for specific procedures to be followed to protect the interests of the principal (for instance, notice must be given to a wide range of persons of any application to the Court or tribunal, and a legal representative must be appointed to represent the principal).<sup>809</sup> Some research suggests that the most practical and effective mechanisms for dealing with abuse of enduring powers is through provision of easy access to either a specific tribunal or a public office (in contradistinction to the Courts).<sup>810</sup> It is believed that the choice of forum may prove crucial to the success or otherwise of a system of enduring powers of attorney.<sup>811</sup> In jurisdictions where control over enduring powers was left to the Courts in addition to other supervisory bodies, the Courts (which are expensive to access), are rarely relied on for this purpose.<sup>812</sup>

7.106 Examples of typical supervisory and accounting safeguards include the following:

- ◆ Requiring authorisation of more than one agent.

---

<sup>805</sup> Alberta Law Reform Institute Final **Report No 88** 2003 10.

<sup>806</sup> See eg the Western Australian model as discussed by Creyke 1991 **Western Australian Law Review** 138.

<sup>807</sup> See eg the New Zealand system (Atkin 1988 **New Zealand Law Journal** 370-371).

<sup>808</sup> Creyke 1991 **Western Australian Law Review** 138; Atkin 1988 **New Zealand Law Journal** 370-371.

<sup>809</sup> Cf Atkin 371.

<sup>810</sup> Carney 1999 **New Zealand Universities Law Review** 492.

<sup>811</sup> Ibid 494.

<sup>812</sup> Ibid.

- ◆ Requiring the agent to provide security to the satisfaction of a Court, public office or tribunal.
- ◆ Requiring enduring powers to be registered.
- ◆ Compelling the agent to act under an enduring power and requiring a specific duty of care from the agent.
- ◆ Requiring the agent to periodically submit accounts (to, for instance, specific relatives of the principal, a public office, or the Court).
- ◆ Providing the agent with the opportunity to call for advice.
- ◆ Providing for revocation and termination of the power.

It is clear that some of these safeguards would depend on enabling the Court, a public office or other tribunal to play a supervisory role. As indicated previously, requiring the agent to keep records or account for his or her actions, providing for termination of the power, and providing for objections to the power are frequently regarded as minimum supervisory requirements.<sup>813</sup>

7.107 Different views were expressed by respondents on Issue Paper 18 on the issue of what a suitable and effective supervisory framework for the enduring power of attorney would be. We already indicated in Chapter 6 that we are in favour of the Master of the High Court fulfilling this role with the High Court as supervisor of last resort. At this stage we envisage that the availability of the enduring power as a means of advanced decision-making should form part of a broader scheme of substitute and assisted decision-making measures. It would therefore be preferable if the same supervisory framework could be used. This view is in concert with the Commission's 1988 recommendations which endowed the Master (with the Court as last resort) with the supervisory powers in respect of enduring powers of attorney.

---

<sup>813</sup>

See par 7.52 above.



### **Requiring more than one agent**

7.108 To reduce the risk of mismanagement and exploitation, recommendations were made in certain jurisdictions requiring a principal to appoint a minimum of two agents who would have to act “jointly” (i e in concert with each other).<sup>814</sup> It was submitted that each agent would guard against abuse of the enduring power by the other by checking on the conduct of the other.<sup>815</sup> Others have strongly rejected this practice arguing that such a requirement would interfere with the autonomy of the principal; would be cumbersome; would introduce additional complexity and inconvenience; and would create unnecessary potential for disagreement.<sup>816</sup> Moreover, it is not unlikely that one agent will delegate much power to the other, so that there will still be potential for abuse.<sup>817</sup> Where more than one agent is appointed, the possibility of conflict is obvious and measures will moreover have to be enacted to indicate how such conflict should be resolved.<sup>818</sup>

7.109 We believe that the disadvantages pointed out above clearly outweigh the advantages of compelling a principal to appoint more than one agent and is not in favour of recommending that the proposed legislation should include such a requirement.

### **7.110 PRELIMINARY RECOMMENDATION**

**We recommend that any proposed legislation should not contain a requirement for mandatory joint agents to be appointed by a principal.**

---

<sup>814</sup> It is allowed under common law that a principal can together appoint two (or more) persons as agents to execute the same transaction (*Kinemas Ltd v Berman* 1932 AD 246; Joubert 103-104; De Villiers and Macintosh 120-123).

<sup>815</sup> Recommendations in this regard by the English Law Commission were however not implemented (Alberta Law Reform Institute **Report for Discussion No 7** 1990 62).

<sup>816</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 62, and **Final Report No 88** 2003 20.

<sup>817</sup> Cf Alberta Law Reform Institute **Final Report No 88** 2003 20.

<sup>818</sup> See eg the New Zealand model as discussed by Atkin 1988 **New Zealand Law Journal** 371-372; cf also English Law Commission **Consultation Paper No 128** 1992 99-100.

### **Requiring that the agent provides security**

- 7.111 A requirement that an agent under an enduring power provides security for the proper execution of his or her duties is regarded by some as a possible safeguard.<sup>819</sup> In practice this can be constructed by, for instance, giving the supervisor discretionary powers to decide on whether security should be furnished and making the registration of the power subject to the provision of security.<sup>820</sup>
- 7.112 In most jurisdictions requiring security is not used as a safeguard against abuse of the principal's interests. The additional cost and inhibiting effect of requiring security are apparently regarded as disadvantages which would distract greatly from the cost-effectiveness of enduring powers and would be likely to derogate from their use.<sup>821</sup>
- 7.113 The Commission's 1988 recommendations provided that the Master of the High Court may require an agent to furnish security for the amount determined by the Master unless the agent has been exempted from this under the enduring power.<sup>822</sup> The Master may also reduce or discharge any security given, or require that the agent furnish additional security.<sup>823</sup> According to these recommendations registration of the power should be subject to furnishing such security (where it is required). Single commentators on Issue Paper 18 (mostly from the legal fraternity) who expressed themselves on this issue held different views: On the one hand the discretion of the Master to require security from the agent was seen as necessary<sup>824</sup> while others submitted that it would introduce an

---

<sup>819</sup> See eg the 1988 proposals of the South African Law Commission as discussed in par 7.113 below. These proposals were not implemented.

<sup>820</sup> Ibid.

<sup>821</sup> Cf Alberta Law Reform Institute **Final Report No 88** 2003 23.

<sup>822</sup> **SALRC Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 54-55.

<sup>823</sup> Ibid.

<sup>824</sup> See eg the comments of Ms Margaret Meyer.

unnecessary complexity.<sup>825</sup> Our preliminary view, again with the aim of providing a simple and accessible procedure, is that security should not be obligatory. We agree with the view that its cost and inhibiting effect could detract from the cost-effectiveness of enduring powers and could derogate from their use. There may however be circumstances where security is necessary to protect the interests of the principal. We believe that the Master would be in the best position, when registering an enduring power, to ascertain whether security is necessary in a specific case.

#### 7.114 **PRELIMINARY RECOMMENDATION**

**It is recommended that legislation should provide that, except where the principal has exempted the agent in an enduring power of attorney from furnishing security, the Master should have discretion to require security where it is necessary in a specific case. The Master should also be able to reduce or discharge any security given or require that the agent furnishes additional security.**

#### **Registration of an enduring power**

7.115 Registration is discussed in paragraph 7.91 et seq above under triggering event safeguards. Where registration is introduced to fulfill a supervisory purpose in addition to being a triggering event safeguard, the supervisor (usually the Court or other public office or tribunal) is generally granted broad powers in respect of enduring powers, including the power to revoke or terminate an enduring power.<sup>826</sup>

7.116 The advantages and disadvantages of registration discussed under triggering event safeguards also apply to its utilisation as a supervisory safeguard. It is

---

<sup>825</sup> Comments of the Society of Advocates of KwaZulu-Natal.

<sup>826</sup> Eg the registration schemes in England, Scotland and Ireland (Alberta Law Reform Institute **Final Report No 88 2003** 22).

indicated above that for various reasons registration is not a popular requirement.<sup>827</sup>

- 7.117 As indicated in the preliminary recommendation in paragraph 7.103 above, the Commission at this stage believes that registration could be a suitable triggering event safeguard. We also indicated in paragraph 7.93 that registration will serve as basis for supervisory safeguards such as withdrawal and cancellation of the power. These safeguards are discussed in paragraph 7.138 et seq below.

**Imposing a duty to act and requiring a specific standard of care from an agent**

- 7.118 In several jurisdictions a statutory duty is imposed on an agent to act under an enduring power.<sup>828</sup> The main argument in favour of this practice is that without it the appointment of an agent “may be an act of futility”.<sup>829</sup> In the absence of a contractual undertaking by the agent, an enduring power of attorney would impose no legal obligation on the agent to exercise the authority which it confers.<sup>830</sup> In granting an enduring power principals are preparing for their own incapacity with the expectation that the agent will manage their affairs once they become incapable of doing so themselves. This expectation may be frustrated if the agent is under no legal duty to exercise the authority conferred by the power.<sup>831</sup>

---

<sup>827</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 54. See also par 7.94 above.

<sup>828</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 67.

<sup>829</sup> Ibid (referring to the views of the Law Reform Commission of British Columbia).

<sup>830</sup> Authorisation under common law is usually closely related to an express or tacit agreement between principal and agent that the agent will execute the mandate (Joubert 168-169; Hutchison in **Wille’s Principles of South African Law** 592; De Wet in **LAWSA Vol 1** par 114; Kerr 166). The existence of such agreement may however not be completely clear, especially where the agent tacitly accepts the mandate.

<sup>831</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 68; Manitoba Law Reform Commission **Report No 83** 1994 16-18.

7.119 Opponents of imposing a statutory duty however raise the following concerns:<sup>832</sup>

- ◆ It could be onerous and compliance with it could be difficult.
- ◆ A statutory duty would be unrealistic where the agent is a close relative of the agent.
- ◆ It might deter people from consenting to act as agent.
- ◆ The scope of a statutory duty is unclear (as there could be uncertainty on whether, for instance, it extends to attending to the needs of the principal's dependents).

Proponents on the other hand doubt whether a statutory duty will deter people from consenting to act as agents. They argue that even if it does, it is far preferable that people decline an appointment as agent rather than refrain from acting under the power after the principal's incapacity. Proponents submit that a duty to act in fact reflects the understanding and expectations of most principals and agents. If in a particular case the duty to manage the principal's affairs do prove to be onerous or difficult, the agent can always apply to the Court to be relieved of such duty.<sup>833</sup> And finally, any unclarity regarding the scope of a statutory duty can easily be addressed in the relevant legislation.<sup>834</sup>

7.120 Where a statutory duty to act is indeed imposed it is usually done with qualifications as regards the following:

- ◆ The nature and scope of the duty (i.e. the standard of care expected from the agent in handling the affairs of the principal). The following practices are followed in other jurisdictions:
  - \* Equating the nature and scope of the duty under an enduring power to that of a trustee. Opponents of this practice however argue that many of a trustee's duties are inappropriate in the context of an enduring power.<sup>835</sup>

---

<sup>832</sup> Cf Scottish Law Commission **Discussion Paper No 94** 1991 292.

<sup>833</sup> See par 7.148 et seq below.

<sup>834</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 68-69; Manitoba Law Reform Commission Report **No 83** 1994 16-18.

<sup>835</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 69-70.

- \* Dealing with the issue more directly by expressly requiring that the agent must act “with reasonable diligence to protect the interests of the principal”.<sup>836</sup> (Note that in some legal systems the standard of care required from an agent under common law varies according to whether the agent is being paid or not: Where the agent is acting in a voluntary capacity [i.e. where he or she is not paid and is thus performing a favour rather than earning a fee] there is no obligation on the agent to act at all.<sup>837</sup> To impose a duty to act with reasonable diligence in cases where the agent is not paid thus amounts to requiring a higher standard of care from an agent than that required by the common law. In South Africa this distinction between a paid and an unpaid agent does not apply: Whether the agent is paid or not the common law standard of care remains that of the reasonable man.<sup>838</sup>)
- ♦ The time when the duty arises. In most jurisdictions where a statutory duty is imposed the duty usually arises either on the mental incompetence of the principal (and then only when the agent knows, or ought to know, that the principal is mentally incapable of managing his or her affairs);<sup>839</sup> or on execution of the power subject to any explicit instructions given by the principal while still competent.<sup>840</sup> Opponents of the first mentioned practice reject it because of the difficulties involved in determining incapacity. Proponents however argue that this practice more accurately reflects the wishes of most principals. They also submit that if

---

<sup>836</sup> Ibid 70; see also the position in Western Australia (Creyke 1991 **Western Australia Law Review** 139).

<sup>837</sup> This is the position, for instance, in Australia (Creyke 1991 **Western Australia Law Review** 133) and Canada (Manitoba Law Reform Commission Report **No 83** 1994 16).

<sup>838</sup> Under South African common law an agent acting under a power of attorney must carry out his or her instructions with due care and diligence (Joubert 211-213; De Villiers and Macintosh 326; Kerr 167-170; see also de Wet in **LAWSA Vol 17** par 10). The standard of care is the normal one of a reasonable and prudent person in the circumstances of the case (**Weber & Pretorius v Gavronsky Brothers** 1920 AD 48 at 53; De Villiers and Macintosh 326 et seq; Joubert 213; Hutchison in **Wille's Principles of South African Law** 600; see also De Wet in **LAWSA Vol 17** par 10). This standard of care applies whether the agent acts gratuitously or for reward (**Bloom's Woollens (Pty)Ltd v Taylor** 1962 (2) SA 532 (A); Joubert 213).

<sup>839</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 70-71.

<sup>840</sup> Ibid; Manitoba Law Reform Commission Report **No 83** 1994 17.

the second practice is followed the agent could, in any event, act on the principal's instructions only if these were issued while the principal was mentally competent – and thus the agent might still have to make a determination as to the principal's competence.<sup>841</sup>

- ◆ Whether the agent has accepted the appointment or not. Given the potential liability faced by an agent who do not act, it is considered fair to impose a duty to act only where the agent has demonstrated his or her acceptance of the agency either expressly (for instance by signing or acknowledging the enduring power), or by implication (for instance, by acting in pursuance of the enduring power). Even though the power would probably have no legal effect in the absence of the agent's express or implied consent, it is believed that legislation imposing a duty to act should state clearly that the duty to act arises only if the agent has accepted the appointment.<sup>842</sup>

7.121 Examples of alternative practices (where legislators were reluctant to directly impose a duty to act and to couple it with a specific standard of care) include the following:

- ◆ Including in legislation certain general principles to guide an agent in making decisions.<sup>843</sup> The substitute judgment principle (requiring the agent to act as far as possible in the way the principal would have done) is frequently emphasised in this regard.<sup>844</sup> This principle focuses on respecting the wishes and thus promoting the autonomy of the principal. The agent would thus, for instance, be expected to continue to make payments which would sustain the standard of living in the principal's

---

<sup>841</sup> Ibid.

<sup>842</sup> Ibid.

<sup>843</sup> See the discussion on these principles in Chapter 5 above.

<sup>844</sup> Creyke 1991 **Western Australia Law Review** 133. (See also the suggestions of the English Law Commission who recommended that the agent should be under no duty to act. However, if the agent acts he or she must act in the best interests of the principal taking into account the ascertainable past and present wishes and feelings of the principal; the need to encourage and permit the principal to participate in any decision-making to the fullest extent of which he or she is capable; and the general principle that the course least restrictive of the principal's freedom of decision and action is likely to be in his or her best interests (English Law Commission **Consultation Paper No 128** 1991 99)).

household at its customary level even if, to the agent, that might be extravagant. Proponents of the substitute judgment principal concede that requiring adherence to it may need to be modified where the principal's wishes have not been expressed, where they are not able to be gauged, or where adherence to the principal's wishes would leave the principal destitute.<sup>845</sup>

- ◆ Requiring that the agent should keep accurate records and accounts. Opponents of this practice submit that accounting provisions (which are usually enforced by considerable penalties) are in any event standard in most legislation dealing with enduring powers.<sup>846</sup>
- ◆ Spelling out the duties of the agent in prescribed explanatory notes which must be included in the instrument and requiring a declaration by the agent at the time of execution of the power that he or she is willing to undertake the responsibilities as set out in these notes.<sup>847</sup>

7.122 The Commission did not specifically canvass the question of imposing a statutory duty on the agent in Issue Paper 18. Neither did respondents offer any special views. The Commission's 1988 recommendations did not contain proposals for compelling an agent to act or requiring a specific standard of care. The Commission at this stage tends to believe that a duty to act should not be imposed by legislation. We are in particular concerned that it might deter people from consenting to act as agent. As pointed out by the Scottish Law Commission, a statutory duty could also impose particular difficulties where an attorney may be reluctant or unable to come to a decision (especially as regards welfare decisions).<sup>848</sup> A duty to act and to exercise a particular standard of care would also be qualified by the general principles set out in paragraph .... above which we recommend should govern any intervention in the affairs of persons

---

<sup>845</sup> Ibid.

<sup>846</sup> Ibid.

<sup>847</sup> Cf the proposals of the Australian Law Reform Commission (Creyke 1991 **Western Australian Law Review** 132-133).

<sup>848</sup> Scottish Law Commission **Report No 151** 1995 39.



with incapacity.<sup>849</sup> Providing information on these principles in guidelines issued by the Department of Justice could alert agents to the required standard of action expected from them.

### 7.123 PRELIMINARY RECOMMENDATION

**A statutory duty to act should not be imposed on an agent.**

#### **Keeping of records and accounting**

- 7.124 The most significant legal device for monitoring an agent under common law is the requirement that the agent account to the principal for his or her actions upon demand.<sup>850</sup> The agent must render an account to the principal of all that has been done under the power of attorney. The agent is also under a continuing obligation to allow the principal to inspect all relevant books and vouchers.<sup>851</sup> However, when the principal is mentally incompetent, accounting by the agent to the principal would be meaningless as he or she is unlikely to be able to use the accounting to detect mismanagement and has no capacity to act upon information reflecting mismanagement even if it is revealed.<sup>852</sup> To deal with the incapacity of the principal it has become common practice in other jurisdictions –
- ♦ to require an agent under an enduring power to keep records and to submit mandatory accounts to a supervisor (eg the Court or a relevant public office) at specific intervals (eg annually) ; or
  - ♦ to provide for the agent to submit accounts on application by a supervisor or certain others.<sup>853</sup>

---

<sup>849</sup> See also the Scottish Law Commission's remarks in this regard (**Report No 151** 1995 39).

<sup>850</sup> **Krige v van Dyk's Executors** 1918 AD 110 at 113-114; **Hansa v Dinbro Trust (Pty) Ltd** 1949 (2) SA 513 (T) at 514. Joubert 225 et seq; Hutchison in Wille's **Principles of South African Law** 601; De Villiers and Macintosh 330 et seq; Kerr 186 et seq. See also De Wet in **LAWSA Vol 17** par 12.

<sup>851</sup> Ibid.

<sup>852</sup> Cf eg Alberta Law Reform Institute **Report for Discussion No 7** 1990 72-74; Manitoba Law Reform Commission Report **83** 1994; Scottish Law Commission **Discussion Paper No 94** 1991 280 et seq.

<sup>853</sup> Ibid.

7.125 Mandatory regular accounting has been rejected by many jurisdictions because of the burden it would place on non-professional agents. These jurisdictions prefer to empower the Court, on the application of an interested party, to direct that the agent provide an account of transactions entered into on behalf of the principal.<sup>854</sup> Although this could be useful and effective, more recent reform highlighted that this practice also has its disadvantages:<sup>855</sup>

- ◆ It could be costly and cumbersome.
- ◆ It could be difficult for an interested person to obtain enough information about the agent's conduct of the principal's affairs to make an application possible.
- ◆ There are likely to be cases where there is no "interested party" who is willing to undertake the cost and trouble of bringing an application.

7.126 Examples of alternative practices suggested by some law reform bodies to overcome the criticism against accounting on application include the following:

- ◆ The agent is required to keep a list of the principal's property of which he or she takes control; to keep record of all transactions in respect of such property; and to allow a "qualified person" to inspect the list of property and the record of transactions at reasonable intervals. A "qualified person" could include family members of the principal, or a person named in the enduring power. (The latter possibility aims to cater for cases where the principal has no family members or where the principal excluded family members from fulfilling a protective function.) In the case of refusal or non-compliance by the agent there is usually provision for recourse to the Court or an official body.<sup>856</sup>
- ◆ Allowing both mandatory regular accounting as well as accounting on application to the Court or other supervisory body (which leaves persons fulfilling a protective function with a choice). And at the same time

---

<sup>854</sup> Ibid.

<sup>855</sup> Alberta Law Reform Institute **Final Report No 88** 2003 10.

<sup>856</sup> Ibid 11.

deformalising mandatory accounting by requiring that the accounts be submitted to a specific person rather than to the Court or an official body. This person could be either a person named by the principal in the enduring power, or (in the absence of a person being named) could be a person from a statutorily named list of persons (eg the spouse or partner, adult children, parents or grand children of the principal) who, in order of preference, must be supplied with accounts on a regular basis.<sup>857</sup>

7.127 The necessity for this safeguard need not be debated: Most respondents on Issue Paper 18 in general emphasised the role of keeping records and accounting as safeguards to protect the principal against the possibility of abuse. Some representatives of the Masters' Offices and others from the legal fraternity once again indicated that they support the recommendations submitted by the Commission in 1988.<sup>858</sup> These recommendations provided for the following accounting mechanism, which differs somewhat from the examples from other jurisdictions referred to above: It should be compulsory for an agent, when called upon by the Master of the High Court to do so, to account to the Master to his or her satisfaction and in accordance with his or her instructions for carrying out instructions in terms of the enduring power.<sup>859</sup> This provision is supported by granting the Master the power to withdraw and cancel the registration of an enduring power if the agent refuses or fails to comply within a reasonable time with a request relating to the rendering of accounts.<sup>860</sup>

7.128 We agree with the suggestion that accounting should not be mandatory at specific intervals. Mandatory accounting would not only burden the agent but also the supervisor who would have to inspect or overview such accounts. We also agree with providing the Master with the discretion to call for accounts. In addition to this, we believe that it is of crucial importance that specific other

---

<sup>857</sup> See eg Manitoba Law Reform Commission Report **No 83** 1994 18-21.

<sup>858</sup> See also the comments of the Johannesburg Bar Council.

<sup>859</sup> **SALRC Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 55.

<sup>860</sup> Ibid.

persons (eg a person named in the power or persons with an interest in the property of the principal such as family members of the principal) should also have the authority to request the agent to account. This possibility was raised by some representatives of the legal fraternity in their comments on Issue Paper 18.<sup>861</sup> In the course of probably the most recent reform done on enduring powers (which specifically addressed the question of additional safeguards against abuse), the Alberta (Canada) Law Reform Institute for example recommended that family members of the principal or a person designated in the enduring power should be enabled to at reasonable intervals inspect and make copies of records of all transactions by which the agent deals with property or the rights of the principal.<sup>862</sup> Where the agent refuses to produce such records an administrative procedure is provided for to compel the agent to produce them (by providing that the family member or other person may approach the relevant tribunal or official body for assistance).<sup>863</sup> The Law Reform Institute observed that although these requirements would not prevent a dishonest agent from looting the principal's property, they would (at least) put an agent on notice that his or her activities could be scrutinised at any time.<sup>864</sup>

#### 7.129 PRELIMINARY RECOMMENDATION

**Legislation should require an agent to prepare and maintain a list of the property of the principal of which he or she takes control, and of all transactions entered into on behalf of the principal concerned. Legislation should compel an agent, when called upon by the Master to do so, to account to the Master. In addition to this, legislation should allow specified persons to inspect any list or record kept by an agent in respect of the property of a principal that is under his or her control.**

---

<sup>861</sup> See eg the comments of the Society of Advocates KwaZulu-Natal.

<sup>862</sup> Alberta Law Reform Institute **Final Report No 88** 2003 11-12. "Family member" would include a spouse, adult interdependent partner or parent of the principal, or an adult child, brother or sister of the principal (ibid xiv).

<sup>863</sup> Ibid.

<sup>864</sup> Ibid 12.

### **Providing for termination of an enduring power**

- 7.130 Supervisory measures dealing with termination of an enduring power typically include provisions dealing with revocation of the power by the principal; termination, substitution and/or variation of the power by the Court or other supervisory body; renunciation of the power by the agent; and the effect of curatorship (or a similar measure) on an enduring power

### ***Revocation by the principal***

- 7.131 In accordance with common law principles an enduring power would be revocable by the principal at any time before the onset of incapacity or after recovery from some disabling condition.<sup>865</sup> After incapacity revocation by the principal is no longer possible. In order to be effective as against third parties to whom the act of authorisation was communicated by the principal, the act of revocation has to be communicated to them.<sup>866</sup> Where the authority is conferred by a power of attorney it would be preferable that the principal see to it that the power is surrendered - otherwise his or her revocation of authority will have no effect against a person who deals with the agent without knowledge that the authority has been revoked.<sup>867</sup>
- 7.132 Experience in other systems however shows that principals often do not know or understand that they may revoke an enduring power of attorney.<sup>868</sup> It has thus

---

<sup>865</sup> The general legal position in South Africa with regard to ordinary powers of attorney is set out in par 7.28 et seq above. Cf also Atkin 371. It is interesting to note that in some states in the US an enduring power related to health care may be revoked by the principal at any time irrespective of the principal's mental capacity (Gilde 1997 **Illinois Bar Journal** 555 et seq).

<sup>866</sup> **Bulawayo Market Co v Bulawayo Club** 1904 CTR 370. See also De Wet in **LAWSA Vol 1** par 123.

<sup>867</sup> De Wet in **LAWSA Vol 1** par 123.

<sup>868</sup> Cf Gilde 1997 **Illinois Bar Journal** 555 et seq.

- frequently been recommended by law reform bodies that it is preferable that legislation on enduring powers should contain express provision to that effect.<sup>869</sup>
- 7.133 It has been accepted that the test for capacity in the context of revocation is whether the principal is capable of understanding the nature and effect of the revocation.<sup>870</sup> This corresponds with the capacity required to grant an enduring power, thus ensuring that a person who revokes an enduring power will be able to grant a new power should he or she chooses to do so. This test is also in keeping with the functional approach to mental capacity.
- 7.134 At common law a power of attorney can be revoked informally and some jurisdictions allow a principal to revoke an enduring power in any manner communicated to the agent or to any other person.<sup>871</sup> Others however argue that although revocation should not be a complex procedure, oral revocation could lead to problems of proof and uncertainty. Revocation moreover has important legal consequences as it will leave the principal who subsequently loses capacity without a substitute decision-maker.<sup>872</sup> For these reasons it has been recommended that revocation by a principal should be in writing; should be signed and witnessed in the same way as the enduring power is executed; and that the principal should take reasonable steps to notify the agent of the revocation.<sup>873</sup>
- 7.135 In some jurisdictions legislation expressly state that a substitute decision-maker cannot be authorised to revoke an enduring power on behalf of a person who has

---

<sup>869</sup> Ibid. See also English Law Commission **Report No 231** 1995 122; Queensland Law Reform Commission **Draft Report** 1995 110.

<sup>870</sup> Cf Alberta Law Reform Institute **Report for Discussion No 7** 1990 91; Queensland Law Reform Commission **Report No 49** 1996 131.

<sup>871</sup> Cf Guilde 1997 **Illinois Bar Journal** 555 et seq referring to the position in some states in the United States.

<sup>872</sup> Queensland Law Reform Commission **Report No 49** 1996 131.

<sup>873</sup> Ibid.

lost capacity and that the power to terminate an enduring power can be exercised only by a Court or other relevant tribunal.<sup>874</sup>

7.136 Single respondents, who referred in their comment on Issue Paper 18 to revocation, confirmed that the common law principles should apply. No views were expressed on whether the common law position should be confirmed in legislation. The Commission's 1988 recommendations did not expressly provide for revocation by the principal. We submit that experience in other systems indicate that it should preferably be stated expressly in legislation that a principal always retain the power to revoke an enduring power granted by him or her provided that such person is legally capable of doing so. The Law Commission of England, for instance, noted in its recommendations in this regard that even where a principal lacks capacity to make the decision in question, he or she may still have capacity to revoke the enduring power and that it is therefore necessary to clarify this aspect in legislation.<sup>875</sup> We further believe that it is particularly important not to restrict or impose any delay on a principal's ability to revoke an enduring power and that therefore no formalities should be required in respect of such revocation.<sup>876</sup>

#### 7.137 **PRELIMINARY RECOMMENDATION**

**Legislation should provide that an enduring power terminates if the principal revokes it at any time when he or she has the capacity to do so. We further recommend that no formalities should be required for such revocation.**

---

<sup>874</sup> Ibid 138-139.

<sup>875</sup> The Commission refers to a principal who lacks capacity to take the decision in question but who is still capable of indicating that "I don't want X deciding things for me any more". The Commission argues that it would be most unappealing to require that a treatment provider, for instance, must continue to honour the decisions of an agent when faced with a principal who in this way effectively revokes the authority granted (English Law Commission **Report No 231** 1995 122).

<sup>876</sup> Cf the English Law Commission's remarks in this regard specifically with reference to revocation of a health care power (English Law Commission **Report No 231** 1995 122).

***Termination, substitution and variation of the power by the Court (or other supervisor)***

7.138 Most jurisdictions regard the power of the Court (or other supervisory body) to *terminate* an enduring power as one of the most fundamental and necessary safeguards which ought to be included in legislation dealing with enduring powers.<sup>877</sup> It serves as an essential mechanism for reviewing the agent's conduct, terminating the agent's appointment, and removing the agent in order to protect the interests of the principal after the principal has lost the capacity to monitor the agent's conduct. Common characteristics of legislative provisions in this regard include the following:

- ◆ The Court is given a broad discretionary power to terminate the enduring power if it considers this to be in the best interests of the principal rather than be limited to expressly stated circumstances for termination.<sup>878</sup> Although opponents to a broad discretion argue that it might invite frivolous applications by disgruntled members of the principal's family, it is generally believed that the judicious exercise of discretion, and the Court's jurisdiction in respect of costs, will provide an effective safeguard against unwarranted claims.<sup>879</sup>
- ◆ The Court can usually terminate the power on application by the principal, by any interested person, or by any other person with leave of the Court.<sup>880</sup>
- ◆ An application for termination is permitted only after incapacity of the principal (since the principal can revoke the power before his or her incapacity, if necessary).<sup>881</sup>
- ◆ It is usually required that notice of the application to terminate the power should be given to the principal (unless the Court dispenses of this); to

---

<sup>877</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 92-93; Queensland Law Reform Commission **Report No 49** 1996 131 et seq.

<sup>878</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 92-93.

<sup>879</sup> Ibid.

<sup>880</sup> Ibid.

<sup>881</sup> Ibid.



the agent; and to a relevant public office (the latter because of its interest in the fact that the incompetent principal will possibly be left without someone to manage his or her affairs).<sup>882</sup>

- ◆ In some jurisdictions the Court may not terminate an enduring power without appointing a substitute agent.<sup>883</sup> In this regard it should be noted that termination of the enduring power will usually create a void (except where the Court is obliged to appoint a substitute) and an application for the appointment of a curator (or similar device) will probably be necessary to fill the void. Many jurisdictions however see the usefulness of a termination order as being a quick and simple procedure for removing an agent ideally suited to emergency situations, where the removal of the agent is immediately necessary to protect the principal's interests.<sup>884</sup>

7.139 As indicated in the previous paragraph, some jurisdictions empower the Court to appoint a *substitute* agent. Although the advantage of this is that the void left by the termination of the enduring power is filled, opponents of this practice argue that it is in conflict with some of the fundamental elements of an enduring power: the principal's personal selection of an agent; and the principal's desire to provide for his or her incapacity without Court intervention. Opponents believe that the enduring power should come to an end on termination thereof and the principal's affairs should then be dealt with by a curatorship order (or similar device).<sup>885</sup> Some jurisdictions solved the problem by giving the Court the discretion to compel the person who applied for termination of the enduring power, or a relevant public office, to bring an application for a curatorship order on termination of the power; and to make arrangements for the interim management of the principal's affairs.<sup>886</sup>

---

<sup>882</sup> Ibid.

<sup>883</sup> Ibid.

<sup>884</sup> Ibid.

<sup>885</sup> Ibid 94-95.

<sup>886</sup> Ibid 95.

7.140 Several jurisdictions empower the Court to *vary* (i.e. amend) the terms of an enduring power (by for instance, allowing the Court to impose limitations on the agent's authority, or to remove a limitation imposed by the principal).<sup>887</sup> Opponents of this practice argue that to empower a Court to amend some provisions of an enduring power, but not the most important one (the selection of the agent) would be illogical. They believe that if the terms of the enduring power are no longer effective or sufficient to protect the interests of the principal, the preferable course of action would be to apply for the termination of the power and have an alternative mechanism (such as curatorship or similar device) put into place.<sup>888</sup>

7.141 Respondents on Issue Paper 18, although not commenting in detail on the Court's powers to terminate an enduring power after the incapacity of the principal, echoed the general view that such power is plainly necessary to protect the interests of the principal. Once again certain representatives of the Masters' Offices supported the termination mechanism recommended by the Commission in 1988. These recommendations provided for a judicial as well as an administrative procedure for termination of an enduring power.<sup>889</sup>

- ◆ The Court may at any time upon the application of the Master or any person who has a personal, financial or social interest with regard to the principal, *withdraw* an enduring power registered in terms of the proposed legislation and *direct that the registration thereof be cancelled* if the Court is of opinion that sound reasons exist for doing so.
- ◆ The Master may *withdraw* a power of attorney registered in his or her office in terms of the proposed legislation and *cancel the registration* thereof under certain circumstances. These circumstances (with the exception of one that deals with non-compliance with a request of the Master) address the position or status of the agent (rather than any

---

<sup>887</sup> Ibid 96.

<sup>888</sup> Ibid.

<sup>889</sup> **SALRC Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons** 1988 55-56.

abusive action on his or her part) and include the following: indication by the agent in writing that he or she is no longer willing or able to carry out the instruction; refusal or failure by the agent to comply with a request by the Master made in terms of the proposed legislation; the agent being convicted of an offence of which dishonesty is an element, being sequestered, being certified under mental health legislation, or being placed under curatele.

The Commission on a preliminary basis supports the approach that both the Court and the Master should have the authority to terminate an enduring power of attorney under certain circumstances. In accordance with the 1988 proposals we suggest that the Master's authority to withdraw the power should be limited to circumstances relating to the status or position of the agent while the Court should deal with concerns regarding the proper execution of the power by the agent.

- 7.142 Issue Paper 18 did not canvass the question of substitution and variation. The Commission's 1988 recommendations did not provide for such possibilities. On the one hand, giving the Court such powers would seem to negate the elements of personal selection and absence of Court intervention that are fundamental to the concept of the enduring power. This could be regarded as a radical departure from the principles of the law of agency that underlies the concept of the enduring power as pointed out at the beginning of this Chapter.<sup>890</sup> On the other hand, it could be argued that strict agency principles will in any case be fundamentally altered by legislating that authority granted in a power of attorney can survive the incapacity of the principal. In the context of such new legislation regulating enduring powers, the interests of the principal might be better served by giving the Court powers to appoint a substitute agent and/or to vary the terms of the power in stead of appointing a curator (or similar substitute).<sup>891</sup>

---

<sup>890</sup> See also the arguments raised by the English Law Commission in this regard (**Report No 231** 1995 128).

<sup>891</sup> Ibid 128-129.

7.143 We agree with the arguments raised in the previous paragraph against granting the Court or other supervisor the power to appoint a substitute agent. We propose in paragraph 6.49 above that the Master should be given supervisory powers which we indicate in clause 91 of the proposed draft Bill should include the power to initiate the appointment of a substitute decision-maker where there is a void left by the termination of the appointment of a manager or mentor. We suggest that this authority of the Master should also cover the situation where a void is created by the withdrawal of an enduring power of attorney.

7.144 As regards variation of the power, we believe that granting the Court or other supervisor powers to amend the terms of the power would intrude on the principal's right to autonomy, which is central to the concept of the enduring power of attorney. The general power of the Court to withdraw an enduring power (as proposed in paragraph 7.141) would be wide enough to enable any person who has concerns about the terms of the power to apply for the withdrawal of the power. This could be followed by the Master initiating procedures for putting alternative measures in place as suggested in the previous paragraph. In addition to this, we suggest that the Master's proposed power to review any action taken or decision made by a manager or mentor as suggested in clause 94 of the proposed draft Bill, should also deal with actions taken or decisions made by agents under enduring powers of attorney. We submit that these control measures would be sufficient in circumstances where there is a need to vary or amend the terms of an enduring power of attorney.

7.145 **PRELIMINARY RECOMMENDATION**

**Legislation should allow for the withdrawal of an enduring power of attorney under the following circumstances:**

- ♦ **The Court should be able to withdraw an enduring power of attorney at any time upon the application of the Master or any interested person; and to direct the Master to cancel the power.**
- ♦ **The Master should be able to withdraw an enduring power of attorney registered in his or her office in terms of the proposed legislation and cancel the registration thereof under certain specified circumstances. These should include the following:**

failure by the agent to perform any duty imposed upon him or her under the proposed legislation or refusal to comply with a request by the Master made in terms of the proposed legislation; the agent being convicted of an offence of which dishonesty is an element, or any other offence for which he or she has been sentenced to imprisonment without the option of a fine; the agent being sequestered, (or where a juristic person has been appointed as agent, where such juristic person is wound up or dissolved); the agent suffering from mental incapacity; and the appointment of a manager, mentor or curator in respect of the adult concerned, in so far as the authority granted by the power of attorney may be exercised by such manger, mentor or curator.

We further recommend that if a registered enduring power of attorney is withdrawn and cancelled by the Master, the Master must notify the agent of such cancellation and the agent must on receipt of such notification return his or her endorsed copy of the power to the Master.

#### **7.146 PRELIMINARY RECOMMENDATION**

The substitution of an agent by the Court (or other supervisor) should not be allowed. Legislation should provide the Master with authority to initiate the appointment of a manager or mentor where a void is left by the withdrawal of the appointment of an agent.

#### **7.147 PRELIMINARY RECOMMENDATION**

The variation of the terms of an enduring power of attorney by the Court (or other supervisor) should not be allowed. The Master's power to review any action taken or decision made by a manager or mentor as proposed in clause 94 of the proposed draft Bill, should include the power to deal with actions taken or decisions made by agents under enduring powers of attorney.

### ***Renunciation by the agent***

7.148 Under common law termination of a power of attorney may also occur on the initiative of the agent.<sup>892</sup> In such case the power will cease to have effect except where there are co-agents or substitute agents provided for.<sup>893</sup> The major problem in the case of an enduring power would be to deal with the possibility of the agent wishing to renounce his or her duties *after* the principal has become incompetent and is consequently unable to authorise another agent. To avoid a lapse in arrangements made for the safeguarding of the principal's affairs, other jurisdictions followed the following practices:<sup>894</sup>

- ◆ Prohibiting the agent from renouncing without Court approval or without advising a relevant official body. In England and Scotland, for instance, it was recommended that the agent must give notice of his or her intention to resign to certain persons and bodies (including the principal, his or her primary carer, the relevant public office or tribunal, or the registration authority if the power had to be registered);<sup>895</sup> and that such notice should become effective only after a period of time.<sup>896</sup>
- ◆ Providing for sanctions in respect of an agent who fails to act under an enduring power. Opponents of this approach however argue that the agent will frequently be a member of the principal's family acting in a voluntary capacity. The law should encourage domestic arrangements of this kind and onerous conditions and sanctions should thus be avoided.
- ◆ Deterring people from accepting the role of agent without proper appreciation of the responsibilities involved by spelling out in prescribed explanatory notes included in the power the responsibilities of an agent,

---

<sup>892</sup> See the common law position set out in par 7.23 above.

<sup>893</sup> Atkin 1988 **New Zealand Law Journal** 371. See par 7.14 above on the possibility to appoint co-agents.

<sup>894</sup> Creyke 1991 **Western Australian Law Review** 136 et seq.

<sup>895</sup> See eg the recommendations of the English Law Commission (**Report No 231** 1995 121-122).

<sup>896</sup> See eg the recommendations of the Scottish Law Commission (**Report No 151** 1995 43-44). The Commission recommended that the resignation should become effective 28 days after notification to the relevant public office (Ibid 44).

and warning potential agents of the disadvantages to an incompetent principal if the agent resigns after the principal has become incompetent. If the agent is committed to resigning, a relevant public office should be advised of this.

7.149 We are not in favour of practices aimed at preventing an agent from resigning or penalising an agent who wants to resign. We do not believe that it would be in the interests of the principal to try and persuade or force a reluctant agent not to resign. We support the proposals of the Scottish and English Commissions as referred to in paragraph 7.148 which provides for notice by the agent of his or her intention to resign and the resignation only becoming effective after a reasonable period of time. This would allow the Master to, if necessary, deal with the void left by the resignation by using his or her authority (as referred to in paragraph 7.143) to initiate the appointment of a manager or mentor, or both. We suggest that the agent's intention to resign should also be brought to the attention of the principal and his or her primary carer.

7.150 **PRELIMINARY RECOMMENDATION**

**Legislation should require an agent who wishes to resign after the registration of an enduring power of attorney to give written notice of this intention to the Master in whose jurisdiction the power is registered, to the principal who granted the power and to the principal's primary carer. The resignation should become effective only 30 days after receipt of this notification by the Master. The Master should be obliged to cancel an enduring power in respect of which the agent has resigned.**

***The influence of curatorship (or similar device) on termination of an enduring power***

7.151 A question which arises with regard to revocation is whether an enduring power should be terminated or revoked if a curator is appointed or if other similar

measures come into force. Several options emerge from different practices in other jurisdictions and recommendations of law reform bodies.<sup>897</sup>

- ◆ The enduring power continues and the curatorship (or similar measure) only operates in relation to property not subject to the power.
- ◆ The enduring power is (automatically) revoked to the extent that it overlaps with the curator's authority.
- ◆ The enduring power continues but the agent becomes accountable to the curator or operates subject to the applicable Court order.
- ◆ The agent may continue to act where there is no inconsistency between the roles of curator and agent.

In some jurisdictions the Court is in any event given the power to terminate the enduring power (i.e. irrespective of what the prescribed practice regarding interaction between the enduring power and the curatorship order might be). In others the Court is obliged to consider appointing the agent as curator before making an appointment. The latter practice is seen as being in concert with recognising the autonomy of the principal.<sup>898</sup>

7.152 This issue was not canvassed in Issue Paper 18. We believe that the enduring power should terminate rather than continue. Continuation of the power where a curator has been appointed would not only create possibility for conflict, but also cause unnecessary complexity and duplication which is undesirable and impracticable.<sup>899</sup> Moreover, as pointed out in some of the other jurisdictions, the Court or tribunal appointing a curator (or similar device) usually has to be satisfied that the person concerned needs this device. If a Court concludes that this is indeed the case, it would be an indication that the principal's interests are not being adequately protected by the enduring power – which would justify that

---

<sup>897</sup> Cf. Atkin 1988 **New Zealand Law Journal** 372; Creyke 1991 **Western Australian Law Review** 136 et seq; Queensland Law Reform Commission **Report No 49** 1996 136 et seq.

<sup>898</sup> Cf. Creyke 1991 **Western Australia Law Review** 140.

<sup>899</sup> Cf. also the concerns raised in this regard by the Alberta Law Reform Institute (**Report for Discussion No 7** 1990 98).



the enduring power must come to an end.<sup>900</sup> The Commission's 1988 recommendations once again provides guidance: It was recommended at the time that if a curator is appointed (i e subsequent to the enduring power having become effective) any powers which an agent may have in terms of the enduring power shall terminate in so far as such powers may be exercised by the curator. We agree with this view.

#### 7.153 **PRELIMINARY RECOMMENDATION**

**The proposed legislation should provide that if a curator (or similar device) is appointed any powers that an agent may have in terms of the enduring power terminates in so far as such powers may be exercised by the curator.**

### ***Other safeguards***

#### **Disqualified agents**

7.154 Under common law the only disqualification for appointment as agent under a power of attorney is lack of legal capacity.<sup>901</sup> Some jurisdictions enacted specific safeguards aimed at disqualifying certain persons or entities to be appointed as agent under an enduring power. The most common safeguards in this respect include the following:

- ◆ Legislation expressly excludes certain persons from being appointed as agents under an enduring power. These mainly fall into two categories:
  - \* First, those with a likely conflict of interest (i e who are considered untrustworthy, or who occupy a position of power or authority over the principal and whose appointment as agent might therefore be the product of undue influence - such as employees for

---

<sup>900</sup> Ibid 99.

<sup>901</sup> See par 7.12 above.

community care facilities and close relatives or carers).<sup>902</sup> Opponents of this practice submit that it is not for the legislator to exclude certain persons as untrustworthy – the principal must decide whether the agent is someone who can be trusted. As regards close relatives and carers – in many cases excluding such persons would exclude the very people who are most likely to act in the principal's best interests.<sup>903</sup>

- \* Second, those whose personal attributes (eg age and mental incapacity) render them unsuitable of effectively performing the functions of an agent.<sup>904</sup> Opponents of this practice submit that an age restriction would serve little practical purpose as it is highly unlikely that a principal would appoint a minor as an agent. They further submit that they are in any event not convinced that an appointment of a person just below the age of majority, for instance, would necessarily be unsuitable. The choice of who to appoint should be left to the principal.<sup>905</sup> As regards the required mental capacity, opponents argue that it is extremely unlikely that a principal would appoint an agent who is mentally incapable of understanding the nature and effect of the appointment. They further argue that a Court (in exercising its discretion to remove an agent under an enduring power or to terminate a power) could more appropriately deal with this issue as it will consider the question of suitability of the agent with reference to the best interests of the principal.<sup>906</sup>

---

<sup>902</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 60-62.

<sup>903</sup> Ibid.

<sup>904</sup> Cf Scottish Law Commission **Discussion Paper No 94** 1991 262 et seq; Alberta Law Reform Institute **Report for Discussion No 7** 1990 60-62.

<sup>905</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 60-62.

<sup>906</sup> Ibid.

- ◆ Some jurisdictions do not allow a juristic person (an entity other than an individual human being) to be appointed as agent.<sup>907</sup> Others however argue that to entirely exclude juristic persons would imply that persons who do not wish or are not able to appoint a relative or friend to act as agent under an enduring power may then be denied the advantages of legislation making enduring powers possible.<sup>908</sup> In general it seems as if juristic persons are allowed to act as agents but with the following limitations: First, only specific types of juristic persons (eg recognised financial institutions such as banks, insurance companies and registered trust companies) are regarded as suitable for appointment.<sup>909</sup> Second, the appointment of juristic persons is usually allowed in respect of enduring powers dealing with financial affairs only. The reason for this is that legislators usually envisage that the person entrusted with making personal decisions will be someone close to the principal, who is familiar with the principal's lifestyle and values. It would thus be inappropriate to confer authority to make decisions requiring sympathetic knowledge of personal preferences on a juristic person.<sup>910</sup>
- ◆ Experience in other jurisdictions showed that people who execute enduring powers of attorney will often appoint their husband or wife as their agent. However if a couple later divorces, it is likely that the relationship has deteriorated to such an extent that it is no longer appropriate for either partner to continue to be nominated as the other's agent. In most jurisdictions an enduring power naming a spouse as agent is thus *automatically* invalidated or revoked or the spouse/agent is deemed to have resigned as agent upon divorce or judicial separation.

---

<sup>907</sup> Scottish Law Commission **Discussion Paper No 94** 1991 264-265. Cf also par 7.13 above where it is indicated that common law allows the appointment of juristic persons as agents under an ordinary power of attorney.

<sup>908</sup> Queensland Law Reform Commission **Draft Report** 1995 103.

<sup>909</sup> Ibid; Scottish Law Commission **Discussion Paper No 94** 1991 32-34. Service providers such as nursing home operators are for instance regarded by some as not being suitable since they may inevitably be faced with a conflict of interest if they were appointed (Queensland Law Reform Commission **Draft Report** 1995 103).

<sup>910</sup> Queensland Law Reform Commission **Draft Report** 1995 103-104. See also Scottish Law Commission **Discussion Paper No 94** 1991 32-34.

Such invalidation, revocation or resignation becomes effective upon the divorce or other event referred to. Alternatively, legislation provides the principal with the *option* to include a provision to this effect in an enduring power should he or she so desires.<sup>911</sup>

7.155 These issues were not canvassed in Issue Paper 18 and the Commission's 1988 recommendations did not include any express disqualifications as discussed in the previous paragraph. Our preliminary views are as follows:

- ◆ With the exception of an unrehabilitated insolvent (who should not be eligible for appointment as agent under an enduring power dealing with financial affairs) we agree with the criticism raised in the previous paragraph against expressly excluding certain persons from being appointed as agents on grounds of possible conflict of interest or personal attributes.
- ◆ Many commentators on Issue Paper 18 in general pointed to the need for arrangements which would also address the position of persons without family and friends to act as substitute decision-makers. We thus agree with the view that juristic persons should be able to act as agents, but, for the reasons referred to in the previous paragraph, we submit that their eligibility for appointment as agents should be limited to appointment in respect of enduring powers dealing with property.
- ◆ We agree with the practice in many other jurisdictions of providing for the effect of divorce on an enduring power. Provisions addressing this issue have in fact been included in the Wills Act, 1953 where the testator appointed a divorced spouse as beneficiary under his or her will.<sup>912</sup> As automatic termination of the power under these circumstances would leave an immediate void as regards the care of the principal or his or her

---

<sup>911</sup> See eg the position in some states in the United States (Schlesinger and Sheiner 1992 **Trusts and Estates** 44); the Republic of Ireland (Alberta Law Reform Institute **Final Report No 88** 2003 40); and Scotland (Adults with Incapacity [Scotland] Act 2000 sec 24(1)). Cf also English Law Commission **Report No 231** 1995 125.

<sup>912</sup> Sec 2B of the Wills Act, 1953. Note however that according to the Wills Act, the spouse could still be a beneficiary under the will if the testator died longer than 3 months after their divorce or the annulment of their marriage.

property, we however suggest that dissolution of marriage (or a same sex life partnership) should be added to the grounds on which the Master may withdraw an enduring power. This would grant the Master time to initiate the appointment of a manager or mentor, or both, where necessary. (Our suggestions on the initiation of alternative arrangements are discussed in paragraphs 7.138-7.146 above.)

#### 7.156 **PRELIMINARY RECOMMENDATION**

**We suggest that legislation should provide that at the date of execution of an enduring power of attorney, an agent appointed under such power –**

- ♦ **Must be a mentally competent adult.**
- ♦ **Can be a juristic person if the enduring power relates to the principal's property only.**
- ♦ **Must not be an unrehabilitated insolvent if the power relates to the principal's property.**

**We further propose that the subsequent dissolution of a marriage (or permanent same sex life partnership) between the principal and the agent should be added to the grounds on which a Master may withdraw an enduring power of attorney as recommended in paragraph 7.145 above.**

#### **Limitation on the value of the estate**

7.157 In the United States, in particular, the 1964 Model Act recommended that a financial limit be placed on the value of estates which could be subject to an enduring power.<sup>913</sup>

7.158 Proponents of this practice believe that large and complex estates are not suited to management by means of an enduring power.<sup>914</sup> Opponents however see no

---

<sup>913</sup> Alberta Law Reform Institute **Report for Discussion No 7** 1990 63. (See par 7.3 for information on the Model Act.)

<sup>914</sup> Ibid.

automatic correlation between the extent of the estate and the difficulty of managing it.<sup>915</sup> They furthermore believe that the imposition of an arbitrary limit could involve costly and time-consuming valuations and would logically involve the termination of the power if the limit were exceeded at some later date.<sup>916</sup> Limitations with regard to the value of the principal's estate has generally not been considered or recommended as a safeguard against abuse in more recent reform on enduring powers of attorney.

7.159 We agree with the above criticism raised against the possibility of limiting the use of enduring powers of attorney to smaller estates.

#### 7.160 **PRELIMINARY RECOMMENDATION**

**Legislation should not place a financial limit on the value of estates which can be the subject of an enduring power of attorney.**

### **Portability of an enduring power<sup>917</sup>**

7.161 In several jurisdictions portability of enduring powers of attorney (i.e. the ability of an enduring power, validly executed in one jurisdiction, to be recognised as valid in another) has been expressly addressed in enduring power legislation to avoid practical problems that may arise in this regard.<sup>918</sup> The most pressing problem usually relates to the possible non-validity of an enduring power because of

---

<sup>915</sup> Scottish Law Commission **Discussion Paper No 94** 1991 261-262. (This has been confirmed as regards the South African situation in informal discussions with Ms Margaret Meyer (lecturer at Justice College and representative of the Masters Offices) during August – October 2003 when drafting the proposed legislation attached to this Discussion Paper.)

<sup>916</sup> Ibid.

<sup>917</sup> Note that references to Dicey and Morris in the footnotes to the following two paragraphs refer to the common law position as discussed by the authors before the Rome Convention was implemented in the United Kingdom through the Contracts (Applicable Law) Act 1990. English law is regarded as a primary foreign source of South African conflict of law rules (Edwards in **LAWSA Vol 2** par 415).

<sup>918</sup> See eg Manitoba Law Reform Commission **Report No 83** 1994 34-36; Alberta Law Reform Institute **Report for Discussion No 7** 1990 52-54; Scottish Law Commission **Discussion Paper No 94** 1991 302 et seq; and Creyke 1991 **Western Australian Law Review** 146 et seq for the position in some of the Australian jurisdictions.

differences in execution formalities of enduring powers in different jurisdictions. If, for example, an enduring power is executed in England and complies with the law pertaining to enduring powers in England but not with South African legal formalities (on the assumption that South Africa indeed has legislation on enduring powers) the question arises whether the agent can exercise any authority under the power after the incapacity of the principal in respect of property situated in South Africa? And further: if the principal moves to South Africa (after incapacity) and the agent wishes to manage the principal's affairs in South Africa, is the enduring power terminated because it does not comply with the required legal formalities in South Africa?

- 7.162 To deal with the increasing mobility of populations, enduring power legislation in other jurisdictions frequently provides that an enduring power will be recognised as valid if it meets the requirements of the jurisdiction in which it was executed.<sup>919</sup>
- 7.163 Questions relating to the validity in South Africa of an ordinary power of attorney with a foreign element (eg where the principal resides in England and grants a power to a family member in South Africa to manage his or her financial affairs in South Africa) are governed by the rules dealing with conflict of laws. According to these rules the "proper law" indicates the appropriate legal system governing contractual obligations involving an element external to the domestic law.<sup>920</sup> It seems to be accepted that as between agent and principal, their mutual rights and obligations are governed by the proper law of the agency (which is in general the law of the place where the relationship of principal and agent is created i.e. the place where the power of attorney is granted).<sup>921</sup> However, the rights and obligations of the agent and principal vis a vis a third party are governed by the proper law of the contract entered into with the third party.<sup>922</sup> In particular, the

---

<sup>919</sup> Ibid.

<sup>920</sup> Forsyth 274-175; Edwards in **LAWSA Vol 2** par 460 and the case law referred to by the authors.

<sup>921</sup> Dicey & Morris Vol 2 1339; Alberta Law Reform Institute **Report for Discussion No 7** 1990 52-54. (As far as could be ascertained this point has not been directly addressed yet by South African Courts.)

<sup>922</sup> Dicey & Morris Vol 2 1341; Forsyth 274-275; Edwards in **LAWSA Vol 2** par 460-462. Cf also Alberta Law Reform Institute **Report for Discussion No 7** 1990 52-54.

question whether the agent's authority is terminated by the mental incapacity of the principal must be determined with respect to each contract entered into by the agent, and is governed by the proper law of the contract. The proper law of the contract is the law chosen and agreed on expressly or tacitly by the parties or if they do not so choose, it is the law which the parties are presumed to have intended to govern their contractual relationship.<sup>923</sup> What their presumed intention is, is a complex question which depends on the circumstances of each case. It will be ascertained with reference to several connecting factors including the place where the contract was entered into, the place where the contract has to be executed, the domicile and nationality of the parties, and the nature and subject matter of the contract.<sup>924</sup>

- 7.164 Apart from the complexities in ascertaining the parties' intention which could be inherent in applying the common law as described in the previous paragraph, it is clear that applying the common law (according to which the proper law of the agency governs the relationship between agent and principal) in the context of an enduring power could also result in undue restrictions on agents from other countries operating in South Africa if the enduring power executed in the other country does not comply with formalities prescribed here.<sup>925</sup> The Commission in accordance with practice in this regard in other jurisdictions, believe that legislation should provide that if an instrument is a valid enduring power

---

<sup>923</sup> ***Standard Bank of SA Ltd v Efroiken and Newman*** 1924 AD 171 at 185-186; Edwards in **LAWSA Vol 2** par 462; cf also Forsyth 274-275, 286-292. Although more recently there has been developments away from this approach towards an approach which regards the proper law as the law with which the contract is "most closely related" (***Improvair (Cape) (Pty) Ltd v Etablissements Neu*** 1983 (2) SA 138 (C) at 145F-146C; ***Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*** 1986 (3) SA 509 (D) 525J-527A; the indirect approval by the Supreme Court of Appeal in ***Ex Parte Spinazze*** 1985 (3) SA 650 (A) at 665F-H; Edwards in **LAWSA Vol 2** par 462; Forsyth 274-275; and Dicey & Morris 1161-1162) the core of the rule laid down by the Supreme Court of Appeal (formerly the Appellate Division) in 1924 remains (***Blanchard, Krasner & French v Evans*** 2002 (4) SA 144 (T) at 149C-D; Edwards in **LAWSA Vol 2** par 462). As it will be rare for the parties to be presumed to have intended any legal system other than that with which the contract has the "closest connection" to govern their relationship, the hope has been expressed that the Supreme Court of Appeal will settle upon this test when the matter comes before it (Forsyth 287).

<sup>924</sup> Forsyth 287-288; ***Standard Bank of SA Ltd v Efroiken and Newman*** 1924 AD 171. Cf also Dicey & Morris 1191-1197.

<sup>925</sup> Eg Manitoba Law Reform Commission **Report No 83** 1994 34-36; Alberta law Reform Institute **Report for Discussion No 7** 1990 54.



according to the law of the place where it is executed, it should be regarded as such by the law of South Africa notwithstanding the fact that it does not comply with the formalities prescribed for enduring powers in South Africa.

#### 7.165 **PRELIMINARY RECOMMENDATION**

**It is recommended that legislation provide that, notwithstanding the formalities of execution prescribed in such legislation, a document is an enduring power of attorney if, according to the law of the place where it was executed**

- ♦ **it is a valid power of attorney; and**
- ♦ **the agent's authority there under is not terminated by the subsequent mental incapacity of the principal.**

### **Provision for alternative measures where no enduring power has been executed**

- 7.166 Refer to the recommendations regarding default arrangements in paragraph 6.49 and the Master's power to initiate the appointment of managers and mentors in clause 91 of the proposed draft Bill.

### **Extending the concept of enduring power of attorney to personal welfare and health care**

#### *Introduction*

- 7.167 We indicated in the beginning of this Chapter that in several jurisdictions where the concept of enduring power of attorney was introduced, it has subsequently been further developed and refined. The refinement in many jurisdictions resulted in extending the concept (which is traditionally limited to empowering an agent to take decisions regarding financial affairs on behalf of a principal) to also cover

personal welfare and health care matters – with the latter in some instances including the authority to take certain end-of-life decisions.

7.168 What is regarded as “personal welfare and health care”?

- ◆ Typically “personal welfare” decisions include decisions concerning accommodation (eg where to live); association (eg with whom to live and whom to see and not to see); participation in social, educational and employment activities (eg which social activities to have, whether to have education or training, whether to work, where and what as); and legal matters (eg applying for housing, medical and other benefits, and whether to leave the country).<sup>926</sup> As in South Africa, the law in all jurisdictions discussed in this Paper regards some “personal” decisions as too personal in nature to delegate (eg decisions about marriage; divorce; adoption of a child; having sexual relations; and whether to vote and in what way) and these are usually excluded from enduring powers or other forms of advance decision-making for personal welfare.<sup>927</sup>
- ◆ “Health care” is normally regarded as any examination, procedure, service or treatment that is done for a therapeutic, preventative, palliative, diagnostic or other health related purpose and typically involves whether to consent to treatment of the nature referred to.<sup>928</sup> In some jurisdictions “personal care and welfare” is defined broadly as “any matter of a non-financial nature that relates to an individual’s person” (which would include health care).<sup>929</sup>

7.169 What is the common law position: Can an ordinary power of attorney be used for decisions regarding personal welfare and health care?

---

<sup>926</sup> Cf English Law Commission **Consultation Paper 128** 1992 68; Alberta, Canada Personal Directives Act, 1997.

<sup>927</sup> See eg Scottish Law Commission **Discussion Paper 94** 1991 311; English Law Commission **Consultation Paper 128** 1992 69; Schlesinger and Scheiner 1992 **Trusts and Estates** 40 referring to the position in some of the states in the USA. See also par 7.19 above for the South African common law position, and par 7.188 et seq below on the need to expressly exclude such decisions from the ambit of a personal welfare power.

<sup>928</sup> See eg sec 1 of the Alberta, Canada Personal Directives Act, 1997.

<sup>929</sup> Ibid.

- ♦ As regards personal welfare decisions, the answer seems to be unclear. The specific exclusion by South African writers of the matters referred to in the previous paragraph might suggest that other matters of a personal nature *where the personal attributes of the actor are **not** of material importance to a third party* are powers in respect of which an agent may be granted decision-making authority.<sup>930</sup> Some English and Australian writers, for instance, classify the same type of activities mentioned in the previous paragraph as *activities which require the personal skill and judgment of the actor* and conclude that activities which do not require such personal skill and judgment could possibly be included in the powers granted to an agent.<sup>931</sup> Others however do not agree with this view and submit that an agent acting under a power of attorney cannot have any power to make “personal life” decisions on behalf of a principal.<sup>932</sup> Some would argue that the latter is a sound principle as people should not be encouraged to avoid making their own personal decisions when they are perfectly capable of doing so themselves.<sup>933</sup> (Note that this consideration does not apply to a power authorising decisions concerned with financial affairs as there can be many good and proper reasons - such as lack of expertise and time to handle complex financial matters - why persons of sound mind may wish to have someone else look after their financial affairs.<sup>934</sup>)
- ♦ Can a principal (of sound mind) authorise an agent in an ordinary power of attorney to consent to medical treatment on his or her behalf? We indicated in paragraph 4.15 et seq above that consent is a prerequisite for medical treatment. Consent is a legal act that restricts the “injured”

---

<sup>930</sup> Cf Creyke 1991 **Western Australian Law Review** 142-143.

<sup>931</sup> Ibid.

<sup>932</sup> Cf Barker 1996 **De Rebus** 259 where the author indicates that appointment of (only) a *curator bonis* (i.e. a curator seeing to the financial affairs of a person) would be necessary when a general power of attorney lapses; Creyke 1991 **Western Australian Law Review** 143 referring to B Porter and M Robinson “Protected Persons and Their Property in New South Wales” (Sydney: **Law Book**, 1987) 86.

<sup>933</sup> This point is raised by Atkin 1988 **New Zealand Law Journal** 369 in highlighting the differences between financial and personal powers of attorney.

<sup>934</sup> Ibid.

person's rights and as a rule the prejudiced person him- or herself must consent.<sup>935</sup> Only in exceptional circumstances may consent to prejudice be given on behalf of someone else.<sup>936</sup> Specific provision is, for instance, provided for in mental health care legislation for consent to medical treatment on behalf of the mentally ill, and in envisaged national health legislation for consent on behalf of persons who is "unable to give informed consent".<sup>937</sup> A principal (of sound mind) would thus not be able to validly instruct an agent to consent to medical treatment on his or her behalf.<sup>938</sup> A power of attorney given with the purpose of authorising an agent to consent to medical treatment on incompetence of the principal would be of no worth as a power of attorney currently lapses on incompetence of the principal.

7.170 Should individuals be allowed to delegate decisions about their personal welfare and health care when they are no longer competent to make such decisions themselves? Although these decisions have intimate and ethical dimensions (which some submit should not be delegated), it is usually argued that the law already provide for proxy consent in the area of personal welfare and health care: In most systems the law allows parents, for instance, to make such decisions on behalf of their children; curators are allowed under the curatorship system (or similar device) to take such decisions on behalf of mentally incapacitated persons or persons who cannot handle their own affairs.<sup>939</sup> In many jurisdictions legislators found no in principle objections against the advance appointment of decision-makers dealing with personal welfare and health care matters. They in fact regarded it as being consonant with the aim of enabling and empowering people to make their own decisions and with the principle that any intervention in the affairs of an incapacitated adult should be that which is the least restrictive.

---

<sup>935</sup> Neethling, Potgieter and Visser 99-100; Strauss 12.

<sup>936</sup> Ibid.

<sup>937</sup> See par 4.18 above.

<sup>938</sup> Cf also Atkin 1988 **New Zealand Law Journal** 369.

<sup>939</sup> Cf Scottish Law Commission **Discussion Paper 94** 1991 309 et seq; English Law Commission Consultation **Paper 128** 1992 83-84.

The introduction of legislation of this nature moreover reflected a clear public demand for it.<sup>940</sup>

7.171 The methods used in other jurisdictions to realise advance decision-making for personal welfare and health care differ: Some jurisdictions extend the concept of the enduring power of attorney to personal welfare and health care issues. In other jurisdictions substitute decision-making related to health care matters, in particular, are dealt with in healthcare-specific legislation. Such legislation typically includes provision for “directives” by a principal to an agent pertaining to health care matters. Several jurisdictions however preferred the enduring power method which is developed strictly in accordance with the common law requirements for the power of attorney (as derived from the law of agency).<sup>941</sup> With this approach the same legislation providing for enduring powers dealing with financial affairs usually also provides for the execution of powers in respect of personal welfare and health care matters.<sup>942</sup> In such legislation the required form of the mandate, the functions of the agent, and the safeguards built into the process to protect the principal (except for specific limitations enforced with regard to certain medical procedures) are generally the same in respect of agents managing financial affairs and agents managing personal welfare and health affairs.<sup>943</sup>

---

<sup>940</sup> English Law Commission **Consultation Paper 128** 1992 83-84. See eg the positions or proposed positions in England (English Law Commission **Report No 231** 1995 par 1.25); Scotland (Adults with Incapacity [Scotland] Act 2000 sec 16); Alberta, Canada (Personal Directives Act, 1997); Manitoba, Canada (Health Care Directives Act, 1992); Ontario, Canada (Substitute Decisions Act, 1991 and Consent to Treatment Act, 1991); Newfoundland (Newfoundland Law Reform Commission **Discussion Paper** January 1992 101-102); United States (Uniform Health Care Decisions Act, 1993); Queensland, Australia (Queensland Law Reform Commission **Report No 49** 1996 91). Neskorá 1997 **Louisiana Bar Journal** 512 et seq.

<sup>941</sup> The power of attorney models (either limited to health care or extended to all personal care decisions) has also been adopted or recommended in New Zealand, in three Australian States, (Victoria, the Australian Capital Territory and Queensland), England and Scotland.

<sup>942</sup> See eg the proposed position in England (English Law Commission **Report No 231** 1995 par 1.25); Scotland (Scottish Law Commission **Report No 151** 1995 29); and New Zealand (Protection of Personal and Property Rights Act, 1988 [New Zealand Law Commission **Preliminary Paper 40** 2000 10 et seq]).

<sup>943</sup> See eg the recommendations of the Scottish Law Commission (Scottish Law Commission **Report No 151** 1995 29).

- 7.172 With regard to the health care aspect, both the above legislative approaches could include provision for directives by a principal pertaining to consent to general or day-to-day medical treatment; taking part in medical research; organ donation; sensitive medical treatment such as certain reproductive procedures; and the cessation or refusal of medical treatment (which usually becomes relevant in the context of end-of-life decisions).
- 7.173 In accordance with the different methods used, the terminology used for providing for advance decision-making regarding personal welfare and health care also differ. We deal with the issue of terminology in paragraph 7.199 below.

### *The need for extension of the concept*

- 7.174 An enduring power for personal welfare and health care has the same advantages that are associated with the enduring power for financial matters. In particular, it promotes individual autonomy and dignity by giving people control over their life after incapacity.<sup>944</sup> Experience in other jurisdictions show that the enduring power for financial affairs, after its initial introduction, frequently had to be extended to include authority for personal welfare and health care matters as a result of a pronounced public need.
- 7.175 The majority of respondents on Issue Paper 18 were of the opinion that the authority granted to an agent in an enduring power of attorney should be as broad as the principal desires and that individual needs should dictate its extent. In particular, that it should be possible to provide for financial, personal welfare and health related issues and that it should be left to the choice of an individual whether he or she would want to utilise the concept. The fundamental message was that the possibility of granting an enduring power for personal welfare and/or health related issues should at least be available to those who wish to utilise it. Once again, as in the case of the financial power, respondents were very

---

<sup>944</sup>

Alberta Law Reform Institute Report for **Discussion No 11** 1991 16, 34.

concerned that control measures will have to be provided for to adequately protect the principal against abuse. Although detail was not canvassed in Issue Paper 18, some respondents suggested that a single agent should not be left with the responsibility of taking medically related decisions and that such decisions should preferably be taken in conjunction with the medical fraternity. Some respondents also indicated that the enduring power should not be the only device introduced for substitute decision-making regarding personal welfare and health care matters. They stressed that more informal ways should also be available (eg by formalising the role of family and carers). The latter issue is dealt with in Chapter 6.<sup>945</sup>

7.176 It is significant that The National Health Bill, 2003 in principle already acknowledges the concept of an enduring power for health care matters in providing that where a user is unable to give informed consent, the necessary consent for the provision of health services may be given by a person “mandated by the user in writing to grant consent on his or her behalf”.<sup>946</sup> (Note that the Bill does not address withdrawal of treatment.<sup>947</sup>)

7.177 In view of the above, we believe that there is sufficient motivation to, on a preliminary basis, recommend that the concept of the enduring power should be formulated to make it possible for a principal to grant an agent the authority to take personal welfare decisions on his or her behalf. This should include decisions about health care, provided that such decisions are taken within the framework of principles laid down with regard to surrogate consent to medical treatment in the National Health Bill. These principles are set out in paragraph 4.16 et seq and 6.26 et seq above.

---

<sup>945</sup> See the recommendations in par 6.49.

<sup>946</sup> Clause 7(1)(a)(i). See also the discussion of this provision in par 4.18 above.

<sup>947</sup> See par 4.22-4.24 above.

### 7.178 PRELIMINARY RECOMMENDATION

Legislation should make it possible for a person to grant an enduring power of attorney giving another person the right to make some or all decisions about the principal's personal welfare. "Personal welfare" should include health care: Provided that decisions regarding the latter are taken within the framework of what is allowed in respect of surrogate consent to medical treatment by the National Health Bill, 2003.

### *Safeguards*

7.179 Except for additional safeguards with regard to the commencement and limitation of the agent's authority, the features of the personal welfare type of enduring power in other jurisdictions correspond with those of the enduring power for financial affairs.<sup>948</sup> The features of the enduring power for financial affairs have been discussed extensively above. Typical additional or different requirements in respect of personal welfare powers are discussed below.

7.180 Issue Paper 18 did not canvass detail about personal welfare powers, except for the question whether such powers should be allowed to include authority to make *sensitive* health care decisions. Comments in this regard are referred to below.

### **Form and execution of the power**

7.181 The general view in other jurisdictions where provision for personal welfare powers is included in general enduring power of attorney legislation, is that there are no good reasons for additional safeguards as regards the form and execution of such powers. It should be noted that this of course implies that where a power for personal welfare is granted it should be expressly done (as in the case of the

---

<sup>948</sup>

Queensland Law Reform Commission **Report No 49** 1996 327.



financial power).<sup>949</sup> Where a specific form for execution of an enduring power is prescribed, a separate part of such prescribed form thus usually provides for the possibility of granting a personal welfare power.<sup>950</sup>

7.182 In accordance with practice in other jurisdictions and for the sake of accessibility and simplicity we suggest that the same execution formalities should apply to both types of enduring power. On a preliminary basis we recommend that the execution formalities suggested in respect of the financial power in paragraphs 7.62, 7.67, 7.73, 7.77 and 7.82 above should apply to personal welfare powers.

#### 7.183 **PRELIMINARY RECOMMENDATION**

**Legislation should reflect that requirements regarding formalities of execution for personal welfare powers do not differ from those required in respect of financial powers. The legislation should clearly reflect that where an enduring power relating to personal welfare is granted, it should be expressly done (as in the case of a power relating to financial affairs).**

#### **Disqualified agents**

7.184 In par 7.154 above we indicated that some jurisdictions allow a corporate body (such as a bank or insurance company) to be appointed as agent in respect of a financial power, but that this is thought to be undesirable in the case of personal welfare powers and is generally not allowed.<sup>951</sup> We confirm our view as set out in paragraph 7.156 that juristic persons should not be eligible for appointment

---

<sup>949</sup> See par 7.67 above.

<sup>950</sup> Creyke 1991 **Australian Law Review** 144; Scottish Law Commission; Adults with Incapacity (Scotland) Act 2000 sec 15, 16 and 19.

<sup>951</sup> See eg Adults with Incapacity (Scotland) Act 2000 sec 16(5)(b); New Zealand Protection of Personal and Property Rights Act 1988 sec 98(2).

under an enduring power of attorney for personal welfare. No further recommendation is necessary.

### **Commencement of the agent's authority to act**

7.185 As indicated earlier, it is generally found to be unacceptable that a principal who is still capable of consenting to medical treatment or making some personal welfare decisions should be divested of their power to make such decisions.<sup>952</sup> (In contradistinction to this there are no objections to an enduring power for financial affairs becoming operative on execution thereof.)<sup>953</sup> This approach would also clearly deal with situations where the principal has an episodic illness, where the incapacity may be only temporary and the authority of the agent may be periodic, lapsing when the person who made the power regains sufficient capacity to make his or her own decisions and becoming reactivated if a recurrent of the illness causes the person to lose capacity again.<sup>954</sup> In accordance with this all jurisdictions referred to in this Paper allow an agent under a personal welfare power to act only once the principal has been incapacitated.<sup>955</sup> In some jurisdictions the incapacity required is not a general incapacity but an incapacity (or a reasonable belief by the agent of such incapacity) with regard to the particular matter at hand - which is easier to determine than incapacity in general.<sup>956</sup> The incapacity can be established through triggering event mechanisms similar to that of the conditional power.<sup>957</sup> In some jurisdictions it has been recommended that where doubt exists as to whether or not a principal has the necessary capacity or not, the matter should

---

<sup>952</sup> See par 7.169 above.

<sup>953</sup> Ibid. See also English Law Commission Report **No 231** 1995 109; Scottish Law Commission **Report No 151** 1995 37.

<sup>954</sup> See eg Queensland Law Reform Commission **Report No 49** 1996 325-326.

<sup>955</sup> Cf Scottish Law Commission **Discussion Paper 94** 1991 319; Queensland Law Reform Commission **Report No 49** 1996 325-326.

<sup>956</sup> See eg the Adults with Incapacity (Scotland) Act 2000 sec 16.

<sup>957</sup> See par 7.87 et seq on triggering event safeguards above.

be referred to a relevant tribunal to determine whether the power is in operation or not.<sup>958</sup>

- 7.186 For the reasons reflected in our earlier discussions, we agree with the general premise that an agent should not be allowed to take personal welfare decisions on behalf of a principal who is still capable of taking such decisions him or herself.<sup>959</sup>

#### 7.187 **PRELIMINARY RECOMMENDATION**

**Legislation should reflect that an agent should not be entitled to exercise any authority granted in terms of a personal welfare power unless the principal is incapable of making a decision regarding the matter in question, or the agent reasonably believes the principal to be incapable.**

#### **Limitation of the agent's authority**

- 7.188 In all jurisdictions referred to certain restrictions are placed on the powers of an agent acting in respect of personal welfare. These generally include restrictions pertaining to the personal status of the principal; institutionalisation of the principal; and giving consent to medical treatment and research (if the power relates to health care).

#### ***Personal status of the principal***

- 7.189 It is indicated above that current law regards decisions pertaining to marriage, divorce, adoption of a child, having sexual relations, and whether to vote and in what way as too personal to delegate and that such decisions are thus by implication excluded from the powers of an agent acting under a personal welfare

---

<sup>958</sup> Queensland Law Reform Commission **Report No 49** 1996 326.

<sup>959</sup> See par 7.169.

power.<sup>960</sup> In some jurisdictions these matters are nevertheless expressly excluded in enduring power legislation for clarity's sake and for the benefit of those who are unaware of the common law rules.<sup>961</sup>

- 7.190 Opponents of this practice however argue that express exclusion is unnecessary as common law rules do not cease to have effect unless they are expressly excluded in legislation.<sup>962</sup> We agree with this view.

***Institutionalizing the principal***<sup>963</sup>

- 7.191 In all jurisdictions referred to in this Paper agents are not allowed to make decisions regarding the placement and treatment of principals in a mental hospital or similar facilities. Enduring power legislation usually expressly forbids this.<sup>964</sup> This safeguard is usually aimed at preventing consent by the agent being used to circumvent any prescribed procedures in mental health care legislation dealing with the institutionalisation and treatment of individuals.<sup>965</sup>

**7.192 PRELIMINARY RECOMMENDATION**

**Legislation should provide that the authority conferred on an agent does not extend to giving any consent required in terms of the Mental Health Care Act 17 of 2002.**

---

<sup>960</sup> See par 7.19.

<sup>961</sup> Cf Scottish Law Commission **Discussion Paper 94** 1991 311.

<sup>962</sup> Ibid.

<sup>963</sup> Cf New Zealand **Preliminary Paper 40** 2000 5.

<sup>964</sup> See eg Adults with Incapacity (Scotland) Act 2000 sec 16(6).

<sup>965</sup> Scottish Law Commission **Discussion Paper No 94** 1991 316.

### ***Medical treatment***

7.193 Generally speaking, probably the most important consequence of extending the concept of the enduring power of attorney to include authority over matters of health care, is that it could permit third party consent to sensitive medical treatments such as sterilisation, chemotherapy and the removal of life-support systems. If the agent's authority is to include decision-making ability about personal welfare, other jurisdictions usually provide for additional protection of the principal, in particular with regard to consent to medical treatment. Practice in this regard usually depends on the type of medical treatment concerned and frequently ties in with other legislation dealing with medical treatment of incapacitated persons. Practices followed in other jurisdictions include the following.<sup>966</sup>

- ◆ Legislation does not allow a principal to grant an agent the authority to make certain sensitive decisions. For instance, legislation does not allow surrogate consent in respect of cessation of medical treatment.
- ◆ Legislation allows the principal to expressly exclude certain specific decisions in a personal welfare power. The disadvantage of this approach is that there may be such significant advances in medical science and technology that it may be inappropriate to give effect to the views expressed by a principal in entirely different circumstances.<sup>967</sup> This difficulty could however be overcome by giving a tribunal or the Court power to override the directions in an enduring power.
- ◆ Legislation allows a principal to give an agent authority to decide about sensitive personal welfare matters provided that the agent adheres to certain additional requirements. For instance, legislation requires the agent to get the consent of the Court.

7.194 The majority of respondents on Issue Paper 18 were of the opinion that it should be possible for a principal to include authority in an enduring power of attorney

---

<sup>966</sup> See eg the position in Western Australia as discussed by Creyke 1991 **Australian Law Review** 144.

<sup>967</sup> Queensland Law Reform Commission **Report No 49** 1996 325.

for an agent to give consent to sensitive medical treatment. (The comments did not cover end-of life decisions as this investigation does not cover that issue.)<sup>968</sup>

The overwhelming majority were however adamant that surrogate consent for medical research should not be allowed. As regards consent to medical treatment in general, several respondents suggested that the power should operate within a supervisory framework that would provide the necessary checks and balances to protect the person with incapacity against abuse. It was in particular suggested that sensitive medical decisions should be taken in conjunction with the medical profession.

7.195 Since the publication of Issue Paper 18 the National Health Bill has been tabled in Parliament. As indicated in paragraphs 4.16 et seq above, the Bill deals extensively with surrogate consent to medical treatment including consent to general treatment; anatomical donations by living persons for therapeutical and other uses; the removal of tissue, blood or gametes from dead bodies for transplantation; and medical research. The Commission is of the view that agents acting under enduring powers of attorney as envisaged under the current investigation should exercise their authority with regard to consent to medical treatment of a principal in accordance with the principles laid down in this Bill.

#### 7.196 **PRELIMINARY RECOMMENDATION**

**Legislation should indicate that an agent acting under an enduring power of attorney relating to personal welfare is limited to exercising any powers granted in respect of consent to medical treatment in accordance with the principles set out in the National Health Bill, 2003. The legislation should further make it clear that such powers do not extend to refusing consent to the carrying out, or continuation, of life-sustaining treatment.**

---

<sup>968</sup>

For information on the Commission's 1998 investigation on end-of-life decisions and its outcome see par 4.24 above.

### **Revocation of agent's authority**

7.197 In most jurisdictions revocation of a personal welfare power by the principal is dealt with in the same way as execution of the power (i.e. requiring the same formalities as for the execution of a financial power).<sup>969</sup> In others less stringent formalities are required. It is argued that in the case of persons becoming progressively more ill they might no longer be able to write, dictate or sign a revocation although they might be able to say that they have changed their minds - and this should be sufficient.<sup>970</sup> This view prefers provision that a decision to revoke a personal welfare and health care power may be indicated "in writing, orally or in any other way in which the person can communicate".<sup>971</sup> Opponents of this approach however argue that an enduring power is an important legal document and that people who make them have a responsibility, for as long as they are able to do so, to review them periodically to ensure that the instructions they contain continue to reflect their maker's current wishes. Moreover, the method of revocation should not be so informal that it creates problems of proof and consequent uncertainty, or the opportunity for well-intentioned but unwanted intervention.<sup>972</sup> It was suggested that middle-ground could be found in retaining the basic requirements for execution of an enduring power but relinquishing some of the more stringent aspects thereof (eg by still requiring writing but not that the revocation be in a prescribed form; by still requiring witnessing but not by a specific class; and by still requiring "certification" of the capacity of the principal but replacing this with verification of capacity by a witness [excluding the appointed agent, a relative of such agent, or a person providing health care to the principal] in stead of formal certification by a medical practitioner).<sup>973</sup>

---

<sup>969</sup> See eg Queensland Law Reform Commission **Report No 49** 1996 327 et seq.

<sup>970</sup> Cf Law Reform Commission of Queensland **Report No 49** 327-329.

<sup>971</sup> Ibid.

<sup>972</sup> Ibid.

<sup>973</sup> Ibid 331.

- 7.198 For reasons stated in paragraph 7.136 we already proposed in paragraph 7.137 that no formalities should be required for revocation of an enduring power of attorney by the principal. We confirm this recommendation in respect of enduring powers relating to personal welfare.

## Terminology

- 7.199 A variety of terms are used in other legal systems to refer to the concept of a power of attorney that endures the incapacity of the principal. Specific terms are moreover used for an enduring power which comes into operation on the incapacity of the principal only; and to distinguish between enduring powers granted in respect of financial affairs and those granted in respect of personal welfare matters. Different terms are also used to refer to what is traditionally known in the South African law of agency as the “principal” (the person granting authority to another to act on his or her behalf) and the “agent” (the person to whom the authority is granted).

- 7.200 Examples of terminology used in other systems are as follows:

- ◆ *The instrument authorising another to act on behalf of an individual:*  
All jurisdictions referred to in this Paper use the basic common law term “power of attorney”.<sup>974</sup>
- ◆ *A power of attorney which continues after the incapacity of the person who granted the authority:*  
The following are used: “continuing power of attorney” (in England<sup>975</sup> and Scotland<sup>976</sup>); “enduring power of attorney” (in Canada,<sup>977</sup> Australia<sup>978</sup> and

---

<sup>974</sup> See the common law meaning of a “power of attorney” in par 7.1 above.

<sup>975</sup> English Law Commission **Report No 231** 1995 par 1.25-1.26. In England the Law Commission suggested that the concept of “enduring power of attorney” (introduced in 1985 and permitting decision-making about property and affairs only) be replaced by a new form of power of attorney which should be known as a “continuing power of attorney” and which would also cover decisions about personal welfare and health care (Ibid).

<sup>976</sup> Adults with Incapacity (Scotland) Act, 2000 sec 15. Note however that Scotland uses the term “continuing” in respect of a financial power only.



New Zealand<sup>979</sup>); and “durable power of attorney” (mainly in United States legislation<sup>980</sup>).

- ◆ *An enduring power of attorney which becomes operative only when the principal becomes incapable:*

In most jurisdictions the literature refers to this as a “springing” power although legislation seldom expressly uses this term. In legislation the concept is usually fully described eg by referring to the ability of a principal to grant a power which “shall have effect only if the principal becomes mentally incapable”.<sup>981</sup>

- ◆ *An enduring power granted in respect of financial affairs as distinguished from one granted in respect of personal welfare and health care matters:*

In some jurisdictions the two types of power are known by distinct terms eg “continuing power of attorney” (for a financial power) and “welfare power of attorney” (for a personal welfare and health care power);<sup>982</sup> or “durable power of attorney” and “durable power for health care”.<sup>983</sup> In other systems both types are known simply as “continuing” or “enduring” powers and are then further described according to type: eg “enduring power of attorney in relation to property” and “enduring power of attorney in relation to personal care and welfare”.<sup>984</sup> Note however that in some jurisdictions it is argued that it is incorrect to refer to a welfare and health care power as a “continuing” power since such power usually has no effect prior to the principal’s incapacity.<sup>985</sup> Where legislation deals

---

<sup>977</sup> See eg the Enduring Powers of Attorney Act, 1991 of Alberta; Manitoba Law Reform Commission Report **on Enduring and Springing Powers of Attorney** 1994; and Law Reform Commission of British Columbia **Report on the Enduring Power of Attorney** 1990.

<sup>978</sup> Queensland Law Reform Commission **Report No 49 Vol 1** 1996 85 et seq; Powers of Attorney Act, 1998 (Queensland).

<sup>979</sup> New Zealand Protection of Personal and Property Rights Act 1988, sec 95.

<sup>980</sup> See the legislation referred to by Schlesinger and Scheiner 1992 **Trusts and Estates** 38 et seq.

<sup>981</sup> Cf the prescribed form of enduring power provided for in the New Zealand Protection of Personal and Property Rights Act, 1988.

<sup>982</sup> As eg in Scotland (Adults with Incapacity [Scotland] Act, 2000 sec 15 and 16).

<sup>983</sup> As eg in some states in the United States (Loue 1995 **The Journal of Legal Medicine** 461).

<sup>984</sup> As eg in New Zealand (Protection of Personal and Property Rights Act, 1988).

<sup>985</sup> Scottish Law Commission **Report No 151** 1995 29.

separately with health care issues (i.e. where it is not included in legislation on enduring powers of attorney), the authority granted is not referred to in terms of “power-of-attorney-terminology” but is usually referred to as a “health care directive”, “advance directive” or “personal directive”.<sup>986</sup>

◆ *The person granting authority to act:*

In this regard there is a variation of terms usually not linked to or associated with the rest of the terminology used. The following are used: “donor”,<sup>987</sup> “granter”,<sup>988</sup> or “the person making the enduring power”.<sup>989</sup>

◆ *The person executing the authority:*

The terminology chosen sometimes follows the terminology used for the instrument. For instance, referring to a “welfare attorney” where the instrument is referred to as a “welfare power of attorney”.<sup>990</sup> A variety of terms are however used in other jurisdictions, including the following: “attorney”,<sup>991</sup> “chosen decision-maker”,<sup>992</sup> “agent” or “health care agent”,<sup>993</sup> and “donee”.<sup>994</sup> Note that “agent” (the South African common law term) is used only in legislation dealing specifically with advanced directives in health care and not in legislation dealing with enduring powers of attorney. Note also that corresponding terms are not necessarily used for the persons granting and executing authority: In New Zealand, for

---

<sup>986</sup> See eg the position in certain provinces in Canada (Alberta Law Reform Institute **Report No 64** 1993 11-13; and the Alberta Personal Directives Act, 1997 sec 1 for a specific example).

<sup>987</sup> As eg in Alberta, Canada (Alberta Law Reform Institute **Final Report No 88** 2003 v); England (English Law Commission **Report No 231** 1995 par 1.26); New Zealand (Protection of Personal and Property Rights Act, 1988).

<sup>988</sup> As eg in Scotland (Adults with Incapacity [Scotland] Act, 2000 sec 15).

<sup>989</sup> As eg suggested in Queensland, Australia (Queensland Law Reform Commission **Report No 49** 1996 Vol 3 (ix)).

<sup>990</sup> As eg in Scotland (Adults with Incapacity [Scotland] Act, 2000 sec 15).

<sup>991</sup> As in Scotland (Adults with Incapacity [Scotland] Act, 2000 sec 17); and Alberta, Canada (Alberta Law Reform Institute **Issues Paper No 5** 2002 1).

<sup>992</sup> As eg recommended by the Queensland Law Reform Commission (Queensland Law Reform Commission **Report No 49** 1996 Vol 1 85).

<sup>993</sup> As eg in Alberta, Canada (the proposed Health Care Instructions Act [Alberta Law Reform Institute **Report No 64** 1993 45]).

<sup>994</sup> As eg proposed by the English Law Commission (English Law Commission Report **No 231** 1995 par 1.27).

instance, the terms “donor” and “attorney” are used (where one would perhaps have expected “donor” and “donee” – as is preferred in England).<sup>995</sup> Different approaches were followed by Law Commissions introducing terminology in respect of enduring powers. In Scotland, for instance, the Law Commission argued that using the term “attorney” for the appointee (although attorneys are further described as “continuing attorneys” or “welfare attorneys”) is preferred because of its connotations to the common law fiduciary relationship (in the law of agency) between grantor and “attorney”. The Commission believed that adoption of a term other than “attorney” would involve setting out all the relevant common law rules in new statutory provisions pertaining to enduring powers.<sup>996</sup> Contrary to this, the Queensland Law Reform Commission seemed to argue that using a term different from the traditional term used in respect of ordinary powers of attorney would clearly emphasise the difference between the traditional concept and the new concept of *enduring* power of attorney.<sup>997</sup>

- 7.201 The Commission in its 1988 recommendations used the term “enduring power of attorney” to refer to the concept of a power of attorney which continues after the incapacity of the person who granted the authority. Although the concept of the conditional power was provided for in the proposed draft legislation, it was not referred to by a specific term but was *described* in the legislation proposed (as is the practice in other jurisdictions). The recommendations at the time only provided for enduring powers in respect of financial and property affairs (although this was nowhere expressly stated) and terminology for personal welfare powers was not at issue. The terms “agent” and “principal” (following the terms used in the law of agency) were respectively used for the person who is authorised to act for a principal and the person who grants an enduring power of attorney. We on a preliminary basis submit that the terms used by the Commission in its 1988

---

<sup>995</sup> Cf the New Zealand Protection of Personal and Property Rights Act 1988 sec 94 and 95; English Law Commission **Report No 231** 1995 par 1.26-1.27.

<sup>996</sup> Scottish Law Commission **Report No 151** 1995 28-29.

<sup>997</sup> Queensland Law Reform Commission **Report No 49 Vol 1** 1996 85-86.

report should be adhered to. There are no reasons to deviate from these recommendations. We prefer the terms “enduring power relating to property” and “enduring power relating to personal welfare” to distinguish between the two types of powers. We suggest that clear definitions should be included in the proposed legislation to indicate the meanings of the different terms used.

#### 7.202 **PRELIMINARY RECOMMENDATION**

**We recommend that the terminology as suggested in the previous paragraph be used in legislation providing for enduring powers of attorney and that definitions should be included in the legislation to clearly indicate what the respective terms mean.**

## 8

# Proposed draft Bill

- 8.1 The Commission made preliminary recommendations for change in the course of the Discussion Paper. These suggestions are embodied in the draft Bill below.
- 8.2 The preliminary recommendations and draft legislation need to be debated thoroughly and the Commission invites comment from all parties who are interested in the issue under investigation. The Commission's in principle recommendations are listed in the SUMMARY at the beginning of this Paper with reference to the relevant paragraphs in the Paper and the clauses in the proposed draft Bill. Respondents are requested to respond as comprehensively as possible. Written comments should be submitted by post or e-mail as set out in the front of the Paper (p ii). **The closing date for comments is 31 March 2004.**
- 8.3 The proposed draft Bill consists of 8 Chapters and a Schedule dealing with the following:
- ♦ **Chapter 1** contains fundamental provisions dealing with decision-making on behalf of adults with incapacity. It sets out the basic principles which will underpin every decision taken on behalf of such adult in terms of the proposed legislation; and aims to clearly indicate to whom the legislation will apply and under what circumstances.
  - ♦ **Chapter 2** creates a first tier of substitute decision-making in providing for a general authority to act on behalf of an adult with incapacity with regard to personal welfare matters. In addition, it provides for continuing authority in relation to signing powers on bank accounts; and authority to act in respect of minors who become adults with incapacity. The provisions aim to legalise day to day decisions taken under certain circumstances by family, carers and others. The procedures created are intended to serve as "default" arrangements, i e they should apply where

other procedures provided for in the proposed legislation have not been utilised.

- ◆ **Chapter 3** enables one-off decisions in respect of property (i.e. financial affairs) or personal welfare to be made on behalf of an adult with incapacity. This measure is intended to render short term assistance and involves an application to the Master of the High Court to appoint a person to make a decision or take action (or the Master making the necessary decision him- or herself) on behalf of the adult with incapacity concerned.
- ◆ **Chapters 4 and 5** deal with the longer term management of the *property* and care for the *personal welfare* of adults with incapacity respectively. The provisions in these Chapters enable the appointment by the Master of the High Court of a *manager* (in respect of property) and a *mentor* (in respect of personal welfare). The procedures created should be seen as alternatives to the current common law system of *curator bonis* and *curator personae*. Note that the common law is not abolished: the proposed legislation aims at supplying the public with a choice by making more accessible procedures available.
- ◆ **Chapter 6** introduces and regulates the concept of the enduring power of attorney. It should be noted that the concept is developed on the basis of the common law principles pertaining to agency. The provisions in the draft Bill should thus be read in conjunction with these principles.
- ◆ **Chapter 7** provides for supplementary supervisory powers and duties of the Master as well as the Court in respect of the new measures created. The Commission's main aim in this regard was to make use of existing supervisory frameworks rather than create new frameworks since the latter approach might, because of the financial and human resources implications thereof, make implementation of the proposed measures problematic.
- ◆ **Chapter 8** provides for general matters, the most significant of which is the creation of an offence in respect of neglect and abuse of persons with incapacity by persons making decisions on behalf of such persons in terms of the proposed legislation.

- ♦ The **Schedule** contains model forms for enduring powers of attorney relating to property and to personal welfare respectively. The forms include explanatory notes for the information of the person executing the power. Although use of the forms is not obligatory it is recommended that the explanatory notes *must* be included in every enduring power of attorney at the time of its execution for it to be valid.

8.4 The Commission's aim was to keep the proposed legislation as simple and accessible as possible. For this reason the application procedures for the appointment of the three types of substitute decision-makers proposed (intervention orders; the appointment of a manager; and the appointment of a mentor) are basically the same. For the sake of clarity and with the aim of using plain language, the provisions relating to these appointment procedures are however repeated (with the small differences that apply in respect of each) in Chapters 3, 4 and 5 of the proposed draft rather than dealing with them together in a single Chapter. In some instances the powers and duties of the decision-makers referred to and of an agent acting under an enduring power of attorney also overlap with each other. Again, for the sake of clarity the provisions have been repeated under different chapters rather than dealing with them in a single chapter.

## **Annexure**



## Respondents to Issue Paper 18 in order of receipt of submissions

- 1      **State Law Advisers, Office of the Premier: Gauteng**  
          Comment by Ms Pravashini Govender
- 2      **Prof M Vorster, Head of Division Psychiatry, Department of Neuroscience: University of the Witwatersrand**
- 3      **Department Social Welfare, Free State Province**  
          Comment by BS Mosella
- 4      **The South African National Council for the Blind**  
          Comment by Mr William Rowland, Executive Director
- 5      **PIMSA (Partners Interfaith Mission) Vukani Ma-Afrika Care of the Aged and Disabled: Shalom Mediation and Legal Advisory, Orange Farm**  
          Comment by MS Motloun, Provincial Chairperson: Disabled
- 6      **Anonymous member of the public 1**
- 7      **Algoa Bay Council for the Aged**  
          Comment by Mrs Lisa Diesel, Social Worker
- 8      **Stroke Support Group**  
          Comment by Ms Ingrid Marren, Chairperson
- 9      **Prof Gina Buijs, Head of Department Anthropology and Development Studies: University of Zululand**
- 10     **Dr Sean Kaliski, Head Forensic Psychiatry Unit Valkenberg Hospital Department of Psychiatry: University of Cape Town**
- 11     **Anonymous member of the public 2**
- 12     **Prof JMT Labuschagne, Department Private Law: University of Pretoria**
- 13     **Prof CJ Davel, Department Private Law: University of Pretoria**
- 14     **Prof PA Carstens, Department Public Law: University of Pretoria**
- 15     **Society of Advocates of KwaZulu-Natal**
- 16     **Project for the Elderly, Disabled, Disadvantaged and the Poorest, Atteridgeville**  
          Comment by Mr Piet Papo, Chairperson
- 17     **Garankuwa Management Committee for Aged and Disabled**
- 18     **Western Cape Forum for Intellectual Disability**  
          Main contributor to collective comments Ms Ingrid Daniels, Director: Cape Mental Health Society. These comments include input from the **Association for the Mentally Handicapped (OASIS)**
- 19     **South African Federation for Mental Health**  
          **Autism South Africa** aligns themselves with these comments
- 20     **Law Society of the Cape of Good Hope**  
          Comment by LSC Specialist Committee on Family Law Matters
- 21     **Durban and Coastal Mental Health**

- 22 **Fr Hyacinth Ennis, Studium Philosophicum**
- 23 **Occupational Therapy Association of South Africa**
- 24 **The National Council for Persons with Physical Disabilities in South Africa**
- 25 **Old Mutual**  
Comment by Ms Deolinda Delcarme, Legal Adviser
- 26 **Sinodale Kommissie vir die Diens van Barmhartigheid, NG Church**  
Comment by Ms WJ Burger, Director: Care for the Aged and Persons with Special Needs
- 27 **The Pretoria Council for the Care of the Aged**
- 28 **Seniors for Seniors**
- 29 **Sinodale Kommissie vir die Diens van Barmhartigheid, NG Church**  
Comment by Ms Heidi Joubert, Social Worker
- 30 **Potchefstroom Service Centre for the Aged**  
Comment by Sr Marinda Swanepoel, Professional Nurse and Ms Wendri Eloff, Director
- 31 **Afrikaanse Christelike Vroue Vereniging (ACVV) Head Office**
- 32 **Legal Component, Detective Service and Crime Intelligence: South African Police Service**
- 33 **Prof Tuviah Zabov, Department of Psychiatry: University of Cape Town**
- 34 **Rev M Balisi**
- 35 **Department of Health**  
Comment by Mrs C Kotzenberg (Director: Chronic Diseases, Disabilities and Geriatrics for the Director-General)
- 36 **Department of Health: Northern Cape Government**  
Comment by Ms Cynthia Isaacs, Programme Manager: Health and Substance Abuse
- 37 **Prof JC Bekker**
- 38 **The Society for the Care of the Retarded**  
Comment by Mrs PD Baudains, Secretary
- 39 **Prof Melvyn Freeman, Director Mental Health and Substance Abuse: Department of Health**
- 40 **The Family Advocate, Pretoria**  
Comment by Adv GJ van Zyl (Head of Office); Ms Christa Coetzer (Social Worker and Family Counsellor); and Ms Renate Scherrer (Clinical Psychologist and part-time Family Counsellor)
- 41 **Howick and District Council for Care of the Aged**  
Comment by Mrs PA Macleod, Social Worker
- 42 **Office of the Master of the High Court, Kimberley**  
Comment by Mr J Du Plessis, Head of Office
- 43 **Office of the Master of the High Court, Bloemfontein**  
Comment by MrLG Basson, Head of Office
- 44 **Southern African Catholic Bishops' Conference**  
Comment by Adv AH Schwrer, Chairman Legal Advisory Committee
- 45 **Alzheimer's and Related Dementias Association (ARDA) KwaZulu-Natal Branch**  
Comment by Mrs CL Eley, Councillor/Administrator and Mr Gavin Gow of Gavin Gow & Co, Attorneys, Conveyancers and Administrators of Estates

**46 Brain Injury Group**

Joint comment compiled by Ms Olga Hattingh (Administrator) from input by Ms Christa Botha (Chief Welfare Worker – Neurology); Ms Ingrid Marren (Physiotherapist); Mr E Leos (Lawyer and traumatic brain injury survivor); Ms Wilma van der Walt (occupational therapist); and Mr Gert van Rensburg (Manager, Brain Injury Group and traumatic brain injury survivor)

**47 Alzheimer's and Related Dementias Association (ARDA) Pretoria Branch**

Comment by Mr CH Badenhorst

**48 Ms Mabel Groenewald**

**49 Messrs RFJ and NJ Yeowart, Attorneys, Notaries, Administrators of Estates**

**50 SA Banking Council (AMH KYK OF DIT DIE REGTE NAAM IS)**

Comment by Mr Stuart Grobler, Managing Director

**51 Prof Chris Boonzaaier, Department of Anthropology: University of Pretoria**

**52 Ms Santie Coetzee, Social Worker**

**53 Suid-Afrikaanse Vrouefederasie**

Comment by Prof A du Toit-Steyn and Ms Carmelita Marx

**54 Alzheimer's and Related Dementias Association (ARDA), National Office**

**55 Peter F Caldwell Attorneys**

**56 Office of the Master of the High Court, Pietermaritzburg**

Comment by Mrs Edwards, Deputy Head of Office

**57 Department of Social Services, Western Cape Province**

Comment compiled by Ms Kota van der Mescht

**58 Mbango Valley Association for the Aged and Disabled, Port Shepstone**

**59 Halt Elder Abuse Line (HEAL)**

**60 Association for the Aged, Darnall, KwaZulu-Natal**

**61 The Association of Trust Companies in South Africa**

Comment by the convenor of the Trust Special Purpose Committee

**62 Office of the Master of the High Court, Cape Town**

Comment by Mr A Hoogendijk, Deputy Master

**63 Johannesburg Bar Council**

**64 Justice College**

Comment by Ms Margaret Meyer, Law Lecturer

**65 General Council of the Bar of South Africa**

Comment by Adv Abraham Louw, Convenor: Law and Administration Committee

**66 Gauteng Health Department**

Comment by Dr Rita Thom (Senior Specialist) and Ms Ray Lazarus, Clinical and Service Development Directorate

**67 Joint comments by The Association for the Aged (TAFTA); The Pietermaritzburg and District Council for the Aged (PADCA); and The South African Association for the Aged (SAAHA)**

Comments compiled by Henry Spencer (CEO of TAFTA); Margie van Zyl (CEO of PADCA) and Mary Leppens (Divisional Manager of Social Services, TAFTA)

- 68      **Legal Services, Provincial Administration Western Cape**  
            Comment compiled from input from various sources by Ms Sanet Botha, State Law  
            Adviser
- 69      **Health Services, Province of KwaZulu-Natal**  
            Comment by Prof RW Green-Thompson, Secretary: Department of Health
- 70      **Cape Peninsula Welfare Organisation for the Aged**
- 71      Joint comment by **Dr Felix Potocnik (Head: Psychogeriatric Unit, Department of Psychiatry),**  
**Dr Christianne Bouwens (Head: Geriatric Unit, Department of Internal Medicine) and Prof**  
**Willie Pienaar (Principal Psychiatrist: Department of Psychiatry Faculty of Health Sciences:**  
**University of Stellenbosch)**
- 72      **Multiple Sclerosis South Africa**
- 73      **Mr Tim Rattenbury, Legislative Services (Law Reform): Department of Justice, New**  
**Brunswick, Canada**

REPUBLIC OF SOUTH AFRICA

-----

**ADULTS WITH IMPAIRED DECISION-MAKING CAPACITY BILL**

-----  
(As introduced .....  
-----

(MINISTER FOR JUSTICE AND CONSITUTIONAL DEVELOPMENT

---

**BILL**

**To provide for statutory authority to make decisions on behalf of an adult with impaired decision-making capacity; to enable an agent under an enduring power of attorney to make decisions on behalf of an adult with impaired decision-making capacity; and to provide for matters connected therewith.**

**PREAMBLE**

RECOGNISING that the inability or limited ability of an adult to make legally effective decisions may reduce such person's ability to control his or her life;

RECOGNISING that human dignity, the achievement of equality and the advancement of human rights and freedoms are founding principles of our democracy; and

RECOGNISING further that the South African common law and statutory law fail to deal effectively with the need for assisted and substituted decision-making, thereby failing to provide adequate protection against exploitation of adults with decision-making incapacity;

**BE IT THEREFORE ENACTED** by the Parliament of the Republic of South Africa, as follows:-

## **ARRANGEMENT OF SECTIONS**

1. Definitions

### **CHAPTER 1**

#### **FUNDAMENTAL PROVISIONS**

2. Objects of Act
3. Application of Act
4. Adult with incapacity
5. Intervention to be in best interests of adult with incapacity

### **CHAPTER 2**

#### **DEFAULT AUTHORITY**

#### **TO ACT ON BEHALF OF ADULT WITH INCAPACITY**

6. General authority to act
7. Expenditure in relation to general authority to act
8. Restrictions on general authority to act
9. Authority in relation to signing power on bank account
10. Authority to act in respect of minors who become adults with incapacity

### **CHAPTER 3**

#### **SPECIFIC INTERVENTION ORDERS**

11. Power of Master to make specific intervention order
12. Application for order
13. Disposal of application and security
14. Legal effect of order
15. Restrictions
16. Notification of address
17. Records
18. Care diligence and skill required of person authorised
19. Reimbursement
20. Account or report on completion of duties

- 21. Discharge

## CHAPTER 4 MANAGEMENT OF PROPERTY

### *Part 1*

#### *Appointment of manager*

- 22. Power of Master to appoint manager
- 23. Application to appoint manager
- 24. Disposal of application
- 25. Security
- 26. Who may be appointed
- 27. Renewal of appointment
- 28. Legal effect of appointment

### *Part 2*

#### *Powers and duties of manager*

- 29. Powers conferred by letter of appointment
- 30. Taking custody of property
- 31. Lodging of and updating inventory of property
- 32. Banking accounts and investments
- 33. Failure to deposit money in banking accounts
- 34. Lodging of documents in case of transfer of immovable property
- 35. Notification of address and change of circumstances
- 36. Accounts
- 37. Care, diligence and skill required of manager
- 38. Remuneration

### *Part 3*

#### *Restrictions on manager*

- 39. General restrictions
- 40. Restriction on alienation or mortgage of immovable property
- 41. Restriction on purchase of property
- 42. No substitution or surrogation

**Part 4**

**Termination**

- 43. Resignation of manager
- 44. Termination of appointment on adult recovering from incapacity
- 45. Withdrawal of appointment by Court or Master
- 46. Cancellation of letter of appointment
- 47. Return of letter of appointment
- 48. Discharge

**CHAPTER 5**

**CARE FOR PERSONAL WELFARE**

**Part 1**

***Appointment of mentor***

- 49. Power of Master to appoint mentor
- 50. Application to appoint mentor
- 51. Disposal of application
- 52. Who may be appointed
- 53. Renewal of appointment
- 54. Legal effect of appointment

**Part 2**

***Powers and duties of mentor***

- 55. Powers and duties conferred by letter of appointment
- 56. Keeping of records
- 57. Notification of address and change of circumstances
- 58. Reports
- 59. Care, diligence and skill required of mentor
- 60. Remuneration and reimbursement



**Part 3**  
***Restrictions on mentor***

- 61. General restrictions
- 62. Restriction relating to health care
- 63. No substitution or surrogation

**Part 4**  
***Termination***

- 64. Resignation of mentor
- 65. Termination of appointment on adult recovering from incapacity
- 66. Withdrawal of appointment by Court or Master
- 67. Cancellation of letter of appointment
- 68. Return of letter of appointment
- 69. Discharge

**CHAPTER 6**  
**ENDURING POWERS OF ATTORNEY FOR PROPERTY AND FOR PERSONAL WELFARE**

**Part 1**  
***Introductory provisions***

- 70. Enduring power of attorney
- 71. Scope of enduring power of attorney: property and personal welfare

**Part 2**  
***Execution formalities***

- 72. Formalities required in execution of enduring power of attorney
- 73. Requirements regarding signing and witnessing
- 74. Dispensing of execution formalities

**Part 3**  
***Appointment of agent***

75. Appointment of agent

**Part 4**  
***Registration***

76. Registration of enduring power of attorney

**Part 5**  
***General powers and duties of agent***

77. Furnishing of security  
78. Notification of address and change of circumstances  
79. Keeping of records  
80. Accounting on request

**Part 6**  
***Restrictions***

81. General restrictions  
82. Restrictions in respect of personal welfare

**Part 7**  
***Termination***

83. Revocation by principal  
84. Resignation by agent  
85. Withdrawal by Court or Master  
86. Return of copy of enduring power of attorney

**Part 8**  
***Validity of certain documents as enduring powers of attorney***

87. Recognition of foreign documents

**CHAPTER 7**  
**SUPPLEMENTARY POWERS OF THE MASTER AND THE COURT**

***Part 1***  
***Powers and duties of the Master***

- 88. Notification of appointment and of cessation
- 89. Returns to registration officer of immovable property included in manager's inventory
- 90. Powers on failure to lodge accounts or perform duties
- 91. Initiation of appointment of manager or mentor under certain circumstances
- 92. Investigation and enquiry
- 93. Interim rulings
- 94. Review

***Part 2***  
***Access to Court***

- 95. Access to Court

**CHAPTER 8**  
**GENERAL PROVISIONS**

- 96. Regulations
- 97. Offences and penalties
- 98. Short title and commencement.

**SCHEDULE**

***FORM 1***

Model form for enduring power of attorney relating to property

***FORM 2***

Model form for enduring power of attorney relating to personal welfare

## Definitions

1. In this Act, unless the context indicates otherwise –

**“Administration of Estates Act”** means the Administration of Estates Act, 1966 (Act 56 of 1966);

**“adult”** means a person -

- (a) who has attained the age of majority in terms of section 1 of the Age of Majority Act, 1972 (Act 57 of 1972) or who has been declared to be a major in terms of section 2 of that Act; or
- (b) who has contracted a legal marriage.

**“agent”** means a person who is authorised to act for a principal under an enduring power of attorney granted in terms of this Act;

**“bank”** means a bank registered in terms of the Banks Act, 1990 (Act 94 of 1990) or a mutual bank registered in terms of the Mutual Banks Act, 1993 (Act 124 of 1993);

**“Constitution”** means the Constitution of the Republic of South Africa, 1996;

**“Court”** means the High Court having jurisdiction;

**“curator”** means a curator as defined in section 1 of the Administration of Estates Act, 1965 (Act 66 of 1965);

**“enduring power of attorney”** means an enduring power of attorney as contemplated in section 70;

**“general authority”** means general authority to act on behalf of a person with incapacity contemplated in section 6;

**“health care”** means any examination, procedure, service or treatment that is done for a therapeutic, preventive, palliative, diagnostic or other health related purpose;

**“incapacity”** means decision-making incapacity contemplated in section 4 and “incapacitated” has a corresponding meaning;

**“joint agent”** means one of two or more agents who have been granted authority under an enduring power of attorney;

**“magistrate”** means a magistrate as defined in the Magistrates Act, 1993 (Act 90 of 1993);

**“manager”** means a person appointed in terms of section 22 to care for and manage the property of an adult with incapacity;

**“Master”** means the Master of the High Court within whose area of jurisdiction the matter concerned is to be dealt with and includes a Deputy Master and an Assistant Master;

**“Master’s office”** means an office of the Master as contemplated in section 3 of the Administration of Estates Act, 1965 (Act 66 of 1965);

**“medical practitioner”** means a person registered as such in terms of the Health Professions Act, 1974 (Act 56 of 1974);

**“Mental Health Care Act”** means the Mental Health Care Act, 2002 (Act 17 of 2002);

**“mentor”** means a person appointed in terms of section 49 to take care of the personal welfare of an adult with incapacity;

**“Minister”** means a Cabinet member responsible for justice;

**“minor with incapacity”** means a person who is not an adult as defined in this section, and who is without capacity as provided for in section 4;

**“National Health Act”** means the National Health Act, 200..... (Act .... of ....);

**“personal welfare”** means any matter relating to the person of an adult with incapacity not relating to “property” as defined in this section and includes health care;

**“prescribed”** means prescribed by regulation;

**“principal”** means an adult who grants an enduring power of attorney in terms of this Act;

**“property”** includes income, finance, business or undertaking and any contingent interest in property;

**“relative”** means a mentally competent person who is the spouse, parent, adult child or a sibling of the person concerned;

**“Republic”** means the Republic of South Africa;

**“specific intervention order”** means an order contemplated in section 11;

**“spouse”** means a spouse in the legal sense and includes a spouse according to any law, custom or religion and a partner in a permanent same-sex life partnership;

**“this Act”** includes the Regulations;

**“sign”** includes –

- (a) the making of initials; and
- (b) in the case of the principal executing an enduring power of attorney, the making of a mark or the placing of a thumb print;

**“substitute agent”** means an agent who has been appointed by the principal in an enduring power of attorney as a substitute as contemplated in section 75(3).

## **CHAPTER 1**

### **FUNDAMENTAL PROVISIONS**

#### **Objects of Act**

2. The object of this Act is to regulate ways in which decisions may lawfully be made on behalf of an adult with incapacity by -
- (a) providing for statutory authority to make such decisions;
  - (b) enabling an agent under an enduring power of attorney to make such decisions;
  - (c) providing for and clarifying informal decision-making;
  - (d) establishing general principles according to which such decision-making must take place; and
  - (e) providing for safeguards to protect the interests of adults with incapacity where other persons are authorised to make decisions on their behalf.

#### **Application of Act**

3. Subject to section 10, this Act does not enable anything to be done for, or a decision to be made on behalf of, a person who is not an adult.

#### **Adult with incapacity**

4. (1) An adult is an adult with incapacity if at the time a decision needs to be made he or she is unable, temporarily or permanently and irrespective of the cause –
- (a) to make the decision for him- or herself on the matter in question;
  - or
  - (b) to communicate his or her decision on that matter.
- (2) An adult is unable to make a decision for him- or herself as contemplated in subsection (1)(a) if he or she is unable -

- (a) to understand or retain the information relevant to the decision; or
  - (b) to make an informed, rational decision based on that information.
- (3) An adult must not be regarded as unable to understand the information referred to in subsection (2)(a) if he or she is able to understand an explanation of the information in broad terms and in simple language.
- (4) An adult must not be regarded as unable to make a decision referred to in subsection (2)(b) merely because he or she makes a decision which would not be made by a person of ordinary prudence.
- (5) An adult must not be regarded as unable to communicate his or her decision referred to in subsection (1)(b) unless all practicable steps to enable communication of the decision has been taken without success.

### **Intervention to be in best interests of adult with incapacity**

5. (1) Any intervention in the affairs of an adult with incapacity in terms of this Act must be in the best interests of such adult.
- (2) In deciding what is in an adult's best interests -
- (a) it must be established that the intervention is the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention;
  - (b) it must be taken into account that -
    - (i) no intervention should take place unless it is necessary with regard to the individual circumstances and needs of the adult; and
    - (ii) intervention is unnecessary if any less formal arrangements can be made or any assistance can be provided by relatives or by others;
  - (c) it must be recognised that the adult must be encouraged to participate, or to improve his or her ability to participate, as fully as

possible in anything done for and any decision affecting him or her;

- (d) the cultural environment, values and beliefs of the adult must be taken into account in so far as it is reasonable and practicable to do so;
  - (e) the adult's past and present wishes and feelings in relation to the intervention must, in so far as they are ascertainable, be taken into account;
  - (f) account must be taken, in so far as it is reasonable and practicable to do so, of the views of –
    - (i) any person named by the adult as someone to be consulted;
    - (ii) the relatives and the primary carer of the adult;
    - (iii) a curator, manager, mentor or agent who has powers relating to the proposed intervention;
    - (iv) any person whom the Master or the Court has directed to be consulted; and
    - (v) any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in -
      - (aa) the welfare of the adult; or
      - (bb) the proposed intervention,
 where these views have been made known to the person responsible.
- (3) The principles in subsection (2) must not exclude consideration of any relevant factor in a particular case.
- (4) For purposes of this section “intervention” means –
- (a) anything done;
  - (b) any decision taken; or
  - (c) any order made,



for, on behalf of, or in relation to an adult with incapacity, including anything done or any decision taken in pursuance of an appointment as manager, mentor or agent.

## CHAPTER 2

### DEFAULT AUTHORITY

#### TO ACT ON BEHALF OF ADULT WITH INCAPACITY

#### **General authority to act**

6. Subject to section 8, anything may be done for the personal welfare of an adult with incapacity if -

- (a) it is reasonable for it to be done by the person who does it in relation to the matter in question; and
- (b) if it is reasonably believed by the person who does it to be in the best interests of the adult with incapacity.

#### **Expenditure in relation to general authority to act**

7. (1) (a) Where any action in terms of section 6 involves expenditure –
- (i) the credit of the adult with incapacity may be pledged for that purpose; and
  - (ii) money in possession of the adult with incapacity may be applied to meet the expenditure; and
- (b) if the expenditure contemplated in paragraph (a) is borne by another person, that person shall be entitled –
- (i) to reimburse him- or herself out of any such money; or
  - (ii) to be otherwise indemnified by the adult with incapacity.

- (2) For purposes of this section “expenditure” means reasonable expenses incurred for goods supplied or services rendered during the course of any action taken in terms of section 6: Provided that -
- (a) such goods or services was necessary and useful in relation to the action taken; and
  - (b) the expenses was suitable in relation to –
    - (i) the standard of living of the adult concerned; and
    - (ii) his or her actual requirements at the time when the goods are supplied or the services rendered.

### **Restrictions on general authority to act**

8. (1) With the exception of taking any steps necessary to avert a substantial risk of serious harm to the adult with incapacity concerned, section 6 does not authorise –
- (a) the use of, or threat of, force to enforce the doing of anything to which the adult objects; or
  - (b) the detention or confinement of the adult.
- (2) (a) Subject to paragraph (b), section 6 does not authorise the doing of anything for the adult concerned which is contrary to directions given, or inconsistent with a decision made, within the scope of his or her authority by -
- (i) a curator appointed by the Court in respect of the person or property of such adult;
  - (ii) an administrator appointed in terms of Chapter VIII of the Mental Health Care Act to care for and administer the property of such adult;
  - (iii) a manager appointed in respect of the property, or a mentor appointed in respect of the personal welfare, of such adult in terms of this Act; or
  - (iv) an agent acting under an enduring power of attorney granted in respect of such adult in terms of this Act.

- (b) paragraph (a) does not preclude any action necessary to prevent the death of the adult concerned or a serious deterioration in his or her condition while an order with regard to a matter in question is sought from a Court.
- (3) The authority under section 6 does not extend to giving or refusing consent on behalf of, or in relation to, an adult with incapacity which is required in terms of -
  - (a) the Mental Health Care Act; or
  - (b) the National Health Act.

#### **Authority in relation to signing power on bank account**

- 9. (1) If an adult granted his or her spouse signing power in respect of such adult's bank account and such adult becomes an adult with incapacity after granting the power and while the power is still in force, the signing power granted shall, subject to subsection (2), continue to be valid despite the adult's incapacity.
- (2) (a) A spouse is not entitled to use the continuing signing power referred to in subsection (1) for any purpose other than the payment of the reasonable living expenses of the adult with incapacity concerned.
- (b) For purposes of this subsection "reasonable living expenses" include expenses in respect of the common household of the spouses that had directly before the incapacity of such adult been paid out of his or her bank account.
- (3) Any interested person may at any time apply to a Master for an order -
  - (a) terminating the continuing signing power referred to in subsection (1); or
  - (b) limiting the purposes for which such power may be used.

(4) In disposing of an application made under subsection (3) the Master may make any ruling he or she deems fit in the interests of the adult with incapacity concerned which interests may include the well-being of the spouse and minor children of such adult.

(5) A continuing signing power referred to in subsection (1) terminates on the dissolution of the marriage, customary or religious union, or permanent same sex life partnership between the adult with incapacity concerned and his or her spouse.

(6) Section 8(2) apply, with the necessary changes, to any authority in relation to a continuing signing power on a bank account under this section.

#### **Authority to act in respect of minors who become adults with incapacity**

10. (1) If a minor with incapacity becomes an adult with incapacity contemplated in section 4, the legal guardian or joint legal guardians who has or have jointly, as the case may be, exercised the powers of guardianship over such minor immediately before he or she became an adult with incapacity, shall, without limiting any power such persons may have in terms of the common law, for all purposes be deemed to have been appointed -

- (a) as manager or joint managers, as the case may be, in terms of Chapter 4 of this Act in respect of the property; and
- (b) as mentor or joint mentors, as the case may be, in terms of Chapter 5 of this Act in respect of the personal welfare, of such adult with incapacity.

(2) Unless the Master, on application by any interested person, directs otherwise, a guardian deemed to have been appointed as contemplated in subsection (1) shall not be required to –

- (a) furnish security in terms of section 25;
- (b) lodge accounts with the Master in terms of section 36; and
- (c) lodge reports with the Master in terms of section 58.

- (3) (a) Any interested person may at any time apply to a Master for an order -
  - (i) terminating the appointment deemed to have been made as contemplated in subsection (1); or
  - (ii) limiting the purposes for which such appointment may be used.
- (b) In disposing of an application made under paragraph (a) the Master may make any ruling he or she deems fit in the interests of the adult with incapacity concerned.
- (4) (a) The Master may at any time require a guardian who has been deemed to have been appointed under subsection (1) to apply for appointment in terms of this Act as manager or mentor or both, as the case may be.
- (b) An application referred to in paragraph (a) must be made within 30 days of the Master so requiring and must be disposed of in terms of this Act.
- (c) An appointment in pursuance of an application referred to in paragraph (a) shall have all the consequences of an appointment as manager or mentor, or both as the case may be, as provided for in this Act.
- (d) A guardian who has been deemed to have been appointed under subsection (1) and who fails to apply for appointment within the period required in subsection (4)(b), or such further period as the Master may allow, shall from the date of the expiry of such period no longer be deemed to be the manager or mentor or both as the case may be, of the adult with incapacity concerned.

**CHAPTER 3**  
**SPECIFIC INTERVENTION ORDERS**  
**IN RESPECT OF PROPERTY AND PERSONAL WELFARE**

**Power of Master to make specific intervention order**

11. (1) A Master may, on consideration and processing of an application submitted in terms of section 12 make a specific intervention order in respect of a matter concerning the property or personal welfare of an adult with incapacity.
- (2) A Master may, in a specific intervention order contemplated in subsection (1) -
- (a) make a decision, or direct the taking of any action, specified in the order; or
  - (b) authorise a person nominated in the application to make such decision or to take such action,
- in relation to the property or personal welfare of the adult with incapacity concerned.

**Application for order**

12. (1) Any person over the age of 18 may apply to a Master for a specific intervention order in respect of an adult with incapacity.
- (2) The application must be made in writing, under oath or solemn affirmation, and must –
- (a) set out the relationship of the applicant to that adult and –
    - (i) if the applicant is not a spouse or relative of that adult, the reason why the spouse or relative did not make the application; and

- (ii) if they are not available to make the application, what steps were taken to establish their whereabouts before making the application;
  - (b) include all medical certificates or reports relevant to the adult's incapacity relating to his or her property or personal welfare, as the case may be;
  - (c) set out the grounds on which the applicant believes that the adult is incapacitated in respect of his or her property or personal welfare;
  - (d) state that, within seven days immediately before submitting the application, the applicant had seen that adult;
  - (e) give the particulars and contact details of persons who may provide further information relating to the state of incapacity of the adult concerned;
  - (f) state the particulars of the adult concerned and his or her estimated property value and annual income; and
  - (g) nominate and give the particulars of a suitable person for purposes of section 11(2)(b).
- (3) The applicant must attach to the application proof –
- (a) that a copy of the application has been submitted to the adult with incapacity or that such adult has consented to the application being made; and
  - (b) if the adult concerned has a primary carer, that a copy of the application has also been submitted to such carer.

### **Disposal of application and security**

**13.** (1) The Master must, within 30 days of receiving the application contemplated in section 12 -

- (a) make a specific intervention order contemplated in section 11(2) if the Master is satisfied that the adult concerned is an adult with incapacity as contemplated in section 4; or

(b) refuse to make such order.

(2) In considering an application under section 12 the Master must, in addition to the matters contemplated in section 5, take into account -

(a) any specific intervention order; or

(b) any order for the appointment of a manager or mentor

which has been previously made in terms of this Act with respect to the adult concerned.

(3) The Master must, in writing inform –

(a) the applicant; and

(b) the adult with incapacity concerned,  
of his or her decision and the reasons thereof.

(4) In the case of an application in respect of the property of an adult with incapacity, the Master may before making an intervention order, if -

(a) such order authorises a person nominated in the application to make a decision or to take action; and

(b) the Master is satisfied that in the circumstances of the case it is necessary to do so,

require such person to furnish security for the amount determined by the Master.

### **Legal effect of order**

**14.** Anything done under a specific intervention order shall have the same effect as if done by the adult concerned if he or she had the capacity to do so.



**Restrictions**

15. Sections 39, 40, 41 and 42 relating to restrictions on managers and sections 61, 62 and 63 relating to restrictions on mentors apply, with the necessary changes, to any person authorised to act under an intervention order in terms of section 11.

**Notification of address**

16. A person authorised under a specific intervention order in terms of section 11, must furnish the Master in writing with an address for the service upon him or her of notices and process.

**Records**

17. (1) Any person authorised under a specific intervention order must keep a record of his or her decisions or activities in terms of such order.

(2) A Master may call upon a person authorised under a specific intervention order to submit to him or her the record referred to in subsection (1) at such times as the Master may direct.

**Care, diligence and skill required of person authorised**

18. (1) A person authorised under an intervention order must, in the performance of his or her duties and the exercise of his or her powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

(2) Any agreement or unilateral juristic act which has the effect of exempting a person authorised under a specific intervention order, or indemnifying him or

her, against liability for failing to show the necessary care, diligence and skill required in terms of subsection (1), is void in so far as it has such effect.

### **Reimbursement**

**19.** A person authorised under a specific intervention order is entitled to be reimbursed out of the estate of the adult with incapacity concerned for his or her reasonable expenses incurred in doing anything directed or authorised under such order.

### **Account or report on completion of duties**

**20.** (1) Any person who completed his or her duties in terms of a specific intervention order granted under section 11 must –

(a) not later than thirty days thereafter; or

(b) within such further period as the Master may allow,

lodge with the Master an account or report of his or her activities in respect of the property or personal welfare, as the case may be, of the adult with incapacity concerned.

(2) An account referred to in subsection (1)(b) must be supported by vouchers, receipts and acquittances.

### **Discharge**

**21.** (1) Upon the completion, to the satisfaction of the Master, of his or her duties in respect of the property or personal welfare of the adult with incapacity concerned, a person authorised under a specific intervention order shall be entitled to obtain his or her discharge from the Master.

(2) After three years have elapsed from the date upon which a person has been discharged under subsection (1) he or she may, with the written consent of the Master, destroy all books and documents in his or her possession relating to his or her activities in respect of the adult with incapacity concerned.

## **CHAPTER 4**

### **MANAGEMENT OF PROPERTY**

#### ***Part 1***

#### ***Appointment of manager***

#### **Power of Master to appoint manager**

**22.** (1) A Master may, on consideration and processing of an application submitted in terms of section 23 appoint a manager to care for and manage the property of an adult with incapacity.

(2) When deciding whether it is in the adult's best interests to appoint a manager a Master must, in addition to the matters contemplated in section 5, take into account that –

- (a) where the adult concerned needs assistance with regard to a single matter or a limited range of matters with regard to his or her property a specific intervention order contemplated in section 11 is to be preferred to the appointment of a manager; and
- (b) the powers conferred on a manager should be as limited in scope and duration as possible.

#### **Application to appoint manager**

**23.** (1) Any person over the age of 18 may apply to a Master to appoint a manager.

(2) The application must be made in writing, under oath or solemn affirmation, and must –

(a) set out the relationship of the applicant to the adult with incapacity concerned and –

(i) if the applicant is not a spouse or relative of that adult, the reason why the spouse or relative did not make the application; and

(ii) if they are not available to make the application, what steps were taken to establish their whereabouts before making the application;

(b) include all medical certificates or reports relevant to the adult's incapacity relating to the care and management of his or her property;

(c) set out the grounds on which the applicant believes that the adult is incapacitated in respect of the care and management of his or her property;

(d) state that, within seven days immediately before submitting the application, the applicant had seen the adult with incapacity;

(e) give the particulars and contact details of persons who may provide further information relating to the state of incapacity of the adult concerned;

(f) state the particulars of the adult with incapacity concerned and his or her estimated property value and annual income; and

(g) nominate and give the particulars of a suitable person to be appointed as manager.

(3) The applicant must attach to the application proof –

(a) that a copy of the application has been submitted to the adult with incapacity concerned or that such adult has consented to the application being made; and

(b) if the adult concerned has a primary carer, that a copy of the application has also been submitted to such carer.

## Disposal of application

24. (1) The Master must, within 30 days of receiving the application contemplated in section 23 -
- (a) appoint a manager -
    - (i) for a period of three years; or
    - (ii) such other period, including an indefinite period, as on good cause shown, he or she may determine,
 if the Master is satisfied that the adult concerned is incapacitated as contemplated in section 4 with relation to the care and management of his or her property;
  - (b) decline to appoint a manager; or
  - (c) instruct the applicant to make an application to Court for the appointment of a *curator bonis*.
- (2) The Master must, in writing inform -
- (a) the applicant; and
  - (b) the adult with incapacity concerned,
- of his or her decision and the reasons thereof.
- (3) (a) An appointment of a manager is effective from the date on which the Master signs an official letter of such appointment.
- (b) The Master must issue a manager appointed in terms of this section with a copy of such letter of appointment.
- (4) The Master may, pending the appointment of a manager under subsection (1), appoint an interim manager to perform all, or any, of the tasks in respect of which a manager may be appointed in terms of this Act.

## Security

- 25.** The Master may, if satisfied that in the circumstances of the case it is necessary to do so –
- (a) before signing an official letter of appointment contemplated in section 24(3), require a manager to furnish security for the amount determined by such Master; and
  - (b) at any time after the appointment of a manager -
    - (i) require the manager to furnish security;
    - (ii) reduce or discharge any security given; or
    - (iii) require the manager to furnish additional security.

## Who may be appointed

- 26.** (1) A person appointed as manager must be -
- (a) a mentally competent adult; or
  - (b) an officer of a juristic person who has been nominated to act on behalf of such juristic person,
- who the Master considers suitable for such appointment.
- (2) In determining if an individual is suitable for appointment as manager the Master –
- (a) must give preference to -
    - (i) the express preference of the adult with incapacity concerned, except where good cause exists for not giving effect to such preference; or
    - (ii) where the adult with incapacity has not indicated an express preference, the primary carer of the adult concerned and failing such a relative of such adult in the order in which the relatives are enumerated in the definition of “relative” in section 1; and
  - (b) must have regard to –

- (i) the accessibility of the individual to the adult with incapacity and to his or her primary carer;
- (ii) the ability of the individual to carry out the functions of manager;
- (iii) any likely conflict of interest between the adult with incapacity and the individual;
- (iv) any undue concentration of power which is likely to arise in the individual over the adult with incapacity;
- (v) any adverse effects which the appointment of the individual would have on the interests of the adult with incapacity which interests may include the well-being of the spouse and minor children of such adult; and
- (vi) such other matters as appear to the Master to be appropriate.

(3) The Master may not appoint an individual as manager unless he or she is satisfied that such individual –

- (a) is aware of the circumstances and condition of the adult with incapacity concerned and of the needs arising from such circumstances and condition;
- (b) is aware of the powers, functions and restrictions on a manager; and
- (c) has consented to be appointed.

(4) The Master may appoint one or more individuals to act jointly in respect of the management and care of the property of an adult with incapacity in terms of this Act.

### **Renewal of appointment**

- 27.** (1) At any time before the end of a period in respect of which –
- (a) a manager has been appointed; or

(b) a manager's appointment has been renewed in terms of this section,

such manager may apply to the Master for renewal of his or her appointment.

(2) Where an application for renewal is made in terms of subsection (1), the appointment referred to in that subsection shall continue to have effect until the application for renewal is determined by the Master.

(3) Subject to subsection (4), sections 23, 24, 25 and 26 apply, with the necessary changes, for purposes of making and disposing of an application in terms of this section.

(4) Where an application is granted under this section, the Master may appoint a manager for -

- (a) a period of 5 years; or
- (b) such other period, including an indefinite period, as on good cause shown, the Master may determine.

### **Legal effect of appointment**

**28.** (1) A manager is the agent of the adult with incapacity in respect of whom he or she has been appointed in relation to anything done or decided by such manager within the scope of his or her appointment and in accordance with this Act.

(2) An adult with incapacity in respect of whom a manager has been appointed has no capacity to -

- (a) enter into any contract;
- (b) perform any unilateral juristic act; or
- (c) take a binding decision

in relation to any matter which is within the scope of the authority conferred on the manager except where such adult has been authorised by the manager in



terms of authority granted under section 29(a)(ii) to enter into such contract, perform such juristic act or take such decision.

## ***Part 2***

### ***Powers and duties of manager***

#### **Powers conferred by letter of appointment**

**29.** Subject to sections 39, 40, 41 and 42 a Master may in a letter of appointment contemplated in section 24(3) –

- (a) authorise a manager –
  - (i) to care for and manage the property, or such parts thereof as may be specified in the letter, of the adult with incapacity concerned; and
  - (ii) to allow the adult concerned to enter into a contract, perform a unilateral juristic act or take a decision with relation to such adult's property as the manager may specify;
- (b) make such further orders or give such directions and confer on a person appointed as manager such powers as the Master thinks necessary or expedient for giving effect to such appointment; and
- (c) make any order granted by him or her subject to such conditions and restrictions as appear to him or her to be appropriate.

#### **Taking custody of property**

**30.** (1) A manager must immediately after a letter of appointment has been issued to him or her take into his or her custody or under his or her control –

- (a) the property in respect of which he or she has been appointed; and
- (b) any books or documents relating to such property.

(2) If the manager suspects that any property, book or document referred to in subsection (1) is being concealed or otherwise unlawfully withheld from him or her, he or she may apply to the magistrate within whose area such property, book or document is suspected to be, for a search warrant.

(3) If it appears to a magistrate to whom such application is made, from an affidavit, that there are reasonable grounds to suspect that any property, book or document referred to in subsection (1) is -

- (a) being concealed upon any person or at any place or upon or in any vehicle or vessel or container of any nature; or
  - (b) otherwise unlawfully withheld from the manager concerned,
- within the area of jurisdiction of the said magistrate, he or she may issue a warrant authorising the manager, or a police officer, to search for and take possession of that property, book or document.

(4) The provisions of sections 21, 27 and 29 of the Criminal Procedure Act, 1977 (Act 51 of 1977) shall, in so far as they are applicable, apply with the necessary changes, with regard to the execution of a warrant referred to in subsection (3).

### **Lodging of and updating inventory of property**

**31.** (1) A manager must –

- (a) within 30 days after a letter of appointment has been issued to him or her, or within such further period as the Master may allow, lodge with the Master an inventory of the property to be taken care of and managed by him or her; and
- (b) thereafter, whenever he or she comes to know of any such property which is not mentioned in an inventory referred to in paragraph (a), within –
  - (i) 14 days after he or she has come to know of such property; or
  - (ii) such further period as the Master may allow,

lodge with the Master an additional inventory thereof.

(2) The inventory and additional inventory referred to in subsection (1) must -

- (a) be in the prescribed form;
- (b) be signed by the manager; and
- (c) if any immovable property is included in such inventory, contain all particulars known to the manager concerning such property.

(3) A manager may not dispose of any property which he or she has been appointed to take care of and manage if that property has not been mentioned in any inventory or additional inventory lodged by him or her with the Master in terms of this section, unless such manager does so in the ordinary course of any business or undertaking carried on by him or her as manager.

### **Banking accounts and investments**

**32.** (1) A manager –

- (a) must open a cheque account in the name of the estate of the adult with incapacity concerned with a bank within the Republic and must deposit therein all moneys received by him or her on behalf of the estate;
- (b) may -
  - (i) open a savings account in the name of the estate of the adult with incapacity concerned with a bank within the Republic and may transfer thereto from the account referred to in paragraph (a) moneys not immediately required for the payment of any claim against the estate; and
  - (ii) place money deposited in an account referred to in paragraph (a) and not immediately required for the payment of any claim against the estate, on interest-bearing deposit with a Bank within the Republic.

- (2) Whenever required by a Master to do so, a manager must –
  - (a) notify the Master in writing of the Bank and branch office or agency thereof with which he or she has opened an account or placed a deposit referred to in subsection (1); and
  - (b) furnish the Master with a bank statement or other sufficient evidence of the state of the account.
  
- (3) A manager who complied with a request of the Master referred to in subsection (2)(a), may not without written notice to the Master transfer any such account from any such Bank, branch office or agency to any other Bank, branch office or agency.
  
- (4) All cheques or orders drawn upon an account referred to in subsection (1), must –
  - (a) contain the name of the payee and the cause of payment;
  - (b) be drawn to order;
  - (c) be signed by the manager of the person with incapacity concerned.
  
- (5) The Master and any surety for the manager shall have the same right to information in regard to an account referred to in subsection (1) as the manager him- or herself has and may examine all vouchers in relation thereto, whether in the hands of the bank or the manager.
  
- (6) The Master may direct the manager of any office or branch of a Bank with which an account has been opened under subsection (1), to refuse, except with the consent of the Master, any further withdrawals of money from that account and shall notify the manager of the adult with incapacity concerned of any such direction.

### **Failure to deposit money in banking accounts**

- 33.** (1) Subject to subsection (2), a manager –
- (a) who fails to deposit money in any banking account when required by or under this Act to do so; or
  - (b) who uses or knowingly permits any joint manager to use any property in the estate of the adult concerned except for the benefit of such estate,
- shall, in addition to any other penalty to which he or she may be liable, be liable to pay into such estate an amount equal to double the amount which he or she has so failed to deposit, or double the value of the property so used.
- (2) A Master may, on good cause shown, exempt a manager, in whole or in part, from any liability which he or she may have incurred under subsection (1).

### **Lodging of documents in case of transfer of immovable property**

- 34.** A manager who wants to effect transfer of any immovable property in pursuance of a sale must, in addition to any deed or document which he or she may by law be required to lodge with the officer charged with the registration of such property, lodge with such officer a certificate by the Master that no objection to such transfer exists.

### **Notification of address and change of circumstances**

- 35.** (1) A manager must, at the time of his or her appointment in terms of this Act, furnish the Master in writing with an address for the service upon him or her of notices and process.
- (2) A manager must notify the Master of -
- (a) any change in the address -

- (i) supplied to the Master in terms of subsection (1); and
    - (ii) of the adult with incapacity concerned;
  - (b) the death of the adult with incapacity concerned; and
  - (c) any event which may result in the withdrawal of such manager's letter of appointment by the Master in terms of section 45(2)(a)(ii), 45(2)(b) and (c).
- (3) If a manager -
- (a) dies, his or her executor contemplated in section 1 of the Administration of Estates Act must, if aware of such appointment, notify the Master of the death of the manager; or
  - (b) becomes incapacitated as contemplated in section 4, his or her primary carer must, if aware of such appointment, notify the Master of the incapacity of such manager.
- (4) A manager may not be absent from the Republic for a period exceeding 60 days unless he or she –
- (a) notifies the Master of this intention before the commencement of such intended absence; and
  - (b) complies with such conditions as the Master may think fit to impose.
- (5) Any notification of the Master in terms of –
- (a) subsections (2) and (3) must be done within 14 days of the occurrence of the event to be notified or as soon as possible thereafter; and
  - (b) subsections (2), (3) and (4) must be -
    - (i) in writing; and
    - (ii) sent by registered post or be delivered by hand for which delivery an acknowledgement of receipt must be obtained.

## Accounts

- 36.** (1) A manager must –
- (a) on or before the date in every year which the Master may in each case determine, lodge with the Master an account in the prescribed form of his or her management of the property of the adult concerned during the year ending upon a date three months prior to the date so determined; and
  - (b) if required to do so by the Master by notice in writing produce, within a period specified in the notice, for inspection –
    - (i) by the Master; or
    - (ii) by any person nominated by the Master for this purpose, any securities held by him or her as manager.
- (2) Any person who ceases to be a manager, must -
- (a) not later than thirty days thereafter; or
  - (b) within such further period as the Master may allow, lodge with the Master an account in the prescribed form of his or her management of the property of the adult concerned between the date up to which his or her last account was rendered under subsection (1) and the date on which he or she ceased to be a manager for such adult.
- (3) The account referred to -
- (a) in subsection (1) must -
    - (i) be supported by vouchers, receipts and acquittances;
    - (ii) include a statement of all property under the manager's control at the end of the year-period referred to in subsection (1)(a); and
    - (iii) if such manager carries on any business or undertaking in his or capacity as manger, also include a statement relating to such business or undertaking.
  - (b) in subsection (2) must -
    - (i) be supported by vouchers, receipts and acquittances; and

- (ii) include a statement of all property under the manager's control immediately before he or she ceased to be manager.

### **Care, diligence and skill required of manager**

**37.** (1) A manager must, in the performance of his or her duties and the exercise of his or her powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

(2) Any act or agreement which has the effect of exempting a manager, or indemnifying him or her, against liability for failing to show the necessary care, diligence and skill required in terms of subsection (1), is void in so far as it has such effect.

### **Remuneration**

**38.** (1) A manager is, subject to subsection (2), entitled to receive out of the property of the adult concerned, or the income derived from such property a remuneration which is assessed according to the prescribed tariff and which must be taxed by the Master.

(2) The Master may –

- (a) reduce or increase the remuneration referred to in subsection (1) if there are in any particular case special reasons for doing so; or
- (b) disallow any such remuneration either wholly or in part, if –
  - (i) the manager failed to discharge his or her duties; or
  - (ii) discharged them in an unsatisfactory manner.



**Part 3**  
***Restrictions on manager***

**General restrictions**

**39.** A manager may not do anything or make any decision on behalf of an adult with incapacity -

- (a) if the manager knows, or has reasonable grounds for believing, that the adult has recovered capacity in relation to the matter with regard to which such action is to be taken or such decision is to be made; or
- (b) which is inconsistent with a decision made, within the scope of his or her authority and in accordance with this Act, by the agent under an enduring power of attorney granted by such adult.

**Restriction on alienation or mortgage of immovable property**

**40.** A manager may not alienate or mortgage any immovable property which he or she has been appointed to care for and manage unless –

- (a) authorised to do so by the Master in a letter of appointment granted in terms of section 24(3);
- (b) authorised to do so by a Court order; or
- (c) with the consent of the Master.

**Restriction on purchase of property**

**41.** A manager, his or her spouse, child, parent, partner, associate or agent may not purchase, or otherwise acquire, any property which such manager has been appointed to care for and manage unless -

- (a) authorised to do so by a Court order;
- (b) with the consent of the Master; or

- (c) the purchase or acquisition was, in writing, legally authorised by the adult concerned before he or she became an adult with incapacity.

### **No substitution or surrogation**

**42.** A manager may not substitute or surrogate any other person to act in his or her place.

## ***Part 4***

### ***Termination***

### **Resignation of manager**

- 43.** (1) A manager who wishes to resign must in writing give notice of such intention to the Master.
- (2) The resignation becomes effective –
- (a) where joint managers have been appointed, on receipt by the Master of written confirmation by the remaining joint manager that he or she is willing to continue to act; or
  - (b) where no joint manager has been appointed, only when the Master has appointed a manager in terms of section 91(3).
- (3) On receiving the written confirmation contemplated in subsection (2)(a), the Master must issue a remaining joint manager with a new letter of appointment contemplated in section 24(3).

### **Termination of appointment on adult recovering from incapacity**

**44.** (1) An adult in respect of whom a manager has been appointed in terms of section 22 may apply to the Master to terminate the appointment of such manager.

- (2) The application must -
  - (a) be made in writing; and
  - (b) include all medical certificates or reports relevant to the applicant's present and future ability with relation to the care and management of his or her property.
  
- (3) The Master must, within 30 days of receiving the application -
  - (a) terminate the appointment of the manager if the Master is satisfied that the adult concerned has sufficiently recovered from his or her incapacity contemplated in section 4 to care for and manage his or her property him- or herself; or
  - (b) decline the application.
  
- (4) The Master must, in writing, inform –
  - (a) the applicant; and
  - (b) the manager concerned
 of his or her decision and the reasons thereof.
  
- (5) Where the appointment of a manager has been terminated in terms of this section, such manager may be discharged from office only after he or she has completed his or her duties to the satisfaction of the Master.

#### **Withdrawal of appointment by Court or Master**

- 45.** (1) A Court may at any time, upon application of the Master or any interested person -
- (a) withdraw the appointment of a manager made in terms of this Act; and
  - (b) direct the Master to cancel the letter of appointment issued to such manager,
- if the Court is of opinion that good cause exists for doing so.
- (2) A Master may withdraw the appointment of a manager –

- (a) if the manager –
    - (i) fails to perform satisfactorily any duty imposed upon him or her by or under this Act or refuses or fails to comply with any lawful request of the Master;
    - (ii) has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element, or any other offence for which he or she has been sentenced to imprisonment without the option of a fine; or
    - (iii) suffers from any incapacity contemplated in section 4;
  - (b) if the manager's estate is sequestrated or, where a juristic person has been appointed as manager if such juristic person is wound up or dissolved;
  - (c) on the dissolution of a marriage or permanent same sex life partnership between the adult with incapacity concerned and the manager; or
  - (d) on the appointment by a Court of a curator in respect of the property of the adult concerned in so far as the appointment of the curator relates to duties which may be exercised by the manager.
- (3) Before the withdrawal of an appointment under subsection (2), the Master must forward to the manager concerned, by registered post, a notice -
- (a) setting out the reasons for such withdrawal; and
  - (b) informing such manager that he or she may, within thirty days of such notice, apply to the Court for an order restraining the Master from withdrawing the appointment.

### **Cancellation of letter of appointment**

- 46.** (1) Where in terms of this Act -
- (a) a manager resigned;
  - (b) the appointment of a manager is withdrawn; or
  - (c) the appointment of a manager is terminated on the adult concerned recovering from incapacity,

the Master must cancel the letter of appointment issued in respect of such manager.

(2) In the case of joint managers reference to “manager” in subsection (1) must be interpreted as a reference to the joint managers or to the last remaining joint manager, as the case may be.

#### **Return of letter of appointment**

**47.** Any person who ceases to be a manager must forthwith return his or her letter of appointment to the Master.

#### **Discharge**

**48.** (1) Upon the completion, to the satisfaction of the Master, of the management of the property of the adult with incapacity concerned, a manager shall be entitled to obtain his or her discharge from the Master.

(2) After three years have elapsed from the date upon which a manager has been discharged under subsection (1) he or she may, with the written consent of the Master, destroy all books and documents in his or her possession relating to his or her duties as manager.

**CHAPTER 5**  
**CARE FOR PERSONAL WELFARE**

***Part 1***  
***Appointment of mentor***

**Power of Master to appoint mentor**

**49.** (1) A Master may, on consideration and processing of an application submitted in terms of section 50 appoint a mentor to take care of the personal welfare of an adult with incapacity.

(2) When deciding whether it is in the adult's best interests to appoint a mentor the Master must, in addition to the matters contemplated in section 5, take into account that –

- (a) where the adult concerned needs assistance with regard to a single matter, or a limited range of matters, with regard to his or her personal welfare an intervention order contemplated in section 11, is to be preferred to the appointment of a mentor; and
- (b) the powers conferred on a mentor should be as limited in scope and duration as possible.

**Application to appoint mentor**

**50.** (1) Any person over the age of 18 may apply to the Master to appoint a mentor.

(2) The application must be made in writing, under oath or solemn affirmation, and must –

- (a) set out the relationship of the applicant to that adult with incapacity concerned and –

- (i) if the applicant is not a spouse or relative of that adult, the reason why the spouse or relative did not make the application; and
    - (ii) if they are not available to make the application, what steps were taken to establish their whereabouts before making the application;
  - (b) include all medical certificates or reports relevant to the adult's incapacity relating to the care for his or her personal welfare;
  - (c) set out the grounds on which the applicant believes that the adult is incapacitated in respect of the care for his or her personal welfare;
  - (d) state that, within seven days immediately before submitting the application, the applicant had seen the adult with incapacity concerned;
  - (e) give the particulars and contact details of persons who may provide further information relating to the state of incapacity of the adult concerned;
  - (f) state the particulars of the adult with incapacity concerned and his or her estimated property value and annual income; and
  - (g) nominate and give the particulars of a suitable person to be appointed as mentor.
- (3) The applicant must attach to the application proof –
- (a) that a copy of the application has been submitted to the adult with incapacity concerned or that such adult has consented to the application being made; and
  - (b) if the adult concerned has a primary carer, that a copy of the application has also been submitted to such carer.

### **Disposal of application**

51. (1) The Master must, within 30 days of receiving the application contemplated in section 50 -

- (a) appoint a mentor -
    - (i) for a period of one year; or
    - (ii) such other period, including an indefinite period, as on good cause shown, he or she may determine,
 if the Master is satisfied that the adult concerned is an adult with incapacity as contemplated in section 4 with relation to the care of his or her personal welfare;
  - (b) decline to appoint mentor; or
  - (c) instruct the applicant to make an application to Court for the appointment of a *curator personae*.
- (2) The Master must, in writing inform -
- (a) the applicant; and
  - (b) the adult with incapacity concerned,
- of his or her decision and the reasons thereof.
- (3) (a) An appointment of a mentor is effective from the date on which a master signs an official letter of such appointment.
- (b) The Master must issue a mentor appointed in terms of this section with a copy of such letter of appointment.
- (4) The Master may, pending the appointment of a mentor under subsection (1), appoint an interim mentor to perform all, or any, of the tasks in respect of which a mentor may be appointed in terms of this Act.

### **Who may be appointed**

52. (1) A person appointed as mentor must be a mentally competent adult who the Master considers suitable for such appointment.
- (2) In determining if an individual is suitable for appointment as mentor the Master –
- (a) must give preference to -



- (i) the express preference of the adult with incapacity concerned, except where good cause exists for not giving effect to such preference; or
    - (ii) where the adult with incapacity has not indicated an express preference, the primary carer of such adult and failing such a relative of such adult in the order in which the relatives are enumerated in the definition of “relative” in section 1; and
  - (b) must have regard to –
    - (i) the accessibility of the individual to the adult with incapacity concerned and to his or her primary carer;
    - (ii) the ability of the individual to carry out the functions of mentor;
    - (iii) any likely conflict of interest between the adult with incapacity concerned and the individual;
    - (iv) any undue concentration of power which is likely to arise in the individual over the adult;
    - (v) any adverse effects which the appointment of the individual would have on the interests of the adult with incapacity; and
    - (vi) such other matters as appear to him or her to be appropriate.
- (3) The Master may not appoint an individual as mentor unless he or she is satisfied that such individual –
- (a) is aware of the circumstances and condition of the adult with incapacity concerned and of the needs arising from such circumstances and condition;
  - (b) is aware of the powers, functions and restrictions on a mentor; and
  - (c) has consented to be appointed.
- (4) The Master may appoint one or more individuals to act jointly to take care of the personal welfare of an adult with incapacity in terms of this Act.

### **Renewal of appointment**

- 53.** (1) At any time before the end of a period in respect of which –
- (a) a mentor has been appointed; or
  - (b) a mentor's appointment has been renewed in terms of this section,
- such mentor may apply to the Master for renewal of his or her appointment.
- (2) Where an application for renewal is made in terms of subsection (1), the appointment referred to in that subsection shall continue to have effect until the application for renewal is determined by the Master.
- (3) Subject to subsection (4), sections 50, 51 and 52 apply, with the necessary changes, for purposes of making and granting an application in terms of this section.
- (4) Where an application is granted under this section, the Master may appoint a mentor for -
- (a) a period of one year; or
  - (b) such other period, including an indefinite period, as on good cause shown, the Master may determine.

### **Legal effect of appointment of mentor**

- 54.** (1) A mentor is the agent of the adult with incapacity in respect of whom he or she has been appointed in relation to anything done or decided by such mentor within the scope of his or her appointment and in accordance with this Act.
- (2) An adult with incapacity in respect of whom a mentor has been appointed has no capacity to -
- (a) enter into any contract;

- (b) perform any unilateral juristic act; or
- (c) take a binding decision

in relation to any matter which is within the scope of the authority conferred on the mentor except where such adult has been authorised by the mentor in terms of authority granted under section 55(a)(iii) to enter into such contract, perform such juristic act or take such decision.

## ***Part 2***

### ***Powers and duties of mentor***

#### **Powers and duties conferred by letter of appointment**

- 55.** Subject to section 6, 62 and 63 a Master may in a letter of appointment contemplated in section 51(3) –
- (a) authorise a mentor –
    - (i) to take care of the personal welfare, or such aspects thereof as may be specified in the letter, of the adult with incapacity concerned;
    - (ii) to, in accordance with the provisions of the National Health Act, consent to the provision of health care to the adult concerned; and
    - (iii) to allow the adult concerned to enter into a contract, perform a unilateral juristic act or take a decision with relation to such adult's personal welfare as the mentor may specify;
  - (b) make such further orders or give such directions and confer on a person appointed as mentor such powers as the Master thinks necessary or expedient for giving effect to such an appointment; and
  - (c) make any order granted by him or her subject to such conditions and restrictions as appear to him or her to be appropriate.

### **Keeping of records**

56. A mentor must after his or her appointment, commence to maintain and thereafter maintain and update a record of the exercise of his or her powers.

### **Notification of address and change of circumstances**

57. (1) A mentor must, at the time of his or her appointment in terms of this Act, furnish the Master in writing with an address for the service upon him or her of notices and process.

- (2) A mentor must notify the Master of -

- (a) any change in the address -
  - (i) supplied to the Master in terms of subsection (1); and
  - (ii) of the person with incapacity concerned;
- (b) the death of the person with incapacity concerned; and
- (c) any event which may result in the withdrawal of such mentor's letter of appointment by the Master in terms of sections 66(2)(a)(ii), 66(2)(b) and (c).

- (3) If a mentor -

- (a) dies, his or her executor contemplated in section 1 of the Administration of Estates Act must, if aware of such appointment, notify the Master of the death of the mentor; or
- (b) becomes incapacitated as contemplated in section 4, his or her primary carer must, if aware of such appointment, notify the Master of the incapacity of such mentor.

- (4) A mentor may not be absent from the Republic for a period exceeding 60 days unless he or she –

- (a) notifies the Master of this intention before the commencement of such intended absence; and

- (b) complies with such conditions as the Master may think fit to impose.
- (5) Any notification of the Master in terms of –
- (a) subsections (2) and (3) must be done within 14 days of the occurrence of the event to be notified or as soon as possible thereafter; and
  - (b) subsections (2), (3) and (4) must be -
    - (i) in writing; and
    - (ii) sent by registered post or be delivered by hand for which delivery an acknowledgement of receipt must be obtained.

## **Reports**

**58.** (1) A mentor must on or before the date in every year which the Master may in each case determine, lodge with the Master a report, in the form required by the Master, of his or her activities in respect of the adult with incapacity concerned during the year ending upon a date three months prior to the date so determined.

- (2) Any person who ceases to be a mentor, must –
  - (a) not later than thirty days thereafter; or
  - (b) within such further period as the Master may allow,
 lodge with the Master a report, in the form required by the Master, of his or her activities in respect of the adult concerned between the date up to which his or her last report was rendered under subsection (1) and the date on which he or she ceased to be a mentor for such adult.

## **Care, diligence and skill required of mentor**

**59.** (1) A mentor must, in the performance of his or her duties and the exercise of his or her powers act with the care, diligence and skill which can reasonably be expected of a person who takes care of the personal welfare of another.

(2) Any act or agreement which has the effect of exempting a mentor, or indemnifying him or her, against liability for failing to show the necessary care, diligence and skill required in terms of subsection (1), is void in so far as it has such effect.

### **Remuneration and reimbursement**

**60.** (1) A mentor is not entitled to any remuneration for his or her services.

(2) A mentor is entitled to be reimbursed out of the estate of the adult in respect of whose personal welfare the mentor has been appointed, for his or her reasonable expenses incurred in taking care of the personal welfare of such adult in terms of this Act.

### ***Part 3***

#### ***Restrictions on mentor***

### **General restrictions**

**61.** A mentor may not do anything or make a decision on behalf of an adult with incapacity -

- (a) if the mentor knows, or has reasonable grounds for believing, that the adult has recovered capacity in relation to the matter with regard to which such action is to be taken or such decision is to be made; or
- (b) which is inconsistent with a decision made, within the scope of his or her authority and in accordance with this Act, by the agent under an enduring power of attorney granted by such adult.

### **Restriction relating to health care**

**62.** No authority granted to a mentor in terms of this Act extends to refusing consent to the carrying out, or continuation, of life-sustaining treatment.

### **No substitution or surrogation**

**63.** A mentor may not substitute or surrogate any other person to act in his or her place.

## ***Part 4***

### ***Termination***

### **Resignation of mentor**

**64.** (1) A mentor who wishes to resign after his or her appointment in terms of section 49 must in writing give notice of such intention to the Master.

(2) The resignation becomes effective –

- (a) where joint managers have been appointed, on receipt by the Master of written confirmation by the remaining joint manager that he or she is willing to continue to act; or
- (b) where no joint mentor has been appointed, only when the Master has appointed a mentor in terms of section 91(3).

(3) On receiving the written confirmation contemplated in subsection (2)(a), the Master must issue a remaining joint mentor with a new letter of appointment contemplated in section 51(3).

### **Termination of appointment on adult recovering from incapacity**

**65.** (1) An adult in respect of whom a mentor has been appointed in terms of section 49 may apply to the Master to terminate the appointment of such mentor.

(2) The application must -

- (a) be made in writing; and
- (b) include all medical certificates or reports relevant to the applicant's present and future ability to take care of his or her personal welfare.

(3) The Master must, within 30 days of receiving the application -

- (a) terminate the appointment of the mentor if the Master is satisfied that the adult concerned has sufficiently recovered from his or her incapacity contemplated in section 4 to take care of his or her personal welfare him- or herself; or
- (b) decline the application.

(4) The Master must, in writing, inform –

- (a) the applicant; and
- (b) the mentor concerned

of his or her decision and the reasons thereof.

(5) Where the appointment of a mentor has been terminated in terms of this section, such mentor may be discharged from office only after he or she has completed his or her duties to the satisfaction of the Master.

### **Withdrawal of appointment by Court or Master**

**66.** (1) A Court may at any time, upon application of the Master or any interested person -



- (a) withdraw the appointment of a mentor made in terms of this Act;  
and
- (b) direct the Master to cancel the letter of appointment issued to such mentor,

if the Court is of opinion that good cause exists for doing so.

(2) A Master may withdraw the appointment of a mentor made in terms of this Act –

- (a) if the mentor –
  - (i) fails to perform satisfactorily any duty imposed upon him or her by or under this Act or refuses or fails to comply with any lawful request of the Master;
  - (ii) has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element, or any other offence for which he or she has been sentenced to imprisonment without the option of a fine;
  - (iii) suffers from any incapacity contemplated in section 4;
- (b) if the mentor's estate is sequestrated;
- (c) on the dissolution of a marriage or permanent same sex life partnership between the adult with incapacity concerned and the mentor; or
- (d) on the appointment by a Court of a curator in respect of the person of the adult concerned in so far as the appointment of the curator relates to duties which may be exercised by the mentor.

(3) Before the withdrawal of an appointment under subsection (2), the Master must forward to the mentor concerned, by registered post, a notice –

- (a) setting out the reasons for such withdrawal; and
- (b) informing such mentor that he or she may, within thirty days of such notice, apply to the Court for an order restraining the Master from withdrawing the appointment.

### **Cancellation of letter of appointment**

- 67.** (1) Where in terms of this Act -
- (a) a mentor resigned;
  - (b) the appointment of a mentor is withdrawn; or
  - (c) the appointment of a mentor is terminated on the adult concerned recovering from incapacity,
- the Master must cancel the letter of appointment issued in respect of such mentor.
- (2) In the case of joint mentors reference to “mentor” in subsection (1) must be interpreted as a reference to the joint mentors or to the last remaining joint mentor, as the case may be.

### **Return of letter of appointment**

- 68.** Any person who ceases to be a mentor must forthwith return his or her letter of appointment to the Master.

### **Discharge**

- 69.** (1) Upon the completion, to the satisfaction of the Master, of his or her duties in respect of the care for the personal welfare of the adult with incapacity concerned, a mentor shall be entitled to obtain his or her discharge from the Master.
- (2) After three years have elapsed from the date upon which a mentor has been discharged under subsection (1) he or she may, with the written consent of the Master, destroy all documents in his or her possession relating to his or her duties as mentor.

**CHAPTER 6**  
**ENDURING POWERS OF ATTORNEY FOR PROPERTY**  
**AND FOR PERSONAL WELFARE**

***Part 1***  
***Introductory provisions***

**Enduring power of attorney**

- 70.** (1) A power of attorney is an enduring power of attorney if it complies with the formalities set out in section 72.
- (2) An enduring power of attorney shall, notwithstanding any law –
- (a) continue to have effect; or
  - (b) come into effect,
- as the case may be, if the principal becomes an adult with incapacity as contemplated in section 4.

**Scope of enduring power of attorney: property and personal welfare**

- 71.** (1) A principal may, in the same or in separate enduring powers of attorney authorise the same agent, or different agents, to make decisions about –
- (a) the principal's property; and
  - (b) the principal's personal welfare.
- (2) Where different agents have been appointed in relation to a principal's property and his or her personal welfare, in any conflict arising between the exercise of the powers of such agents, the exercise of the powers in relation to the principal's personal welfare shall prevail, unless a Court, on the application of either agent, directs otherwise in any particular case.

**Part 2**  
**Execution formalities**

**Formalities required in execution of enduring power of attorney**

- 72.** (1) An enduring power of attorney shall be valid only if -
- (a) it is in writing;
  - (b) it is, in accordance with section 73, signed by the principal and witnessed by two independent competent witnesses one of which must be the commissioner of oaths referred to in paragraph (e);
  - (c) it contains a statement indicating the principal's intention that the power is to continue to have effect notwithstanding the principal's subsequent incapacity or shall come into effect on the principal's incapacity;
  - (d) it is in the form, or substantially in the form, and contains the explanatory notes provided for in –
    - (i) Form 1 of the Schedule if it relates to the principal's property; or
    - (ii) Form 2 of the Schedule if it relates to the principal's personal welfare;
  - (e)
    - (i) a commissioner of oaths, who must be one of the witnesses referred to in paragraph (b), in addition to witnessing the power certifies that he or she is satisfied that at the time the principal grants the power, the principal understands its nature and effect;
    - (ii) the certificate referred to in subparagraph (i) must be made at the time the power is signed by the principal and must be attached to the power at the time of its execution.
- (2) For purposes of this section “independent competent witness” means a person -
- (a) of fourteen years or over who at the time he or she witnesses an enduring power of attorney is not incompetent to give evidence in a Court of law; and

- (b) who is not –
  - (i) the agent authorised in the power of attorney or the person signing by direction of the principal in terms of section 73(2); or
  - (ii) the spouse of such agent or such other person at the time of the execution of the power.

### **Requirements regarding signing and witnessing**

**73.** (1) Subject to subsection (2), an enduring power of attorney must be signed by the principal and the witnesses referred to in section 72(1)(b) at the bottom of each page and at the end thereof.

(2) If the principal is physically incapable of signing an enduring power of attorney, the power may be signed by some other person in the presence and by the direction of the principal, such other person -

- (a) being an adult; and
- (b) not being -
  - (i) the agent authorised in the power or a witness to the power; or
  - (ii) the spouse of such agent or witness at the time of the execution of the power.

(3) The principal, or the other person signing by direction of the principal in terms of subsection (2), must sign the power or acknowledge his or her signature in the presence of the two witnesses referred to in section 72(1)(b).

(4) The witnesses referred to in section 72(1)(b) must sign the power –

- (a) in the presence of the principal and of each other; and
- (b) if the power is signed by some other person by the direction of the principal in terms of subsection (2), in the presence also of such other person.

- (5) (a) If the power is signed by the principal by making a mark or placing a thumb print or by some other person by the direction of the principal in terms of subsection (2), the commissioner of oaths referred to in section 72(1)(e) must in addition certify at the end of the power that he or she has satisfied him or herself of the identity of the principal and that the power thus signed is the power of the principal.
- (b) the certificate referred to in paragraph (a) must be made at the time of execution of the power.

### **Dispensing of execution formalities**

- 74.** The Court may declare that a power of attorney -
- (a) signed by the principal; or
  - (b) signed by some other person in the presence and by the direction of the principal as contemplated in section 73(2),
- which does not comply with the other execution formalities set out in section 73, is a valid enduring power of attorney if the Court is satisfied that the persons executing the power intended it to create an enduring power of attorney.

## ***Part 3***

### ***Appointment of agent***

#### **Appointment of agent**

- 75.** (1) At the date of execution of an enduring power of attorney, an agent appointed under such power must, subject to subsection (2), be -
- (a) a mentally competent adult; or
  - (b) if the power relates to the principal's property only, either such adult or a juristic person.
- (2) If the enduring power relates to the principal's property only, the agent must, at the date of his or her appointment not be an unrehabilitated insolvent.

(3) A principal may not in an enduring power of attorney authorise an agent to appoint a substitute agent: Provided that the principal may him- or herself in such power appoint a person replacing an agent on the death of the agent or on the occurrence of an event contemplated in section 85(2)(c) or (e).

## ***Part 4***

### ***Registration***

#### **Registration of enduring power of attorney**

**76.** (1) If it comes to the knowledge of an agent granted authority under an enduring power of attorney that the principal is an adult with incapacity contemplated in section 4 the agent may not continue to act upon the power, or commence acting on it, as the case may be unless -

- (a) he or she has filed it for registration -
  - (i) with the Master within whose jurisdiction the principal is ordinarily resident; or
  - (ii) in the case of such principal who is not so resident, with the Master appointed in respect of any such area in which the greatest portion of the principal's property is situated; and
- (b) the Master has endorsed the enduring power of attorney to the effect that it has been registered.

(2) An agent who files an enduring power of attorney with the Master for registration must together with it file –

- (a) an affidavit by a person named in the power, which person may be the agent appointed under the power; or
- (b) a report by a medical practitioner,

dated not more than seven days before the filing of the power, stating that the principal is in the opinion of such person or such medical practitioner an adult

with incapacity as contemplated in sec 4 and referring to the facts on which this opinion is based.

(3) If the Master is satisfied that the principal is an adult with incapacity as contemplated in sec 4 he or she must –

- (a) register the enduring power of attorney and file the original in his or her office; and
- (b) return a copy of the original power, endorsed to the effect that it has been registered in his or her office, to the agent.

### ***Part 5***

#### ***General powers and duties of agent***

##### **Furnishing of security**

**77.** (1) The Master may, before registering and endorsing an enduring power of attorney as contemplated in section 76(3), require the agent to furnish security for the amount determined by the Master, unless the agent has been exempted from furnishing security under the power: Provided that the Master shall require security from an agent only if he or she is satisfied that, in the circumstances of the case, it is necessary to do so.

(2) The Master may, at any time after registration of an enduring power of attorney as contemplated in section 76(3), if in his or her opinion there is sufficient ground to do so -

- (a) require an agent to furnish security;
- (b) reduce or discharge any security given; or
- (c) require an agent to furnish additional security.



### **Notification of address and change of circumstances**

- 78.** (1) An agent must when filing an enduring power for registration with the Master in terms of section 76 furnish the Master in writing with an address for the service upon him or her of notices and process.
- (2) An agent must, after the registration of an enduring power terms of section 76(3), notify the Master of -
- (a) any change in the address supplied to the Master in terms of subsection (1);
  - (b) the death of the principal who granted the power; and
  - (c) an event which may result in the withdrawal of the power by the Master in terms of section 85(2)(b), (c) and (e).
- (3) If, after the registration of an enduring power in terms of section 76 -
- (a) the agent dies, his or her executor contemplated in section 1 of the Administration of Estates Act must, if aware of the existence of the power, notify the Master of the death of the agent; or
  - (b) the agent becomes an adult with incapacity as contemplated in section 4, his or her primary carer must, if aware of the existence of the power, notify the Master of the incapacity of the agent.
- (4) Any notification of the Master in terms of subsections (2) and (3) must -
- (a) be done within 14 days of the occurrence of the event to be notified or as soon as possible thereafter; and
  - (b) be in writing and sent by registered post or be delivered by hand for which delivery an acknowledgement of receipt must be obtained.

### **Keeping of records**

- 79.** (1) An agent under an enduring power of attorney relating to property must before or within 30 days after exercising any power or authority under the power –
- (a) prepare, and thereafter maintain and update, a list of the property of the principal of which the agent takes control; and
  - (b) commence to maintain, and thereafter maintain and update, a record of all transactions by which the agent deals with property of the principal.
- (2) An agent under an enduring power of attorney relating to personal welfare must commence to maintain, and thereafter maintain and update, a record of the exercise of his or her powers.

### **Accounting on request**

- 80.** An agent must when called upon in writing –
- (a) by the Master to do so, account to the Master to his or her satisfaction and in accordance with the Master's instructions for carrying out the authority conferred upon such agent in terms of the enduring power of attorney; and
  - (b) by any person -
    - (i) named in the power; or
    - (ii) with an interest in the property or personal welfare of the principal, at reasonable intervals allow such person, at the expense of such person, to inspect and receive or make copies of the power, and of the lists and records that the agent is required to maintain in terms of section 79(1) and (2).

**Part 6**  
**Restrictions**

**General restrictions**

- 81.** (1) An enduring power of attorney does not authorise an agent to –
- (a) use, or threaten to use, force to secure the doing of an act which the principal resists; or
  - (b) restrict the principal's liberty of movement whether or not the principal resists,
- except under circumstances where the agent reasonably believes that it is necessary to act to avert a substantial risk of significant harm to such principal.

**Restrictions in respect of personal welfare**

- 82.** (1) An enduring power of attorney relating to personal welfare may not be exercised unless –
- (a) the principal is an adult with incapacity contemplated in section 4;
  - or
  - (b) the agent reasonably believes that paragraph (a) applies.
- (2) No authority granted to an agent under an enduring power of attorney relating to personal welfare –
- (a) shall authorise an agent to consent to medical treatment on behalf of the principal concerned other than in accordance with the provisions of the National Health Act; and
  - (b) extends to refusing consent to the carrying out, or continuation, of life-sustaining treatment.

**Part 7**  
**Termination**

**Revocation by principal**

- 83.** Nothing in this Act precludes a principal from revoking an enduring power of attorney granted by him or her at any time when he or she has the capacity to do so.

**Resignation by agent**

- 84.** (1) An agent who wishes to resign after an enduring power of attorney conferring authority on him or her has been registered in terms of this Act, must in writing give notice of such intention to -
- (a) the principal who granted the power;
  - (b) the principal's primary carer; and
  - (c) the Master in whose jurisdiction the power was registered,
- (2) The resignation becomes effective –
- (a) 30 days after receipt by the Master of the notification contemplated in subsection (1); or
  - (b) in the case of the resignation of a joint agent or a substitute agent, on receipt by the Master of written confirmation that the remaining joint agent or the substitute agent is willing to act under the power.
- (3) On receipt of a notice of resignation contemplated in subsection (1) the Master in whose office the enduring power is registered must –
- (a) cancel the power; or
  - (b) where a joint agent or a substitute agent indicated his or her willingness to continue acting or commence to act under the power, endorse the power to this effect.

### **Withdrawal by Court or Master**

- 85.** (1) A Court may at any time, upon application by the Master or any interested person –
- (a) withdraw an enduring power of attorney registered in terms of this Act; and
  - (b) direct the Master to cancel the registration of such power,
- if the Court is of opinion that good cause exist for doing so.
- (2) A Master may withdraw an enduring power of attorney registered in his or her office in terms of this Act and, subject to subsection (3), cancel the registration thereof –
- (a) if the agent –
    - (i) fails to perform satisfactorily any duty imposed upon him or her by or under this Act; or
    - (ii) refuses or fails to comply with any lawful request of the Master;
  - (b) if the agent has been convicted in the Republic or elsewhere of –
    - (i) any offence of which dishonesty is an element; or
    - (ii) any other offence for which he or she has been sentenced to imprisonment without the option of a fine;
  - (c) in the case of an enduring power of attorney relating to property –
    - (i) if the agent's estate is sequestered; or
    - (ii) where a juristic person has been appointed as agent, if such juristic person is wound up or dissolved;
  - (d) if the agent suffers from any incapacity contemplated in section 4;
  - (e) on the dissolution of a marriage or permanent same sex life partnership between the principal and the agent, except where the power provides otherwise;
  - (f) on the appointment, in terms of this Act, by a Master of a manager or a mentor for the principal concerned, in so far as the authority granted by the power may be exercised by such manager or mentor; or

- (g) on the appointment by a Court of a curator in respect of the person or property of the principal, in so far as the authority granted by the power may be exercised by such curator.
- (3) Where an enduring power of attorney -
  - (a) grants authority to joint agents; or
  - (b) provides for substitute agents, the appointment of one being conditional upon the termination of the authority of another, reference to "agent" in subsection (2) must be interpreted as a reference to the last remaining agent.

### **Return of copy of enduring power of attorney**

- 86. If, after registration of an enduring power of attorney, the power is cancelled by a Master in terms of this Act –
  - (a) the Master must notify the agent within 14 days of such cancellation; and
  - (b) the agent must, on receipt of such notification, without delay return his or her endorsed copy of the power to the Master.

## ***Part 8***

### ***Validity of certain documents as enduring powers of attorney***

#### **Recognition of foreign documents**

- 87. Notwithstanding section 72, a document is an enduring power of attorney if, according to the law of the place where it was executed -
  - (a) it is a valid power of attorney; and
  - (b) the agent's authority there under is not terminated by the subsequent incapacity of the principal.

**CHAPTER 7**  
**SUPPLEMENTARY POWERS OF THE MASTER AND THE COURT**

***Part 1***

***Powers and duties of the Master***

**Notification of appointment and of cessation**

**88.** (1) The Master must whenever he or she signed or issued a letter of appointment in respect of a manager or mentor and whenever any such manager or mentor ceases to be a manager or mentor under this Act, cause a notice to be published –

- (a) in the *Gazette*;
- (b) in a newspaper circulating in the district in which the adult with incapacity concerned is ordinarily resident; and
- (c) in the case of the appointment of a manager, also in a newspaper circulating in the area or areas in which such adult owns property.

(2) The notice referred to in subsection (1) must -

- (a) state that a manager or mentor has been appointed, or has ceased to be manager or mentor, for the adult with incapacity concerned; and
- (b) must supply the name and address of such adult and such manager or mentor.

**Returns to registration officer of immovable property included in manager's inventory**

**89.** (1) The Master must within seven days after receipt by him or her of an inventory referred to in section 31 in which immovable property has been included, furnish the officer charged with the registration of such property with a return containing –

- (a) the name of the adult concerned;
- (b) the name of the manager; and

(c) particulars of such immovable property.

(2) A registration officer who has been furnished with a return referred to in subsection (1) may not register any transaction in respect of such property entered into by the manager concerned, unless authorised to do so by a Court order or with the consent of the Master.

### **Powers on failure to lodge accounts or perform duties**

**90.** If any manager, mentor or person acting under a specific intervention order fails -

- (a) to lodge any account or report with the Master as and when required by this Act;
- (b) to lodge any voucher or vouchers in support of such account or any entry therein as required by this Act;
- (c) to perform any other duty imposed upon him or her in accordance with a provision or a requirement imposed under this Act; or
- (d) to comply with any reasonable demand of the Master for information or proof required by him or her in connection with the management of the property or the care for the personal welfare of an adult with incapacity under this Act ,

the Master may, after giving the manager, mentor or person acting under a specific intervention order not less than one month's notice, apply to the Court for an order directing such manager, mentor or person to lodge such account, report, or voucher or to perform such duty or to comply with such demand.

### **Initiation of appointment of manager or mentor under certain circumstances**

**91.** (1) A Master may –

- (a) where -
  - (i) no application has been made for the renewal of the appointment of a manager or mentor;



- (ii) a manager, mentor or agent has resigned; or
    - (iii) the appointment of a manager, mentor or agent has been withdrawn,

in terms of this Act;
  - (b) if it comes to his or her knowledge that -
    - (i) an adult with incapacity is the owner of any property in the Republic which is not under the care and management of a manager; or
    - (ii) the personal welfare of an adult with incapacity is not taken care of by a mentor; or
  - (c) in any case in which it would be competent for such Master, or any other Master, to appoint a manager or mentor, obtain the information he or she may deem necessary to determine whether it will be in the best interests of the adult concerned to appoint a manager or mentor or both, for such adult.
- (2) If the Master is satisfied that it is in the best interests of the adult concerned to appoint a manager or mentor, or both, for such adult he or she must -
- (a) by notice in the *Gazette*; and
  - (b) in such manner as in his or her opinion is best calculated to bring it to the attention of the persons concerned,
- call upon the relatives of the adult with incapacity concerned and any other person with an interest in the property or personal welfare of such adult to attend before such Master, or if more expedient before any other Master or any magistrate, at a time and place specified in the notice for the purpose of recommending to the Master for appointment as manager or mentor in respect of the adult concerned, a specific person or persons.
- (3) If the Master published a notice under subsection (2) and -
- (a) received a recommendation contemplated in subsection (2); or
  - (b) received no such recommendation,
- he or she must appoint and issue letters of appointment to such person or persons as the Master considers suitable for appointment, unless it appears to

him or her to be necessary or expedient to postpone the appointment and to publish another notice under subsection (2).

- (4) The provisions relating to the appointment of –
  - (a) a manager in sections 24, 25 and 26; or
  - (b) a mentor in sections 51 and 52,
 apply, with the necessary changes, to the appointment under this section of a manager or a mentor, or both, as the case may be.

### **Investigation and enquiry**

- 92.** (1) A Master may, in respect of any appointment, decision, ruling, direction or order to be made by him or her under this Act –

- (a) obtain such further information; or
- (b) make such enquiry,

as he or she may deem necessary to fulfill his or her functions and powers in terms of this Act.

- (2) For purposes of subsection (1), a Master may by notice in writing require any person who may in the opinion of such Master be able to give such information, or assist such enquiry, to appear -

- (a) before such Master; or
- (b) a Master nominated by such Master,

at a place and time stated in the notice, to be examined under oath or solemn affirmation in connection with such matter.

### **Interim rulings**

- 93.** Without prejudice to any other powers conferred by this Act, the Master may make such interim order or ruling as appears to him or her to be appropriate pending the disposal of an application or any proceedings in terms of this Act.

## **Review**

- 94.** (1) Any person with an interest in the property or personal welfare of an adult with incapacity may apply to a Master to review any action taken or decision made in terms of this Act –
- (a) under a general authority to act;
  - (b) under an intervention order;
  - (c) by a manager;
  - (d) by a mentor; or
  - (e) by an agent under an enduring power of attorney,
- in respect of the property or personal welfare, or both, of an adult with incapacity.
- (2) The Master may, if he or she considers it to be reasonable to do so in all the circumstances –
- (a) review the act or decision contemplated in subsection (1); and
  - (b) make a ruling with regard to such act or decision as he or she thinks fit.

## ***Part 2***

### ***Access to Court***

## **Access to Court**

- 95.** (1) Every appointment by the Master and every decision, ruling, direction or order by the Master under this Act is subject to review by the Court at the instance of any interested person.
- (2) A Court hearing a review contemplated in subsection (1) may, without derogating from its inherent powers of review, confirm, set aside or vary such appointment, decision, ruling, direction or order as the case may be.

## **CHAPTER 8**

### **GENERAL PROVISIONS**

#### **Regulations**

- 96.** The Minister may make regulations regarding –
- (a) any form required to be prescribed in terms of this Act;
  - (b) any matter required to be prescribed in terms of this Act; and
  - (c) any other matter which it is necessary or expedient to prescribe in order to achieve the objects of this Act.

#### **Offences and penalties**

- 97.** (1) Any person who -
- (a) contravenes or fails to comply with any prohibition, restriction, limitation, condition, notice, letter of appointment, order, request, instruction, directive, authorisation, duty, obligation, permission or exemption given, issued, granted or imposed in terms of this Act;
  - (b) in any application, record, inventory, account, report, notification or document submitted in terms of this Act, knowingly makes a misleading, false or deceptive statement, or conceals any material fact, or misrepresents a fact; or
  - (c) ill-treats or willfully neglects an adult with incapacity in relation to whom he or she has any powers or responsibility by virtue of this Act,
- is guilty of an offence.

- (2) Any person convicted of an offence in terms of subsection (1) is liable on conviction –
- (a) in the case of an offence referred to in paragraph (a) to a fine or to imprisonment for a maximum period of one year or to both such fine and such imprisonment;
  - (b) in the case of an offence referred to in paragraphs (b) or (c) to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

**Short title and commencement**

**98.** This Act is called the Adults with impaired decision-making capacity Act, 200..., and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

## SCHEDULE

### Introduction

This Schedule contains in –

Form 1: A model form for an enduring power of attorney relating to *property* referred to in section 72(1)(d)(i) of this Act.

Form 2: A model form for an enduring power of attorney relating to *personal welfare* referred to in section 72(1)(d)(ii) of this Act.

### Purpose of this Schedule

The forms provided for are model forms for granting enduring powers of attorney relating to property and to personal welfare, respectively. The model forms contain all the prescribed elements for legally valid enduring powers of attorney for property and for personal welfare as required by this Act. The forms are intended to increase accessibility of the use, and reduce the possible misuse and abuse of enduring powers of attorney by providing clear guidelines as to its contents.

Although use of the model forms is not obligatory, this Act in section 72(1)(d) requires that every enduring power of attorney must be *substantially* in the form provided for in this Schedule. This means that every enduring power of attorney must at least contain all the elements provided for in the model forms.

The model forms include the explanatory notes that *must* in terms of section 72(1)(d) of this Act be included in every enduring power of attorney for it to be valid. The notes contain a simplified explanation of the most important aspects of an enduring power of attorney as provided for in the Act and is not intended to derogate from or add to the contents of the Act.

**FORM 1****MODEL FORM FOR ENDURING POWER OF ATTORNEY RELATING TO PROPERTY**

THIS POWER OF ATTORNEY is made in terms of the Adults with Impaired Decision-making Capacity Act, 200..., this ... day of ..... 200....

By: .....

Of: .....

Born on: .....

(Full name, address and date of birth of principal)

**1. EXPLANATORY NOTES FOR THE ASSISTANCE OF THE PRINCIPAL**

READ THESE NOTES BEFORE SIGNING THIS DOCUMENT

**Definitions**

- Adult:** means a person –
- (a) who has attained the age of majority in terms of section 1 of the Age of Majority Act, 1972 (Act No. 57 of 1972) or who has been declared to be a major in terms of section 2 of that Act; or
  - (b) who has contracted a legal marriage.
- Agent:** means a person who is authorised to act for a principal under an enduring power of attorney granted in terms of the Act.
- Principal:** means a person who grants an enduring power of attorney in terms of the Act.
- Property:** includes income, finance, business or undertaking and any contingent interest in property.
- Personal welfare:** means any matter relating to the person of an adult with incapacity not relating to “property” and includes health care.
- The Act:** means the Adults with Impaired Decision-making Capacity Act, 200.. (Act No. ... of 200..).

**What is an enduring power of attorney?**

Adults make decisions about their lives everyday. These decisions deal with their property (such as whether to buy a car), or their personal welfare (such as where to live). It is however possible that, at some stage in their lives, they may not be able to make these decisions on their own because of illness, injury or disability.

An enduring power of attorney is a legal document that enables one to plan in advance for a stage when you might become mentally incapable of taking your own decisions regarding your property and / or your personal welfare. It enables another person, referred to as your agent, to make these decisions on your behalf.

Note that if you wish to grant powers of attorney in respect of both your property and your personal welfare, you must do this in separate documents.

### **What types of decisions can be covered by an enduring power of attorney for property?**

You can include almost any kind of decision-making authority relating to your property in this enduring power of attorney.

### **Who can make an enduring power of attorney for property?**

A person who wishes to make an enduring power of attorney for property –

- \* must be an adult; and
- \* must be able to understand the nature and effect of an enduring power of attorney. This means that he or she must understand what an enduring power of attorney is and what, in a general sense, it could be used for.

### **Must an enduring power of attorney comply with specific execution formalities to be valid?**

Yes. In order for an enduring power of attorney to be legally valid it must comply with the formalities regarding content, signing of the power and witnessing of the power as set out in Chapter 6 of the Act.

Note that a principal may sign an enduring power of attorney by making a mark or placing a thumb print on the power. Or, if the principal is physically incapable of signing the power, it may be signed by some other person in the presence and by the direction of the principal. The Act contains express requirements in this regard.

Note also that a Commissioner of Oaths must certify that he or she is satisfied that at the time the principal grants an enduring power the principal understands its nature and effect. This certificate must be attached to the power.

### **Who should I choose to be my agent?**

You should choose a person who is -

- \* an adult;
- \* someone you trust; and
- \* willing to act as your agent.

You may choose more than one person to act as your agent. If you do this, you should clearly indicate it in the enduring power of attorney.

Discuss your choice of agent/s with the important people in your life if possible.

### **Should my agent know about this enduring power of attorney?**

Yes. You must discuss your decision to appoint a person as your agent with that person before making your enduring power of attorney.

### **What are the consequences of giving this enduring power of attorney?**

The effect of giving this enduring power of attorney is to authorise the person you have named as your agent to make decisions and to act on your behalf with respect to your property. This could include your bank accounts, pensions, investments and anything of a financial nature.



### **How wide are the powers that my agent has in respect of my affairs?**

Unless you state otherwise in this document, your agent will have very wide powers to deal with affairs relating to your property.

### **When does an enduring power of attorney take effect?**

Generally speaking, an enduring power of attorney comes into effect either –

- (1) as soon as it is executed - i.e. while you are still mentally capable of making your own decisions; or
- (2) at some future date when you become mentally incapable, but only if you clearly stipulate in the document that the power should not come into effect until such future event.

However, in the case of both (1) and (2) your agent may not act on your behalf when you are mentally incapacitated *unless the power has been registered* with the Master of the High Court. This is explained in the next paragraph.

### **When can my agent start acting on my behalf under this power of attorney?**

In the case of (1) in the previous paragraph, the power will take effect as soon as it is signed and witnessed and your agent may immediately start acting on your behalf. The power will continue to have effect during your lifetime and it will not come to an end if you become mentally incapacitated in the future, unless you have revoked it before that time. If you become mentally incapacitated your agent must register the power with the Master of the High Court in order to be able to continue to legally act on your behalf. After registration he or she will have a duty to manage your affairs while you are mentally incapacitated and will not be able to resign without first notifying the Master of the High Court.

In the case of (2), you should ensure that the event of your mental incapacity can be clearly ascertained. For this purpose, you can name a person in your enduring power who must declare that you have become mentally incapacitated. If you do not name any person, or if the named person is unable or unwilling to declare that the event has taken place, then a medical practitioner may declare that you are mentally incapacitated. At the point of such declaration, your agent can register this power with the Master of the High Court and he or she would then have legal authority to manage your affairs.

### **Can I amend or revoke this enduring power of attorney?**

You can amend or revoke this power at any time if you are still mentally capable of understanding the nature and effect of the document.

### **What happens if my agent does not handle my affairs properly?**

If your agent does not handle your affairs properly, you may revoke your power of attorney if you are still mentally capable of doing so.

If you are not capable, then any interested person may request the Master of the High Court to investigate, or may apply to the High Court to withdraw the power granted to your agent.

### **What should I do with my enduring power of attorney?**

If you have made an enduring power of attorney that will come into operation upon signing thereof, you should give the original to your agent and keep a copy for yourself.

If you have made a power of attorney that will come into effect on your mental incapacity (i.e. on a later date), you should give the original to your agent for safe keeping and keep a copy for yourself.

**Where can I seek further advice?**

These notes are a simplified explanation of the most important aspects of an enduring power of attorney as provided for in the Act. If you need more information you can seek advice from –

- \* a legal practitioner; or
- \* the Master of the High Court.

**2. \*CANCELLATION OF PREVIOUS POWERS OF ATTORNEY**

I revoke the power of attorney previously given by me

on .....  
*(date of power of attorney now being revoked)*

appointing .....  
*(name of agent appointed in the power of attorney now being revoked).*

**3. APPOINTMENT OF AGENT**

(a) I hereby appoint:

.....  
*(full name, address, and occupation of agent)*

to be my agent for the purpose of Chapter 6 of the Adults with Impaired Decision-making Capacity Act, 200... (Act No. ... of 200...).

(b) In addition to the person I appointed as my agent under paragraph (a), I appoint the following person/s to act –

\* jointly OR

\* jointly and severally

with that person as my agent.

**4. POWERS GRANTED TO AGENT**

The appointment in paragraph 3 -

- (a) is -
- \* a general authority to act on my behalf  
OR
  - \* authority to act on my behalf in the following respects only:  
.....  
.....
- in relation to –
- \* the whole of my property  
OR
  - \* the following property only:  
.....  
.....
- (b) is subject to the following conditions and restrictions:  
.....  
.....

**5. STATEMENT OF INTENT REGARDING OPERATION OF POWER**

- \* I intend that the authority granted in paragraph 3 of this power shall not cease if I become mentally incapacitated.
- OR
- \* I intend that the authority granted in paragraph 3 of this power shall have effect only if I become mentally incapacitated.

**6. \*PAYMENT OF AGENT**

I authorise my agent to take annual compensation from my property in the amount of:

.....

SIGNED BY: .....  
(Signature of principal)

IN THE PRESENCE OF:

.....  
(Full name and signature of witness 1)

.....  
(Full name and signature of witness 2)

***\*Delete where not applicable***

**CERTIFICATE OF EXECUTION****required in terms of****section 72(1)(e) of the Adults with Decision-making Incapacity Act, 200...**

I, .....  
 (Full name)  
 of .....

in my capacity as commissioner of oaths certify that I have satisfied myself that at the time the principal named in this enduring power of attorney grants this power, the principal understands the nature and effect of this enduring power of attorney.

.....  
 (Signature of Commissioner of Oaths)

.....  
 (Capacity)

.....  
 (Date)

**FORM 2****MODEL FORM FOR ENDURING POWER OF ATTORNEY RELATING TO PERSONAL WELFARE**

THIS POWER OF ATTORNEY is made in terms of the Adults with Impaired Decision-making Capacity Act, 200..., this ... day of ..... 200....

By: .....

Of: .....

Born on: .....

(Full name, address and date of birth of principal)

**1. EXPLANATORY NOTES FOR THE ASSISTANCE OF THE PRINCIPAL**

READ THESE NOTES BEFORE SIGNING THIS DOCUMENT

**Definitions**

- Adult:* means a person –
- (a) who has attained the age of majority in terms of section 1 of the Age of Majority Act, 1972 (Act No. 57 of 1972) or who has been declared to be a major in terms of section 2 of that Act; or
  - (b) who has contracted a legal marriage.
- Agent:* means a person who is authorised to act for a principal under an enduring power of attorney granted in terms of the Act.
- Principal:* means a person who grants an enduring power of attorney in terms of the Act.
- Property:* includes income, finance, business or undertaking and any contingent interest in property.
- Personal welfare:* means any matter relating to the person of an adult with incapacity not relating to “property” and includes health care.
- The Act:* means the Adults with Impaired Decision-making Capacity Act, 200.. (Act No. ... of 200..).

**What is an enduring power of attorney?**

Adults make decisions about their lives everyday. These decisions deal with their property (such as whether to buy a car), or their personal welfare (such as where to live). It is however possible that, at some stage in their lives, they may not be able to make these decisions on their own because of illness, injury or disability.

An enduring power of attorney is a legal document that enables one to plan in advance for a stage when you might become mentally incapable of taking your own decisions regarding your property and / or your personal welfare. It enables another person, referred to as your agent, to make these decisions on your behalf.

Note that if you wish to grant powers of attorney in respect of both your property and your personal welfare, you must do this in separate documents.

**What types of decisions can be covered by an enduring power of attorney for personal welfare?**

You can include almost any kind of decision-making authority relating to your personal welfare (including decision-making relating to your medical treatment) in this enduring power of attorney.

However, the law prohibits an individual to take decisions on certain very personal matters on behalf of someone else. These include decisions relating to matters such as marriage, divorce, adoption of a child, or making a will. In addition to this, the Act places restrictions on certain decisions relating to medical treatment being taken on behalf of a principal by an agent. The latter in particular includes decisions relating to refusing consent to the carrying out, or continuation, of life-sustaining treatment.

**Who can make an enduring power of attorney for personal welfare?**

A person who wishes to make an enduring power of attorney for personal welfare –

- \* must be an adult;
- \* must be able to understand the nature and effect of an enduring power of attorney. This means that he or she must understand what an enduring power of attorney is and what, in a general sense, it could be used for.

**Must an enduring power of attorney comply with specific execution formalities to be valid?**

Yes. In order for an enduring power of attorney to be legally valid it must comply with the formalities regarding content, signing of the power and witnessing of the power as set out in Chapter 6 of the Act.

Note that a principal may sign an enduring power of attorney by making a mark or by placing a thumb print on the power. Or, if the principal is physically incapable of signing the power, it may be signed by some other person in the presence and by the direction of the principal. The Act contains express requirements in this regard.

Note also that a Commissioner of Oaths must certify that he or she is satisfied that at the time the principal grants an enduring power the principal understands its nature and effect. This certificate must be attached to the power.

**Who should I choose to be my agent?**

You should choose a person who is -

- \* an adult;
- \* someone you trust; and
- \* willing to act as your agent.

You may choose more than one person to act as your agent. If you do this, you should clearly indicate it in the enduring power of attorney.

Discuss your choice of agent/s with the important people in your life if possible.

**Should my agent know about this enduring power of attorney?**

Yes. You must discuss your decision to appoint a person as your agent with that person before making your enduring power of attorney.

### **What are the consequences of giving this enduring power of attorney?**

The effect of giving this enduring power of attorney is to authorise the person you have named as your agent to make decisions and to act on your behalf with respect to your personal welfare. This could include taking decisions on where you should live, whether and what medical treatment you should receive, or anything relating to your personal welfare.

### **How wide are the powers that my agent has in respect of my affairs?**

Unless you state otherwise in this document, your agent will have very wide powers to deal with affairs relating to your personal welfare.

### **When does an enduring power of attorney take effect?**

Generally speaking, an enduring power of attorney comes into effect either –

- (1) as soon as it is executed - i.e. while you are still mentally capable of making your own decisions; or
- (2) at some future date when you become mentally incapable, but only if you clearly stipulate in the document that the power should not come into effect until such future event.

However, in the case of both (1) and (2) your agent may not act on your behalf when you are mentally incapacitated *unless the power has been registered* with the Master of the High Court. This is explained in the next paragraph.

### **When can my agent start acting on my behalf under this power of attorney?**

In the case of (1) in the previous paragraph, the power will take effect as soon as it is signed and witnessed and your agent may immediately start acting on your behalf. The power will continue to have effect during your lifetime and it will not come to an end if you become mentally incapacitated in the future, unless you have revoked it before that time. If you become mentally incapacitated your agent must register the power with the Master of the High Court in order to be able to continue to legally act on your behalf. After registration he or she will have a duty to manage your affairs while you are mentally incapacitated and will not be able to resign without first notifying the Master of the High Court.

In the case of (2), you should ensure that the event of your mental incapacity can be clearly ascertained. For this purpose, you can name a person in your enduring power who must declare that you have become mentally incapacitated. If you do not name any person, or if the named person is unable or unwilling to declare that the event has taken place, then a medical practitioner may declare that you are mentally incapacitated. At the point of such declaration, your agent can register this power with the Master of the High Court and he or she would then have legal authority to manage your affairs.

Note that in the case of an enduring power relating to personal welfare your agent may however only act on your behalf once you have become mentally incapable of acting yourself. This differs from the position regarding an enduring power relating to property where an agent may act on behalf of a principal irrespective of whether such principal is mentally incapacitated or not.

### **Can I amend or revoke this enduring power of attorney?**

You can amend or revoke this power at any time if you are still mentally capable of understanding the nature and effect of the document.

**What happens if my agent does not handle my affairs properly?**

If your agent does not handle your affairs properly, you may revoke your power of attorney if you are still mentally capable of doing so.

If you are not capable, then any interested person may request the Master of the High Court to investigate, or may apply to the High Court to withdraw the power granted to your agent.

**What should I do with my enduring power of attorney?**

If you have made an enduring power of attorney that will come into operation upon signing thereof, you should give the original to your agent and keep a copy for yourself.

If you have made a power of attorney that will come into effect on your mental incapacity (i.e. on a later date), you should give the original to your agent for safe keeping and keep a copy for yourself.

**Where can I seek further advice?**

These notes are a simplified explanation of the most important aspects of an enduring power of attorney as provided for in the Act. If you need more information you can seek advice from –

- \* a legal practitioner; or
- \* the Master of the High Court.

**2. \*CANCELLATION OF PREVIOUS POWERS OF ATTORNEY**

I revoke the power of attorney previously given by me

on .....  
(date of power of attorney now being revoked)

appointing .....  
(name of agent appointed in the power of attorney now being revoked).

**3. APPOINTMENT OF AGENT**

(a) I hereby appoint:

.....  
(full name, address, and occupation of agent)

to be my agent for the purpose of Chapter 6 of the Adults with Impaired Decision-making Capacity Act, 200... (Act No. ... of 200...).

(b) In addition to the person I appointed as my agent under paragraph (a), I appoint the following person/s to act –

- \* jointly



OR

\* jointly and severally  
with that person as my agent.

#### 4. POWERS GRANTED TO AGENT

The appointment in paragraph 3 -

(a) is in relation to -

\* my personal welfare generally

OR

\* the following specific matters relating to my personal welfare only:

.....  
.....

(b) \* is subject to the following conditions and restrictions:

.....  
.....

#### 5. STATEMENT OF INTENT REGARDING OPERATION OF POWER

I intend that the authority granted in paragraph 3 of this power shall have effect only if I become mentally incapacitated.

#### 6. \*PAYMENT OF AGENT

I authorise my agent to take annual compensation from my property in the amount of:

.....

SIGNED BY: .....  
(Signature of principal)

IN THE PRESENCE OF:

.....  
(Full name and signature of witness 1)

.....  
(Full name and signature of witness 2)

***\*Delete where not applicable***

**CERTIFICATE OF EXECUTION**  
**required in terms of**  
**section 72(1)(e) of the Adults with Decision-making Incapacity Act, 200...**

I, .....  
*(Full name)*  
 of .....

in my capacity as commissioner of oaths certify that I have satisfied myself that at the time the principal named in this enduring power of attorney grants this power, the principal understands the nature and effect of this enduring power of attorney.

.....  
*(Signature of Commissioner of Oaths)*

.....  
*(Capacity)*

.....  
*(Date)*