



When disability impacts legal capacity

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Introduction

Introduction

No person is by nature able to act on behalf of another.

A POA is a formal document by which a person (“**the principal**”) authorises another (“**the agent**”) to conclude *juristic acts* on his or her behalf. A juristic act is an act whereby legal relationships are created, and which has legal consequences.

Introduction

By signing a POA the principal also indicates to third parties his or her will to be bound by acts performed by the agent.

If properly authorised, the **agent** is therefore protected.

However, if the agent is **not** properly authorised, the agent is at risk.

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Capacity of the principal

Capacity of the principal

The law of agency –

- agent cannot do that which his principal has no capacity to do himself
- for the POA to be **valid**, the **principal** must have contractual capacity.

Capacity of the principal

Often the intention with granting a POA is specifically to cater for when the principal is no longer capable of acting on their own behalf.

The problem comes in when the principal's mental capacity starts to diminish.

Capacity of the principal

The dilemma?

POA **automatically terminates** once the principal loses mentally capacity to act....when a principal is no longer able to perform the act in question *himself*, the agent can no longer *do it for him*.

Capacity of the principal

Leaves the agent with no authority to act AND the principal cannot act either.

The risk? Agent exposes himself to personal liability.

POA is of little or no value to someone who fears that their mental capacity is/may be weakened in the future.

Capacity of the principal

Where does that leave us?

Only legal options:

- approach the High Court for the appointment of a **Curator**, or
- apply to the Master of for the appointment of an **administrator**.

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**When mental
capacity is lost**

When mental capacity is lost

Current options in our law

Both common law and the Mental Health Care Act 17 of 2002 makes provision for authorising other people to make legal decisions:

1. common law: the **High Court** has the jurisdiction to appoint a **curator**
2. Mental Health Care Act: the **Master** may appoint an **administrator**

When mental capacity is lost

Appointing a curator

The High Court may declare a person incapable of managing their own affairs.

Process is set out in Rule 57 of the Uniformed Rules of the High Court.

Application be supported by affidavits of at least two medical practitioners.

When mental capacity is lost

In effect, the applicant is asking the court for three things, namely:

- i. to declare the patient incapable of managing his/her own affairs;
- ii. to appoint a curator *ad litem*; and
- iii. to appoint a curator *bonis* or curator *personae* or both.

When mental capacity is lost

Appointing an administrator

Only available where a person is mentally ill or severely mentally disabled.

Section 60 of the Mental Health Care Act 17 of 2002 – anyone can apply to the Master for the appointment of an Administrator for a **mentally ill** person or person with **severe or profound intellectual disability**.

Section 61 – where application for an Administrator is brought on the recommendation of the High Court.

When mental capacity is lost

This application is made *directly to the Master* – must set out the **grounds** on which the applicant believes that such person is incapable of managing his or her property and include **mental health reports**.

The Master may:

- appoint an Administrator without conducting an investigation, or
- appoint an interim Administrator pending the outcome of an investigation.

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Is an enduring
POA the route to
go?

Is an enduring POA the route to go?

Other foreign countries have introduced EPOA's.

The possibility of introducing such a system in South Africa has been investigated by the South African Law Reform Commission – *will discuss this later.*

Is an enduring POA the route to go?

England and Wales

- Lasting Powers of Attorney (LPAs) was created under the **Mental Capacity Act**.
- Two types of LPAs: (i) for **property and financial affairs**; and (ii) for **Health and Welfare**.
- The LPA is created and registered (in prescribed format) with the **Office of the Public Guardian**. The main role of the **Office of the Public Guardian** is the protection of people who lack mental capacity.

Is an enduring POA the route to go?

England and Wales

- **Mental Capacity Act** empowers and protects vulnerable people. Detailed guidance is provided by a **Code of Practice**.
- Special tribunal - the **Court of Protection** deals with all disputes A.

Is an enduring POA the route to go?

New Zealand

- EPOA's were introduced by the **Protection of Personal and Property Rights Act**.
- 2 types (i) **for personal care and welfare** and (ii) **for property**.
- Prescribed **forms** needed which must be signed by the attorney and the donor.

Is an enduring POA the route to go?

New Zealand

- The donor must receive advice:
 - lawyer, a qualified legal executive, or trustee;
 - explaining the effects and implications;
 - complete a certificate which confirms they explained it; and
 - must be independent from the attorney.
- The attorney must have his/own witness.

Is an enduring POA the route to go?

Canada

- Substitute Decisions Act, 1992 sets out legal requirements for:
 - A **Continuing Power of Attorney for Property** - donor gives the attorney the authority to make decisions about their **financial affairs** (not *health care*)
 - A **Power of Attorney for Personal Care** - donor gives the authority to make personal care decisions.

Is an enduring POA the route to go?

Canada

- Some restrictions as to who may be attorney.
- Must be witnessed.
- Must be recorded (filed) with the registry or the Land Titles Office

Is an enduring POA the route to go?

South African Law Reform Commission

Attempted to introduce the concept of the *enduring power of attorney* into our legal system as far back as 1988.

Investigation was undertaken in 2001 - was in line with the extensive reform in this area of the law over the past two decades in other jurisdictions.

Is an enduring POA the route to go?

Current problems are further complicated by:

- no specific act/law dealing with impaired decision-making capacity;
- no formal assisted decision-making device that clearly provides for mild, fluctuating or temporary impairment;
- no provision for some default arrangement.

Is an enduring POA the route to go?

Commission proposed the following:

1. A change to the law to provide for an *alternative* to the curatorship system
2. Developing the common law concept of “*capacity*”
3. Prescribing clear principles to govern incapacity

Is an enduring POA the route to go?

4. Introducing a tiered system of substitute decision-making:

- A default arrangement as a first tier
- Applying to the Master for a “specific intervention order” in circumstances where **one-off decisions** have to be made
- Applying to the Master for the appointment of:
 - a “manager” to care for and manage property on a long term basis;
 - a “mentor” to take care of the personal welfare on a long term basis;

Is an enduring POA the route to go?

5. Introducing the concept of an EPOA:

- Enact legislation
- Set conditions for agent

Is an enduring POA the route to go?

- Proper **safeguards** -
 - Execution safeguards: EPOA must be in writing, witnessed, in prescribed form, contain prescribed explanatory notes, certified.
 - As a triggering event safeguard, require that agent may not continue to act upon an EPOA, or commence to act on a conditional power, *if it has not been **filed for registration and been endorsed***.

Is an enduring POA the route to go?

- Supervisory safeguards:
 - Furnishing of security
 - restrictions on an agent's authority
 - Record keeping obligations
 - termination of an EPOA.
- Agents should be supervised by Master of the High Court.

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Conclusion

Conclusion

POA - little or no value to someone with diminishing capacity.

Currently, the only legal solution is to approach the High Court for the appointment of a curator, or applying to the Master for the appointment of an administrator.

Conclusion

Our existing **curatorship** system has various drawbacks:

- formal High Court application - expensive and lengthy process
- the size of the estate might also not justify the cost

Appointing an **administrator** in terms of the Mental Health Care Act, although somewhat less complicated, remains inaccessible to many.

Both are entitled to a fee.

Conclusion

Way forward?

Law must be adapted to cater for adults with **impaired decision making** capacity –

- either by way of introducing new legislation
- or EPOA.

THANK YOU

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