



Legal position of persons incapable of managing their own affairs

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1. Some people cannot make legally effective decisions because of diminished mental capacity. Diminished capacity may result from a number of causes, such as mental illness, intellectual disability, brain injury or disease, a stroke, dementia or incapacity relating to aging in general.
2. Decision making impairment affects mostly the mentally disabled and the elderly.
3. Many people, when they get older and frailer, give a general power of attorney to a trusted person, usually a family member or their attorney, accountant or financial advisor (their agent) to transact business on their behalf. This business normally includes banking and investments but could also include the power to buy and sell shares or immovable property. It can also include the incurrence of expenditure relating to the day-to-day living of the person who grants the general power of attorney and his or her family. In this way the older person is saved the trouble of having to go to the bank or having to go to the attorney or stockbroker's office, or doing their own shopping. An agent is required to act in good faith and in the best interests of the principal and is accountable to the principal for his or her actions.
4. In South Africa the general power of attorney remains valid only for as long as the principal is still capable of appreciating the concept and consequences of granting another person his or her power of attorney. The moment a person becomes mentally incapacitated and is no longer

capable of managing his or her own affairs, the power of attorney lapses.¹

5. At present there are two legal procedures in terms of which someone can be appointed to administer the affairs of a person who is found to be incapable of managing his or her own affairs. These procedures are the common law procedure for the appointment of a *curator* that acquires an application to the High Court and the procedure for the appointment of an administrator as set out in the Mental Health Care Act, Act 17 of 2002, which came into operation on 15 December 2004.
6. In terms of the common law procedure, the High Court may declare a person incapable of managing his or her own affairs and appoint a *curator* in terms of the procedure as set out in Rule 57 of the Rules of the High Court and includes an application in respect of the following persons:
 - a. mentally ill or mentally deficient persons;
 - b. persons who owing to a physical infirmity cannot manage their own affairs;
 - c. persons declared prodigals.
7. The *curator* appointed to administer the estate of the person declared incapable of managing his own affairs, is known as a *curator bonis*, while a *curator* appointed to take decisions as to the care, custody and welfare of a person, or to consent to medical treatment on behalf of such person is called a *curator personae*. The appointment of a *curator personae* involves a serious curtailment of a person's rights and freedoms and the Court will not likely make such an appointment.
8. The application to Court for the appointment of a *curator bonis* is preceded by the Court appointing a *curator ad litem* who must report to the Court prior to the appointment of a *curator bonis*. This is an expensive method of appointing a *curator*.
9. In terms of the Mental Health Care Act, Act 17 of 2002 and the fact that no High Court application is required for the appointment of an administrator, the applicant can lodge the application directly with the Master of the High Court in whose area of jurisdiction the person in respect of whom an administrator is to be appointed, resides. There are no application fees charged by the Master in processing the application. However, if the value of the persons capital assets is above R200,000.00 and the annual income is above R24,000.00 per annum, or there are certain allegations in the application that require confirmation, or further information is required to support the application, the Master is obliged to cause an investigation to be conducted before an administrator is appointed and the cost of the investigation will be borne by the estate of the person to be placed under administration.
10. The Master may, however, appoint an interim administrator pending the outcome of the investigation.

¹ *Pheasant v Warne* 1922 AD 481; *Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz* 1957 (4) SA 354 (W) confirmed on appeal in 1958 (1) SA 505 (A).



11. The Mental Health Care Act defines “mental illness” in section 1 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”.
12. The application procedure for the appointment of an administrator in terms of the Mental Health Care Act is set out in section 60 of the Act. The application is done by way of affidavit from the person applying for such appointment , and must contain the information as required by the Act. Unless the applicant is either the spouse or a relative, the reason why they are bringing the application must be specified.
13. A copy of the application must be served on the person for whom the administrator is sought to be appointed .

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