

SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 18

PROJECT 61

ENDURING POWERS OF ATTORNEY AND THE  
APPOINTMENT OF CURATORS TO MENTALLY  
INCAPACITATED PERSONS

Closing date for comment 30 May 1988

November 1987

ISBN 07970 13814



## 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 -

The Honourable Mr Justice G Viljoen (Chairman)  
The Honourable Mr Justice H J O van Heerden (Vice-Chairman)  
The Honourable Mr Justice P J J Olivier  
Prof D J Joubert  
Mr J E Knoll  
Mr P A J Kotzé  
Adv G G Smit

The Secretary is Mr G J van Zyl. The Commission's offices are on the 8th Floor, NG Kerk Sinodale Sentrum, 228 Visagie Street, Pretoria. The postal address is:

The Secretary  
South African Law Commission  
Private Bag 668  
0001 PRETORIA

Telephone (012) 3226440



CONTENTS	PAGE
INTRODUCTION	(ii)
PREFACE	(vi)
LIST OF SOURCES AND MODE OF CITATION	(vii)
TABLE OF CASES	(x)
1. BACKGROUND AND SCOPE OF INVESTIGATION	
* Origin of investigation	1
* Survey of problems	1
2. THE POSITIVE LAW	
* Introduction	6
. Roman Law	6
. Roman-Dutch Law	6
. The Mental Health Act	7
* Various types of curators	8
. The <u>curator bonis</u>	8
. The <u>curator personae</u>	9
. The <u>curator ad litem</u>	10
* Present procedure for appointment of curators	12
. Introduction	12
. Procedure in terms of section 56 of the Mental Health Act	13
. Procedure in terms of Supreme Court Rule 57	18
* Persons on whom the investigation is focused and the term "mental incapacity"	22

* The enduring power of attorney	24
. Introduction	24
. Representation through power of attorney	25
. Termination of the power of attorney	27
. Various types of powers of attorney	29
3. COMPARISON OF LAWS	
* The enduring power of attorney	31
. Introduction	31
. Reasons for reform	32
. Ontario	33
. Manitoba	34
. British Columbia	34
. The Australian Capital Territory	36
. New South Wales	36
. South Australia	37
. Tasmania	37
. England	38
. California	40
. Summary	40
4. SUMMARY OF PROBLEM AREAS	42
5. RECOMMENDATIONS	
* The enduring power of attorney	45
* A simplified procedure for the appointment of a curator	47

6. PROPOSED BILLS

* Annexure A	50
* Annexure B	55





## LIST OF SOURCES AND MODE OF CITATION

Where there is no entry in the left-hand column, the source concerned is not explicitly quoted in the paper.

LRC of California	<u>California Law Revision Commission Recommendation relating to durable powers of attorney for health care decisions</u> Palo Alto 1983
Claassen	<u>C J Claassen Dictionary of legal words and phrases</u> Vol 3 Durban: Butterworths 1976
De Villiers and Macintosh	<u>J E de Villiers and J C Macintosh The law of agency in South Africa</u> 3rd edition by J M Silke Cape Town: Juta 1981
De Wet in <u>LAWSA</u>	<u>J C de Wet "Agency and representation" in The Law of South Africa</u> Vol 1 1976 Durban: Butterworths 1976 73-118
De Wet and Yeats	<u>J C de Wet en A H van Wyk Kontraktereg en handelsreg</u> 4de uitgawe Durban: Butterworths 1978
Hoggett	B Hoggett <u>Mental Health</u> London: 1976
Joubert	<u>D J Joubert Die Suid-Afrikaanse verteenwoordigingsreg</u> Kaapstad: Juta 1979
Kruger in <u>THRHR</u> 1977	<u>A Kruger "Die amptelike curator ad litem van geestesongestelde persone" Tydskrif vir Hedendaagse Romeins-Hollandse Reg</u> 1977 3 253-260
Kruger	<u>A Kruger Mental health law in South Africa</u> Durban: Butterworth 1980

- Kruger in TRW  
1983
- A Kruger "Tekortkominge in wetgewing oor geestesongesteldes" Tydskrif vir Regswetenskap 1983 2 182-192
- Law Com
- The Law Commission The incapacitated principal Report 122 London: Her Majesty's Stationery Office 1983
- LRC of the Australian Capital Territory
- Law Reform Commission of the Australian Capital Territory Report on the management of the property and affairs of mentally infirm persons Canberra: Australian Government Publishing Service 1973
- LRC of British Columbia
- Law Reform Commission of British Columbia Report on the law of agency Part 2: Powers of attorney and mental incapacity Report 22 British Columbia: K M MacDonald 1975
- LRC of New South Wales
- Law Reform Commission of New South Wales Report on powers of attorney Report 18 New South Wales: A West Government Printer 1975
- LRC of Tasmania
- Law Reform Commission of Tasmania Report on powers of attorney Report 39 Tasmania: A B Candell Government Printer 1984
- LRC of South Australia
- Law Reform Committee of South Australia Forty-seventh Report: relating to powers of attorney South Australia: D J Woolman Government Printer 1981
- Modderman
- W Modderman Handboek voor het Romeinsch Recht 2de uitgawe deur H L Drucker Groningen: 1892
- Nathan, Barnett and Brink
- C J M Nathan, M Barnett and A Brink Uniform Rules of Court 3rd edition Cape Town: Juta 1984
- Pothier
- Pothier Traite du contract de mandat (Translated by B G Rogers and B X de Wet) Johannesburg: Lex Patria 1979

- Schoonees P J Schoonees Verklarende handwoordeboek van die Afrikaanse taal Pretoria: Voortrekkerpers 1973
- Snyman J L Snyman Die siviele opneming van geestesongesteldes: regte en regsbeskerming van die betrokke Ongepubliseerde LL D-verhandeling UNISA 1981
- S A Strauss Doctor, patient and the law 2nd edition Pretoria: Van Schaik 1984
- Van der Linden J van der Linden Institutes of the laws of Holland (Translated by J Henry) London: 1828
- Van Jaarsveld S R van Jaarsveld (red) Suid-Afrikaanse handelsreg Vol 1 2de uitgawe Johannesburg: Lex Patria 1984
- Van Oven J C van Oven Leerboek van Romeinsch Privaatrecht 3de uitgawe Leiden: 1948
- C L Wicht Die bejaarde en sy kwale Pretoria: HAUM 1984
- Wille G Wille Principles of South African law 6th edition by J T R Gibson Cape Town: Juta 1970

## TABLE OF CASES

- Berman, Ex parte: in re estate Dhlamini  
1954 2 SA 386 (W)
- Blay, Ex parte 1942 OPD 73
- De Villiers, Ex parte 1939 OPD 128
- De Villiers and Another v Espach and Another  
1958 3 SA 91 (T)
- Drew v Nunn 1878 4 QBD 661
- Du Toit, Ex parte: in re curatorship estate  
Schwab 1968 1 SA 33 (T)
- Glover v Bothma 1948 1 SA 611 (W)
- Hill, Ex parte 1970 3 SA 411 (C)
- Hulett, Ex parte 1968 4 SA 172 (D)
- Knight, Ex parte 1976 2 SA 903 (R)
- Koch v Mair 1894 11 SC 71
- Martinson v Brown; Gray v Armstrong 1961  
4 SA 107 (C)
- Molyneux v Natal Land and Colonization Com-  
pany 1905 AC 555
- Natal Bank Ltd v Natorp and Registrar of Deeds  
1908 TS 1016
- Pheasant v Warne 1922 AD 481
- Pienaar v Pienaar's Curator 1930 OPD 171
- Powrie, Ex parte 1963 1 SA 297 (W)
- Steward-Wynne, Ex parte: in re Mason 1944 EDL 176
- Tarbett, Ex parte 1946 EDL 6
- Tomich, Ex parte 1957 4 SA 667 (N)
- 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)

Van den Berg v Van den Berg 1939 WLD 228

Van der Linde, Ex parte 1970 2 SA 718 (O)

Ward v Barrett 1962 4 SA 732 (N)

Ward v Lockhat Ltd 1928 AD 279



## 1. BACKGROUND AND SCOPE OF INVESTIGATION

### \* Origin of investigation

1.1 On 20 May 1985 the Association of Trust Companies in South Africa invited the South African Law Commission's attention to the Enduring Powers of Attorney Bill which had been introduced in the British Parliament and posed the question whether a similar system of enduring powers of attorney should not be introduced in this country. An enduring power of attorney is one which continues and retains its legal force even after the donor of that power has become mentally incapacitated. The present position, as will be discussed in greater detail later, is that a power of attorney is terminated if the principal becomes mentally ill.<sup>1</sup> (Where the term "mental incapacity" is used in this investigation, it should be interpreted as including any form of mental illness discussed herein, and "mental illness" or any similar term includes "mental incapacity.")

1.2 On 18 April 1986 Professor I Vorster of the Potchefstroom University for Christian Higher Education pointed out to the Commission that the courts are reluctant to appoint a curator personae to a mentally ill patient since this is regarded as a serious curtailment of a person's rights and liberties. A proposal was made that a new section 58A should be inserted in the Mental Health Act in terms of which the appointment of a curator personae would be a measure readily available to the public and which would clearly define the powers of the curator. As this proposal had a bearing on the one regarding enduring powers of attorney, it was decided to investigate both matters simultaneously. On 28 January 1987 the Commission decided to include the current investigation in its programme.

### \* Survey of problems

---

1 De Wet and Yeats Kontraktereg en Handelsreg 107, hereinafter referred to as "De Wet and Yeats"; De Villiers and Macintosh The law of agency in South Africa 63; hereinafter referred to as "De Villiers and Macintosh". Also cf par 2.42.

1.3 The submission made by Professor Vorster pinpointed certain problems in connection with the present procedure for the appointment of curators. If no curator personae has been appointed to a mentally incapacitated person, if he has no next-of-kin and if he has not been admitted to an institution for mentally ill patients, no one can legally consent to medical intervention in respect of that person. Section 60A of the Mental Health Act provides that, if a patient is not capable of consenting to medical treatment or an operation because of his mental illness, a curator appointed to the person of the patient, or the patient's spouse, parent, major child or brother or sister may consent. These persons, in the order indicated, have precedence the one over the other to consent to medical treatment of or an operation on a patient in an institution. If the person having precedence cannot be found timeously, the person following in precedence has the power to consent. If there are no such persons or if they cannot be found, the superintendent of the institution in which the patient is at the time may consent to the required treatment or operation.

1.4 A curator (who can only be a curator personae since a curator bonis has no powers in respect of the person of the patient) to the patient takes precedence with regard to consent to medical treatment and operations over all the persons mentioned in the preceding paragraph. These persons may consent only if the curator cannot be found timeously, or if consent is withheld unreasonably and the operation is urgent. The section provides for cases where no curator has been appointed and there are no relatives by providing that the superintendent of the institution where the patient is at the time may consent in such circumstances. The Act defines "institution" as a "state psychiatric hospital or a provincial hospital or a halfway house at which provision has been made for the detention or treatment of persons who are mentally ill".<sup>2</sup> The effect of the section is therefore that if no curator personae has been appointed in respect of a mentally incapacitated person, there are no relatives referred to in section 60A, and he is not a patient in a mental institution, and the need for medical treatment or an operation should arise, that person is left to his

---

2 Sec 1 of the Mental Health Act 18 of 1973.



own fate. Admittedly the court may be approached for consent in these circumstances, but the application inevitably entails expense (sometimes prohibitive).

1.5 Further problems are encountered in that members of a mentally incapacitated person's family are often under the misapprehension that they have the power to enter into negotiations and exercise control over property on behalf of that person without obtaining an appointment as a curator; this cannot be legally justified. The costs involved in the appointment of a curator are furthermore beyond the means of those who are not well-off, with the result that the required appointment is not obtained and unsatisfactory situations arise.

1.6 In order to illustrate the problem mentioned in the preceding paragraph, the following case, which had been brought to the attention of the Lifelong Care Association, is quoted:<sup>3</sup>

A 24 year old retarded male adult resident in a Care Centre was found employment on the open labour market at R95-00 per month. His earnings were placed in a Bank Savings Account. The amount and frequency of withdrawal was decided by the Social Worker at the Care Centre.

Questions that arise are inter alia:-

- (i) Who had authority to enter into an employment contract?
- (ii) Who contracted with the bank to open a savings account?
- (iii) Where did the Social Worker obtain the right to decide the amount and frequency of withdrawal?

1.7 A further problem indicated by Professor Vorster is that the Mental Health Act limits the capacity of persons to apply for the appointment of a curator on behalf of another. In this regard he refers to section 8 of the Act. For various reasons, however, this view appears to

---

3 Prof Vorster, referred to above, included in his submission to the Commission a Memorandum by the Lifelong Care Association. The quotation is an extract from the Memorandum.

be unfounded. First, section 8 refers to people who may apply for a reception order in terms of which a mentally ill person may be received and detained in an institution, and not to people who may apply for the appointment of a curator. The section is furthermore very wide and provides that any person over the age of 18 years may bring the application. If the applicant is not the spouse of the person concerned, the reason why the application is being made by some other person must be stated. Therefore nothing in the section prohibits a person who is not related by consanguinity or affinity to the mentally ill person from applying for a reception order.

1.8 Rule 57 of the Uniform Rules of Court prescribes the procedure for the appointment of a curator to a person alleged to be mentally incapacitated.<sup>4</sup> The rule provides that any person who applies to court for an order appointing a curator to a mentally incapacitated person must set forth fully the grounds upon which he claims locus standi. Again no material limits are imposed on the capacity of persons desiring to bring an application. As a rule the application is brought by one of the next-of-kin of the mentally incapacitated person but it may even be brought by a friend, partner or business associate in cases where the patient has no relatives in the Republic.<sup>5</sup> A curator bonis was appointed upon the application of an assistant welfare officer from the Department of Social Welfare in Ex parte Knight.<sup>6</sup>

1.9 Professor Vorster's intention might have been to extend the capacity of persons who may apply for the appointment of curators to include bodies corporate or institutions. However, there is nothing to prohibit an institution from applying for the appointment of a curator bonis through a representative in his personal capacity. All that is required is

---

4 Nathan, Barnett and Brink Uniform rules of court 352, hereinafter referred to as "Nathan, Barnett and Brink".

5 Ex parte Reid: In re M MacGuiness WLD 9.8.1960, not included in the law reports; Nathan, Barnett and Brink 358.

6 1976 2 SA 903 (R).

that the affidavit to the notice of motion must state the grounds upon which the application is founded and upon which the applicant claims locus standi.

1.10 Without doubt, however, there are certain problems with regard to the appointment of curators, either to the person or to the property of a mentally incapacitated person. Enduring powers of attorney might present a solution to some of the problems mentioned above. The introduction of such powers would however constitute a drastic change to the common law, which calls for careful consideration. It will be necessary to guard in particular against the abuse of such powers of attorney.

1.11 Furthermore it is clear that the existing provision for taking care of the interests of a mentally incapacitated person is inadequate when it comes to senile and feeble-minded persons who are cared for at home. There are many aged persons in old-age homes or retirement villages who display signs of cognitive ageing (senility), or who have in fact already reached an advanced stage of dementia. Because the possibility of exploitation of these persons is very great, there is a need for some method of administering their affairs, property and interests in an inexpensive and simple way, coupled with legal certainty, either by means of a power of attorney or by a curator or possibly a new procedure. Admittedly it is possible to use the existing procedure for the appointment of curators in order to come to the aid of these people, but, as will be indicated later, this procedure is expensive and available only to mentally incapacitated persons who are fairly well-off. The procedure is furthermore a cumbersome one and it can take a couple of months for a curator to be appointed, during which period the danger of exploitation cannot be excluded.

1.12 In seeking a solution to all these problems, it will be necessary to examine the existing procedure for the appointment of curators to mentally incapacitated persons, with special reference to the various procedures that are available, the categories of persons who qualify for the appointment of curators, and the adequacy of the current procedures.

## 2. THE POSITIVE LAW

### \* Introduction

#### Roman Law

2.1 The fact that in the Roman period the family was a closely knit unit, and therefore the most suitable body to accept responsibility for a mentally ill person, is reflected in the law of the Twelve Tables:<sup>1</sup>

Si furiosus escit, agnatum gentiliumque in eo pecuniaque eius potestas esto.<sup>2</sup>

2.2 Freely translated the quotation means that the nearest agnate had control not only over the possessions of a mentally ill person, but also over his person. No procedure was followed to appoint a curator. As soon as the person displayed signs of mental degeneration, he was in cura.<sup>3</sup>

#### Roman-Dutch Law

2.3 An important development in the sphere of mental disorders in the Roman-Dutch Law was the appointment of curators to the insane by the Provincial Court of Holland or the ordinary magistrates, depending on which court was approached by the family of the "patient".<sup>4</sup> The court could also order that the person be detained, usually in cases where the "patient" was

---

1 Kruger Mental health law in South Africa 2; hereinafter referred to as "Kruger".

2 Modderman Handboek voor het Romeinsch recht 70.

3 Van Oven Leerboek van Romeinsch privaatrecht 510.

4 Kruger 5.

dangerously insane.<sup>5</sup> Until the eighteenth century, however, there was no hospital or effective treatment for the mentally ill.<sup>6</sup>

### The Mental Health Act<sup>7</sup>

2.4 Before Union each colony had its own laws relating to mental disorders. The pre-Union legislation was repealed by the Mental Disorders Act 38 of 1916, which was in turn repealed by the present Mental Health Act, except for sections 27 to 29bis inclusive. This Act provides for the reception, detention and treatment of persons who are mentally ill.

2.5 Section 56(1) of the Mental Health Act 1973 (hereinafter referred to as the "Act") provides for the appointment of a curator bonis (in other words, a curator to the property of a person) to a person detained as or declared to be mentally ill or detained as a mentally ill prisoner or a President's patient. If the estimated value of the mentally ill person's property does not exceed R50 000 in respect of the corpus thereof or R10 000 per annum in respect of income, a judge in chambers or the Master may make the appointment. It is interesting to note that section 56(1) does not explicitly use the words "curator bonis", but "a curator to perform or exercise on his behalf any particular act in respect of his property or to take care of or administer his property or to carry on any business or undertaking of such person." Section 56(2) however expressly mentions a curator bonis who may be appointed by the Master pending the appointment of a curator under subsection (1). The Act appears to distinguish between a curator (to a person's property) and a curator bonis, especially since section 57(3) mentions "a curator (including a curator bonis appointed under section 56(2)) ..." The reason for such a distinction is not clear, since only three types of curators are known in South African law, namely the curator bonis, the curator personae and the curator ad litem.<sup>8</sup> Nor

---

5 Van der Linden Institutes of the laws of Holland 1.5.8.1.

6 Kruger 7.

7 18 of 1973.

8 Cf par 2.7 and further.

does Snyman<sup>9</sup> distinguish in his doctoral thesis between a curator to property and a curator bonis when he refers to section 56, using the term curator bonis. The Master, too, treats an appointment under section 56(1) as that of a curator bonis. In order to avoid confusion, the words curator bonis where used in this investigation should be interpreted as meaning a curator appointed to a person's property.

2.6 The Act does not limit the power of the court to appoint curators under common law, but expressly retains it.<sup>10</sup> The procedure for the appointment by the court of a curator bonis or a curator personae is governed by Supreme Court Rule 57. There are at present therefore three authorities who may appoint curators for mentally incapacitated persons, namely the Supreme Court (curator bonis and curator personae); a judge in chambers (curator bonis) and the Master of the Supreme Court (curator bonis). Furthermore provision is made for the appointment of an interim curator bonis in cases where a patient's assets are in urgent need of care or custody while the administrative processes for the appointment of a curator have not yet been concluded. The appointment of an interim curator may be made in two ways:

- . by a judge in chambers<sup>11</sup>
- . by the Master<sup>12</sup>

\* Various types of curators

The curator bonis

---

9 Snyman Siviele Opneming van geestesongesteldes: regte en regsbeskerming van die betrokene 712, 714; hereinafter referred to as "Snyman".

10 Sec 60(1).

11 Sec 19(1)(e).

12 Sec 56(2).

2.7 The purpose of appointing a curator bonis is to protect the proprietary interests of a mentally incapacitated person, since such a person is often, owing to his mental illness, unable to perform this function properly. The question whether a person is capable of managing his own affairs must be decided on the facts of each case.<sup>13</sup> The mere fact that a person has been admitted to or is being detained in a mental institution is not per se an indication that he is unable to manage his own affairs.<sup>14</sup> It may therefore be said that a curator bonis to a person will be appointed when the authority<sup>15</sup> who makes the appointment is, after a thorough investigation, satisfied that the person's mental condition is of such a nature that he is unable to protect his proprietary interests adequately.

2.8 The duties of the curator bonis are very similar to those of the nominated judge or Court of Protection under English law and the American guardian.<sup>16</sup> The procedure for nominating a receiver, who may be appointed by a nominated judge to perform certain functions on his behalf, is similar to the procedure for appointing a curator bonis in South Africa.<sup>17</sup>

#### The curator personae

2.9 A curator to the person of a mentally ill person is appointed to look after his personal welfare.<sup>18</sup> The curator personae will have to take decisions such as where the person should stay; whether he should be admitted to an institution or be permitted to stay at home; whether he should undergo medical treatment or an operation and by whom it should be performed, etcetera. Sometimes a curator to the person is appointed on an

---

13 Pienaar v Pienaar's Curator 1930 OPD 171, 174.

14 De Villiers & Another v Espach & Another 1958 3 SA 91 (T) 95; Pheasant v Warne 1922 AD 481, 490.

15 Cf par 2.6 above.

16 Snyman 703.

17 Halsbury's laws of England par 1262-76, as referred to in Snyman on 703.

18 Ex parte Hill 1970 3 SA 411 (C) 412.

ad hoc basis for a specific purpose, for example, to consent to a specific operation on the person.<sup>19</sup> Section 60A of the Mental Health Act has however largely rendered such an appointment nugatory in respect of a hospitalised patient.<sup>20</sup> It must be borne in mind that the appointment of a curator personae should not be seen in conjunction with the appointment of a curator bonis. Although the court may order both appointments in one application, the appointment of a curator bonis will not necessarily be accompanied by the appointment of a curator personae.<sup>21</sup> A person's inability to manage his own affairs and property is not per se an indication of an inability to take decisions in respect of his person.

2.10 The reluctance of the courts to appoint a curator personae to a mentally ill person too readily is evident from several decisions.<sup>22</sup> In Martinson v Brown; Gray v Armstrong<sup>23</sup> this attitude is reflected as follows:

In Hudson v Price<sup>24</sup> Gardiner, J P, said that one of the reasons for the appointment of a curator to the person is that he may be able to restrain, if necessary, the movements, and curb the liberty, of the person placed in his charge. In other words, the appointment of a curator to the person involves a serious curtailment of that person's rights and liberties. This the Court should not, in my opinion, do unless a strong case is made out for it.

#### The curator ad litem

---

19 Snyman 708.

20 Cf also par 1.3 and 1.4.

21 Sec 58.

22 Martinson v Brown; Gray v Armstrong 1961 4 SA 107 (C) 109; Ex parte Hill 1970 3 SA 411 (C); Ex parte Powrie 1963 1 SA 297 (W) 300.

23 1961 4 SA 107 (C) 109.

24 1933 CPD 367.



2.11 The curator ad litem is a person who conducts a law suit or legal proceedings on behalf of another person<sup>25</sup> who by reason of youth or insanity is unable to understand the nature and effect of the procedure. In terms of section 17 of the Mental Health Act the Attorney-General in whose area of jurisdiction an institution in which a patient is being detained under a magistrate's reception order or a judge's order for further detention is situated is automatically the official curator ad litem of that patient.

2.12 What is an official curator ad litem and how does he differ from an ordinary curator ad litem? It emerged from an examination of earlier legislation that at the time it was provided that the Attorney-General would ex officio be the curator ad litem.<sup>26</sup> It may be inferred that the Attorney-General is by virtue of his office the curator ad litem and that it is therefore unnecessary to appoint him as such. From the provisions of Supreme Court Rule 57(1) it appears that the applicant must first apply for the appointment of a curator ad litem before a curator can be appointed to the person or property of the patient. Since the Attorney-General is the official curator ad litem to the persons mentioned in the preceding paragraph, the question arises whether, in view of the provisions of Supreme Court Rule 57(1), it is still necessary to appoint a curator ad litem for these persons. The answer is that the functions and powers of the official curator ad litem are limited to those which are clearly set forth in the Mental Health Act and that he may act as curator for those purposes only.<sup>27</sup> These functions and powers, according to Kruger,<sup>28</sup> are as follows:

---

25 Kruger 89.

26 Kruger "Die amptelike curator ad litem van geestesongestelde persone" in THRHR 1977 253.

27 Ward v Lockhat Ltd 1928 AD 279 284-5.

28 THRHR 1977 255-9.

- . the official curator ad litem is responsible for bringing a patient's case before a judge;<sup>29</sup>
- . he may call for a further report on the mental condition of the patient;
- . he may be involved in an investigation regarding the lawfulness of a patient's detention;<sup>30</sup>
- . he has certain duties in respect of the discharge of President's patients.<sup>31</sup>

2.13 Since the Attorney-General has no powers in respect of the person or property of a patient, he does not act as curator for the purposes of Supreme Court Rule 57(1). Kruger<sup>32</sup> in fact considers section 17 to be an archaic provision which should be removed from the Act since the curator ad litem who is appointed in cases where the mentally ill person has to conduct a lawsuit is usually a member of the Bar. In addition he puts forward the acceptable argument that the Attorney-General is not the appropriate person for the office of curator ad litem because of the conflict of interests which may arise as a result of his prosecution function.

\* Present procedure for appointment of curators

Introduction

2.14 The Mental Health Act distinguishes between voluntary patients, patients by consent, patients detained in terms of a reception order issued by a magistrate and an order of further detention issued by a judge,

---

29 Sec 18(3).

30 Sec 20.

31 Sec 29.

32 "Tekortkominge in wetgewing oor geestesongesteldes" in Tydskrif vir Regswetenskap November 1983 183.

President's patients and mentally ill prisoners. It must be borne in mind that this classification does not include all mentally ill persons. There are many such people who have not been admitted or are not receiving treatment in terms of the Act and who are in the care of relatives or compassionate people who are often ill informed as to their rights and powers in respect of these persons.

2.15 A voluntary patient is one who, by applying in writing, voluntarily submits himself in terms of section 3 of the Act, to treatment as a patient at an institution. His guardian may make the application on his behalf if he is a minor and incapable of doing so himself.

2.16 A patient by consent is one who, in terms of section 4 of the Act, is received and treated by the superintendent of the institution if the superintendent is not satisfied that the person concerned understands the meaning and effect of his voluntary application for admission, provided that the person is not opposed to being received and treated and provided that the application is made by suitable persons.<sup>33</sup>

2.17 Apart from the voluntary patient and the patient by consent there is a further category of patients: they are persons who, under a reception order issued by a magistrate, are received and detained for a period not exceeding 42 days,<sup>34</sup> or a further period of detention upon the issue of an order by a judge in chambers in terms of section 19(1)(a) of the Act, and those persons who are admitted to an institution as President's patients in terms of section 28 or as mentally ill prisoners to an institution or hospital prison in terms of sections 30 to 32. Patients in this category are commonly referred to as "certified patients".

Procedure in terms of section 56 of the Mental Health Act

---

33 Sec 4(1)(b).

34 Sec 11(1).

2.18 In terms of section 55 of the Act a magistrate who has issued a reception order must immediately make full enquiry as to the property or estate of the patient and transmit to the Master of the Supreme Court a report as to the result thereof. The Master or a judge in chambers may appoint a curator bonis if the estimated value of the property does not exceed R50 000 in respect of the corpus thereof or R10 000 per annum in respect of income.<sup>35</sup> When a judge in chambers makes the appointment the procedure is identical to the procedure followed when the Supreme Court appoints a curator bonis,<sup>36</sup> the only difference being that a judge in chambers hears the application instead of the application being heard in open court. When the Master makes the appointment, he may convene a meeting of interested persons to appear either before him, or before another Master or a magistrate in order to obtain nominations for the appointment of a curator.<sup>37</sup> In practice the Master appoints a curator without convening a meeting if the patient's assets do not exceed R5 000,<sup>38</sup> but it is preferable for a meeting to be convened when no particulars regarding relatives, guardians or friends are available. The following documents must be at the disposal of the Master before he will issue letters of curatorship:

- . reception order issued by the magistrate;
- . further detention order by the judge in chambers;
- . report as to the assets of the patient, prepared by the magistrate;
- . bond of security by the curator bonis<sup>39</sup> on form J262;

---

35 Section 56(1).

36 Cf par 2.23 et seq.

37 Sec 73 of the Administration of Estates Act 66 of 1965, hereinafter referred to as the "Estates Act".

38 Ibid sec 73(4).

39 Ibid sec 77.

- application for appointment as curator by the nominated curator bonis;
- minutes of the meeting held in terms of section 73 of the Estates Act.

2.19 After the Master has received an inventory from the appointed curator bonis in respect of the property of the mentally ill person, and if it appears that this person is the owner of immovable property, he has to notify the Registrar of Deeds that the property belongs to a mentally ill person.<sup>40</sup> The Registrar then enters a caveat against the title deeds of the property which will prevent any transaction from taking place in respect of the property other than by the properly appointed curator bonis.

2.20 Should the value of the property of the mentally ill patient exceed R50 000 or his income exceed R10 000 per annum, the Supreme Court appoints a curator bonis.<sup>41</sup> The procedure followed by the court is the same as that laid down in Supreme Court Rule 57 and is extensively discussed from paragraph 2.25 onwards. Although the court subsequently appoints a curator bonis by a court order, the Master, after he has received the court order, still issues the letters of curatorship under section 72(1)(d) of the Estates Act.<sup>42</sup> This act in effect confirms the court's appointment.<sup>43</sup> In his report to the court<sup>44</sup> the Master usually requests the court to issue an order in terms of which the curator will exercise his function subject to the Master's approval, and the court normally complies with this request. Notwithstanding the important supervisory capacity conferred on the Master by such an order, it is submitted that it does not empower the Master to take over the powers

---

40 Ibid sec 79(1).

41 Sec 56(1) of the Mental Health Act.

42 Cf also sec 57(4) and (5) of the Mental Health Act.

43 Kruger 97.

44 See par 2.29.

assigned to the curator.<sup>45</sup> Apart from the documents which the Master must have at his disposal before issuing the letters of curatorship,<sup>46</sup> he must consequently also be in possession of the court order by virtue of which the curator bonis was appointed and in which the curator's powers are clearly set forth.<sup>47</sup> The minutes of a meeting in terms of section 73 of the Estates Act do not ipso facto apply in this instance.

2.21 The exposition of the powers of a curator bonis is included in an annexure to the letters of curatorship and as a rule takes the following form:

The curator bonis is authorised-

- (a) to receive, take care of, control and administer all the patient's property;
- (b) to continue or discontinue, subject to any law which may be applicable, any business, trade or undertaking of the patient;
- (c) to acquire, whether by purchase or otherwise, any movable or immovable property on behalf of the patient;
- (d) to let, exchange, partition, alienate and for any lawful purpose to mortgage or pledge any of the patient's property;
- (e) to perform any contract relating to the property of the patient entered into by him or on his behalf before he was declared incapable of managing his own affairs;

---

45 Kruger 97 ftn 71.

46 See par 2.18.

47 The powers usually conferred on a curator bonis by the court, are summarised in Ex parte du Toit: In re curatorship estate Schwab 1981 1 SA 33 (T) and Ex parte Hulett 1968 4 SA 172 (D).

- (f) to exercise any power or give any consent required for the exercise of any power where such power is vested in the patient for his benefit or is in the nature of a beneficial interest of the patient;
- (g) to raise funds by way of mortgage or pledge of any of the patient's property for the payment of debts or the payment of expenditure incurred or to be incurred for his maintenance or for his benefit or the improvement or maintenance of any of the patient's property;
- (h) to apply any moneys for the maintenance of the patient or for his benefit;
- (i) to incur expenditure in respect of the improvement of any of the patient's property by building or otherwise;
- (j) to apply any moneys of the patient for the maintenance, education or advancement of any person wholly or partially dependent on him or to continue such deeds of benevolence or charity, as exercised by the patient, as the Master, after consideration of the circumstances and the value of the patient's estate, may deem fit and reasonable;
- (k) to invest and reinvest moneys which may be available from time to time and which are not immediately required for the purposes referred to in section 82(2) of the Estates Act;
- (l) to take such steps as may be necessary in the interests of the patient or for the proper administration of his estate.

2.22 It should be noted that the procedure for appointing a curator in terms of section 56 of the Mental Health Act provides for the appointment of only one type of curator, namely the curator bonis. It is furthermore important to note that section 56 provides for only a specific category of

mentally ill persons, that is, the certified patient.<sup>48</sup> The magistrate issues no reception order in respect of the voluntary patient or the patient by consent - consequently he is unable to furnish the Master with the report in terms of section 55 of the Mental Health Act.<sup>49</sup> This procedure does not apply to a mentally ill person who has not been admitted to an institution either.

#### Procedure in terms of Supreme Court Rule 57

2.23 Section 58 of the Mental Health Act reads as follows:

Where upon an enquiry the court is of the opinion that the person to whom the enquiry relates is mentally ill to such a degree that he is incapable of managing his affairs but that he is capable of managing himself and is not a danger to himself or to others, the court may make such order as it thinks fit for the care and administration of the property of such person, including provision for his maintenance, but it shall not be necessary, unless the court thinks proper to do so, to make any order as to the custody of his person.

It is clear from this section that the court has the power to appoint both a curator bonis and a curator personae in respect of a person, not only a certified patient, but also any person who is mentally ill to such a degree that he is incapable of managing his own affairs. The court's power to appoint curators under common law emerges from this section already. Section 60(1) then goes further by providing that "nothing in this Act shall be construed as limiting any power which the court may by law have to declare any person mentally ill or to appoint a curator to the person or property of any patient". The court's power to appoint a curator bonis or a curator personae for that persons under common law is therefore laid down expressly by this section. The procedure to be followed in order to obtain an appointment in terms of section 60(1) is laid down by Supreme Court Rule 57.

---

48 See par 2.17.

49 Snyman 714.



2.24 Contrary to section 56(1) of the Mental Health Act, which provides only for the appointment of a curator bonis, the common law procedure may be applied in order to obtain the appointment of both a curator bonis and a curator personae.<sup>50</sup>

2.25 In terms of Rule 57 any person<sup>51</sup> (ex parte by notice of motion) may apply to court for an order declaring a person to be of unsound mind and consequently incapable of managing his own affairs and appointing a curator to the property or person of the patient. A person need not be declared to be of unsound mind prior to the appointment of a curator.<sup>52</sup> In Ex parte Tomich,<sup>53</sup> for example, the only question was whether the patient was capable of managing his own affairs.

2.26 The rule further provides that when an application is made for the appointment of a curator bonis or personae, the applicant first has to apply for the appointment of a curator ad litem to the patient,<sup>54</sup> although the court may dispense with any of the requirements of this rule on cause shown, and by reason of urgency or special circumstances.<sup>55</sup> The court usually appoints an advocate as curator ad litem to the patient.<sup>56</sup>

2.27 The following must be set forth in the applicant's notice of motion: (i) the grounds upon which the applicant claims locus standi to

---

50 Supreme Court Rule 57(1).

51 Usually a member of the family. Cf par 1.8 above.

52 Kruger 86; Van den Berg v Van den Berg 1939 WLD 228; Ex parte Van der Linde 1970 2 SA 718 (O); Ex parte Steward-Wynne: In re Mason 1944 EDL 176; Ex parte Berman NO: In re Estate Dhlamini 1954 2 SA 386 (W).

53 1957 4 SA 667 (N).

54 Cf par 2.11 above. In exceptional circumstances the court will abolish the rule, eg Ex parte De Villiers 1939 OPD 128; Ex parte Tarbett 1946 EDL 6; Ex parte Blay 1942 OPD 73.

55 Rule 57(4).

56 Cf par 2.13.

make such application; (ii) the grounds upon which the court is alleged to have jurisdiction,<sup>57</sup> (iii) the patient's age and sex, as well as full particulars regarding his means and general state of physical health; (iv) the relationship (if any) between the patient and the applicant and the duration and intimacy of their association (if any); (v) the facts and circumstances relied on to show that the patient is incapable of managing his own affairs; (vi) the name, occupation and address of the respective persons suggested as curator ad litem, curator bonis or curator personae and a statement that these persons have intimated that they would be able and willing to act in these respective capacities.

2.28 The application must further, as far as possible, be supported by an affidavit by at least one person to whom the patient is well known (setting forth the personal interest in and/or relationship—of the deponent with the patient), as well as affidavits by at least two medical practitioners (one of whom should preferably be an alienist) who have recently examined the patient with a view to reporting on his mental condition, containing all their observations, including their opinions concerning the nature, extent and probable duration of the mental disorder or defect, and as to whether the patient is capable of managing his affairs. Where practicable the medical practitioners should be unrelated to the patient and without personal interest in the terms of the order sought.<sup>58</sup>

2.29 Upon his appointment the curator ad litem must interview the patient without delay in order to inform him of the nature and purpose of the application unless after consulting one of the medical practitioners he is satisfied that this would be detrimental to the patient's health. Thereafter he has to prepare a report on his observations, and file it with the registrar and furnish the applicant with a copy.<sup>59</sup> The applicant then has to submit the curator ad litem's report to the Master, who considers the

---

57 The court in whose jurisdiction the patient is will have jurisdiction to entertain the application even though the patient's business and property are in another province (Nathan, Barnett and Brink 358).

58 Rule 57(3)(b).

59 Rule 57(5).

report and in turn files a report with the court (with a copy for the curator ad litem). The Master's report is aimed at guiding the court as to the suitability or otherwise of the curator suggested; the furnishing of security by the curator; the rendering of accounts in respect of the administration of the patient's estate for examination by the Master, and the powers which, in his opinion, should be conferred on the curator.<sup>60</sup>

2.30 Upon receipt of the Master's report, the applicant may place the matter on the roll for hearing, and it is desirable that the curator ad litem should inform the patient of the placing.<sup>61</sup> The court may require the patient, the applicant and others to attend the proceedings to give oral evidence or furnish any information which the court may require.<sup>62</sup> After consideration of all documents and evidence before the court, the court may give such order as it deems fit (including an order that the costs of the proceedings be defrayed from the patient's assets).<sup>63</sup> In his comments<sup>64</sup> on a system of enduring powers of attorney, the Master of Grahamstown pointed out to the Commission that, according to random checks done in his office, the costs involved in obtaining an order under the common law to declare a person incapable and to appoint a curator amount to about R1700.

2.31 Apart from the various procedures of appointment described above, there are two types of interim curators<sup>65</sup> who may be appointed by a judge in chambers and the Master respectively. Kruger is however of the opinion that section 19(1)(e) of the Mental Health Act, which authorises a

---

60 Cf par 2.21 above.

61 Rule 57(8).

62 Rule 57(9).

63 Rule 57(10).

64 Dated 8 September 1986.

65 Cf par 2.6 above.

judge in chambers to appoint a curator bonis immediately or at any subsequent time, is never used and should be deleted.<sup>66</sup>

\* Persons on whom the investigation is focused and the term "mental incapacity"

2.32 Section 1 of the Mental Health Act defines the term "mental illness" as "any disorder or disability of the mind, and includes any mental disease, any arrested or incomplete development of the mind and any psychopathic disorder, and "mentally ill" has a corresponding meaning". Psychopathic disorder is further defined as "a persistent disorder or disability of the mind (whether or not subnormality of intelligence is present) which has existed in the patient from an age prior to that of eighteen years and which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and "psychopath" has a corresponding meaning."

2.33 This definition is very wide and it would appear that the terms "mental disorder", "mental disease" and "arrested or incomplete development of the mind" (also known as mental handicap) all denote variations which may occur under the collective noun "mental illness". (See also par 1.1) From a memorandum submitted to the Commission by the South African National Council for Mental Health (SANCMH)<sup>67</sup> it appears that the Council makes a clear distinction. According to the Council mental illness usually presents itself as a disorientation of the emotional or rational functioning of the mind, whereas mental handicap appears as a reduced intellectual functioning of the mind as a result of incomplete or arrested development. Some mentally ill persons may therefore also be handicapped as a result of their condition or medication used in treatment; conversely some mentally handicapped people may also be mentally ill.

---

66 Kruger 100.

67 Dated 26 November 1986.

2.34 According to the SANCMH mentally ill persons may be classified into two categories, namely certifiable and uncertifiable persons. A certifiable person is one who is mentally ill to such an extent that he poses a danger to himself or others and needs to be detained and treated. Approximately 20 000 mentally ill persons in South Africa are certified, while there are also an estimated 100 000 potentially certifiable persons. Alongside this category there are the uncertifiable persons who suffer from conditions ranging from irrational fears to depression, and who form some 10 % of the population.

2.35 Mental handicap may be classified into the following categories:

Mild mental handicap	:	IQ 51-70
Moderate mental handicap	:	IQ 36-50
Severe mental handicap	:	IQ 21-35
Profound mental handicap	:	IQ 0-20

Mentally handicapped persons constitute approximately 30 per 1000 members of the population. The degree of supervision and care which is necessary varies in respect of the different categories. Mildly mental handicapped persons attend special schools and are often capable of living independently in the community, although some supervision is desirable. A person with an IQ of 60 may therefore be trained for a specific occupation and make a positive and productive contribution, and may even live independently. For the purposes of the Mental Health Act, however, he is mentally ill. Snyman's objection to the definition is that it does not contribute to a statutory refinement of the term "mental illness".<sup>68</sup> Hoggett's view may however be endorsed where she says:<sup>69</sup>

---

68 Snyman 140.

69 Hoggett Mental Health 59.

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 labelled a disorder.

2.36 However, when it comes to the question whether a person is in need of a curator, the category of mental illness to which he belongs is immaterial. The test to be applied is whether the person concerned is capable of managing his affairs.<sup>70</sup> For the purposes of appointing curators the origin of the inability is not relevant. It should be noted however that some forms of mental illness may be of organic origin, for example, senility psychosis and brain tumours.<sup>71</sup> Therefore the present investigation is focused on all persons who, for some reason or other, have become mentally incapacitated, (whether they fall under the provisions of the Mental Health Act or not) and are accordingly incapable of managing their own affairs, and especially those persons who have not been admitted to and are not being treated in institutions in terms of the Act.<sup>72</sup>

\* The enduring power of attorney

Introduction

2.37 The enduring power of attorney<sup>73</sup> may be seen as a possible alternative to the whole procedure for the appointment of curators as set

---

70 Cf Pheasant v Warne 1922 AD 481 at 488 in respect of civil liability; Ex parte Tomich 1957 4 SA 667 (N).

71 Snyman 149, 150.

72 Cf par 2.14 above.

73 See par 1.1.

out above. For purposes of an examination of the implementation of this power of attorney, it will be necessary to discuss briefly the present legal position in the field of representation through power of attorney.

### Representation through power of attorney

2.38 Representation embraces the performing of an act on behalf of another in concluding a juristic act. The legal consequences of this act are then imputed to the principal.<sup>74</sup> In order to conclude juristic acts on behalf of another, the representative must have authorisation.<sup>75</sup> Authorisation is a statement by a person that he is giving another person the power (that is he is giving him a power of attorney) to represent him in the conclusion of juristic acts. Therefore an agent derives his authority to act on behalf of another from the power of attorney granted.

2.39 An authority may be granted orally or in writing, and as a rule does not have to be in a prescribed form, except authority to purchase and sell immovable property.<sup>76</sup> In important matters it is customary to grant a power of attorney in writing.

2.40 The requirements for a valid power of attorney may be summarised as follows:<sup>77</sup>

- (a) The principal must, when granting the power, have contractual capacity or be properly assisted;<sup>78</sup>
- (b) execution of the power of attorney must be juridically and physically possible;

---

74 De Wet and Yeats 86.

75 De Wet in LAWSA Vol 1 1976 86.

76 De Wet and Yeats 100.

77 Joubert Die Suid-Afrikaanse verteenwoordigingsreg 94; hereinafter referred to as "Joubert".

78 Cf de Wet and Yeats 100.

- (c) any formalities must be complied with, if applicable;
- (d) any suspensive condition must be fulfilled, if applicable; and
- (e) the agent must be able to act as a legal representative.

2.41 Point (a) above is of special importance. A person who has no capacity to conclude juristic acts may not authorise another to conclude those acts on his behalf;<sup>79</sup> consequently a person who lacks contractual capacity, for example a mentally ill person, may not authorise another to act on his behalf.<sup>80</sup> If such an authorisation does take place, no legal consequences resulting from the ensuing juristic act (for example the conclusion of a contract) may be imputed by the agent to the mentally ill person. In Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz<sup>81</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>82</sup> assisted by herself in her capacity as his curatrix, was invalid. Williamson, J, regards 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. That authority is revoked upon the husband's mental illness:<sup>83</sup>

It seems to me here that the general proposition that a change of status, for instance, a declaration of insolvency or declaration of

---

79 De Wet in LAWSA Vol 1 1976 88.

80 Cf Pheasant v Warne 1922 AD 481.

81 1957 4 SA 354 (W); confirmed on appeal in 1958 1 SA 505 (A).

82 Mental illness of the husband does not abolish his marital power - at 356 of the law report. The position is of course different in respect of marriages contracted after 1 November 1984. Sec 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.

83 1957 4 SA 354 (W) 356-7.



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.

### Termination of the power of attorney

2.42 It appears from the quotation above that an agency terminates upon a declaration of insanity. It is not necessary however for a person to be declared to be insane before the power of attorney is terminated. Joubert points out that a power of attorney is terminated when insanity of the principal supervenes: "It is the fact of insanity and not a declaration of insanity which has this effect."<sup>84</sup> Pothier<sup>85</sup> however requires a formal declaration of insanity before the power of attorney is terminated. Nevertheless, Joubert's view that a declaration of insanity is no prerequisite for the termination of a powers of attorney can be supported. A mentally ill person's change of status by means of a formal declaration by court does not make his contractual capacity less than before such declaration was made.<sup>86</sup>

2.43 A court order declaring a person to be mentally ill and appointing a curator bonis to that person does serve to establish legal certainty. The effect of a court order will be to terminate an earlier power of attorney. A problem is however that loss of mental capacity is not necessarily final and complete and often does not take place within a short period. A mentally ill person may at times be quite capable of performing certain acts - including those acts on which the power of attorney is based - but not at other times. During the so called lucidum intervallum a mentally ill person may

---

84 Joubert 133; (our translation).

85 Pothier Traite du contract de mandat (translated into English by B C Rogers and B X de Wet) par 111; hereinafter referred to as "Pothier".

86 Also cf De Wet and Yeats 106-7; De Villiers and Macintosh 630; Molyneux v Natal Land and Colonization Company 1905 AC 555 on 563; De Wet in LAWSA Vol 1 1976 95.

for instance have complete criminal responsibility and even contractual capacity. Even an order of court declaring a person to be mentally ill and appointing a curator is not conclusive that he is incapable of transacting affairs.<sup>87</sup> According to the decision in Pienaar v Pienaar's Curator<sup>88</sup> the purpose of appointing a curator is mainly to assist a person in so far as assistance may be necessary. It is suggested that it would be extremely difficult in a case where a curator had been appointed to a mentally ill person to prove that at a given moment that person was completely able to contract and therefore capable of entering into an agreement without the assistance of his curator.

2.44 A problem arises if the principal, after he has authorised an agent or a representative by a power of attorney, becomes mentally incapacitated and the agent, not knowing of the mental incapacity and consequent termination of the power of attorney, acts in terms of that power and enters into an agreement with third parties, by virtue of which mutual rights and obligations are established. Pothier<sup>89</sup> compares this position with the case where a principal, after granting a mandate, dies, and the mandatary is unaware of his death. Although the mandate is terminated by the death of the mandant, the agreement nevertheless devolves upon his heirs who have to comply with the terms of the agreement.<sup>90</sup> In respect of mentally ill persons, Pothier argues:<sup>91</sup>

... all decisions relating to the mandate must be reached on the basis of the arguments advanced in the case where the mandatary executes the mandate before any news of the mandant's death has reached him.

---

87 De Villiers and Macintosh 630.

88 1930 OPD 171.

89 Pothier par 111.

90 Ibid par 106.

91 Ibid par 111.

It also appears from the case of Molyneux v Natal Land and Colonization Company<sup>92</sup> that in these cases the rights of third parties must be protected.

#### Various types of powers of attorney

2.45 A distinction is often made between "general" and "special" powers of attorney. De Wet and Yeats<sup>93</sup> regard a general power of attorney as one entitling a person to conclude any juristic act on behalf of another. A special power of attorney authorises an agent to execute only those juristic acts which are specified in the power, although it may set out a large variety of acts.<sup>94</sup>

2.46 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 such power will be irrevocable does not deprive the principal of his right to withdraw the power of attorney at any time.<sup>95</sup> There are however certain exceptions where a power of attorney may be granted irrevocably, and the question therefore arises whether there is not already provision in our law for the granting of an enduring power of attorney with a view to the eventuality of insanity.

2.47 Van Jaarsveld<sup>96</sup> mentions that an irrevocable power of attorney may be granted-

- . if the power of attorney is coupled with an interest of the agent or forms part of a security, for instance where the principal borrows money from the agent and grants him an irrevocable

---

92 1905 AC 555 on 563.

93 On 102 ftn 92.

94 De Wet in LAWSA Vol 1 1976 88.

95 Glover v Bothma 1948 1 SA 611 (W); Ward v Barrett 1962 4 SA 732 (N).

96 Suid-Afrikaanse handelsreg Vol 1 201.

power of attorney in order to pass a bond over the principal's property;<sup>97</sup>

- . if the power is granted for the purpose of securing an obligation of the principal in relation to the agent.<sup>98</sup>

2.48 These exceptions are criticised by De Wet and Yeats<sup>99</sup> who say that they have developed under the influence of concepts in 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<sup>1</sup> argues that a procuratio in rem suam coupled with cession is irrevocable, De Wet and Yeats hold 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. Wille<sup>2</sup> however holds the following view:

An irrevocable agency can apply only to a distinct right or rights and not to all the affairs of a person, for that would amount to the enslavement of such person.

2.49 Whatever the position may be, our law does recognise the exceptions, but they are regarded as "exceptional phenomena which occur casuistically in specific cases".<sup>3</sup> It may therefore be stated that the principle of enduring powers of attorney is completely foreign to South African law.

---

97 Ward v Barrett above; Natal Bank Ltd v Natorp and Registrar of Deeds 1908 TS 1016.

98 Koch v Mair 1894 11 SC 71; Natal v Natorp above.

99 On 107.

1 Voet 17.1.17.

2 Principles of South African law 470.

3 Joubert 140 (our translation).

### 3. COMPARISON OF LAWS

#### \* The enduring power of attorney

##### Introduction

3.1 In recent years few subjects have elicited so much attention from other law reform institutions as the enduring power of attorney: law reform bodies of England, Scotland, states in Australia and provinces in Canada have considered the subject, while this type of power has already been included in the uniform model legislation of the United States of America.<sup>1</sup> It is of interest to note that the same problem as that which has been identified by those who have made representations in this country gave rise to the investigations of the law reform bodies mentioned.

3.2 As the fundamental principles relating to powers of attorney in these countries basically correspond with those of the South African law, it would be fruitful to examine the reform that has taken place in those countries.<sup>2</sup>

3.3 As a point of departure it may be stated that a principal's capacity to contract is determined by the principles governing contractual capacity generally – a person who grants a power of attorney should also be capable of understanding the nature and effect of his act.<sup>3</sup>

3.4 As in South Africa, a power of attorney is as a general rule terminated by the principal's loss of mental capacity. This follows from the

---

1 Law Reform Committee of South Australia Forty-seventh Report: Relating to powers of attorney 3 (hereinafter referred to as LRC of South Australia).

2 In this discussion, except in quotations, terms used in South Africa, such as "power of attorney", "principal" and "agent", will in the main be used and not terms with corresponding meanings used in some other countries.

3 Cf The Law Commission The incapacitated principal Law Com No 122 3 (hereinafter referred to as "Law Com").

rule that an agent's act should be regarded as an act performed by the principal himself and that the agent or representative is not authorised to do something which the principal himself may not do.<sup>4</sup>

### Reasons for reform

3.5 The law reform bodies concerned all recommend that enduring powers of attorney should be introduced into their respective legal systems. Their reasons may be summed up as follows:

3.6 In the first place it was felt that an enduring power of attorney would obviate the unhappy necessity of applying to a court for a declaration that a person is no longer capable of managing his own affairs. In many cases a person may not be capable of managing his affairs, yet he is still well aware of the humiliating nature of the application.<sup>5</sup> In many instances there are elderly people who have reached an advanced stage of senility, but who are being cared for in an old age home or retirement retreat, and for whom it is unnecessary to go through the relatively expensive procedure of placing them under curatorship.

3.7 The relatives are often reluctant to approach the court for such legal assistance; the cost, formalities and time involved in these applications serving as deterrents.<sup>6</sup>

---

4 Drew v Nunn 1878 4 QBD 661 as referred to in Law Com 7 fn 38. This rule accords with the Roman maxim nemo plus iuris ad alium transferre potest quam ipse haberet (Ulpianus Dig 50.17.54), in other words nobody can confer more rights upon another than he himself possesses.

5 Law Reform Commission of British Columbia Report on the law of agency, Part 2: Powers of attorney and mental incapacity 11 (hereinafter "LRC of British Columbia").

6 Law Reform Commission of the Australian Capital Territory Report on the management of the property and affairs of mentally infirm persons 11 (hereinafter "LRC of the Australian Capital Territory"); LRC of British Columbia 11.

3.8 Furthermore it is evident from practice that powers of attorney which purport to be enduring in that they will survive supervening mental illness of the principal are already being executed, regardless of uncertainty as to the validity of such a power. Reform would bring the law into line with practice.

3.9 In general the law reform bodies were of the opinion that a system of enduring powers of attorney would not only establish legal certainty, but would also constitute an inexpensive, more informal and more private procedure to manage the affairs of mentally ill persons and therefore presents a more attractive solution than the present legal position.

#### Canada

#### Ontario

3.10 The law reform commission of this province recommended, inter alia, the following:<sup>7</sup>

- (a) The principal granting a power of attorney should expressly state that he intends the power to survive and remain valid even if he should become mentally incapacitated.
- (b) The power should be executed in the presence of an independent witness and the agent should file a copy thereof not later than fifteen days after the principal's mental illness has come to his knowledge. Non-compliance herewith will result in invalidity of the power of attorney.

---

7 Ontario Law Reform Commission Report on powers of attorney as referred to in LRC of British Columbia 15 and 16.

- (c) The Public Trustee<sup>8</sup> should be empowered to apply on behalf of an interested party to the Surrogate Court for an order directing the rendering of accounts by the agent or the appointment of a substitute for the agent.
- (d) The power of attorney should continue to be valid only as long as the principal has not been formally declared to be mentally incompetent.
- (e) The principal may revoke the power at any time prior to his mental illness or after his recovery therefrom.
- (f) The provisions of the Act may not be waived by agreement or otherwise.

#### Manitoba

3.11 The law commission<sup>9</sup> of this province made similar recommendations to those of Ontario, but also recommended comprehensive safeguards. Thus, for example, two independent witnesses should be present at the execution of the power of attorney. Furthermore the agent should be required to file accounts annually or as directed by the Public Trustee with the Public Trustee, who may then investigate the accounts and take such action as he deems necessary.

#### British Columbia

3.12 The law commission of this province considered that the comprehensive safeguards of Manitoba went too far and would defeat the purpose of an enduring power of attorney, namely to secure inexpensive,

---

8 An office similar to that of the South African Master of the Supreme Court.

9 Law Reform Commission Manitoba Report on special, enduring powers of attorney as referred to in LRC of British Columbia 17 and 19.



informal and private administration of a mentally ill person's affairs. (It should be borne in mind however that the Public Trustee in British Columbia has a general supervisory power which enables him to call an agent to account.)<sup>10</sup>

3.13 Some of the recommendations are to the following effect:

- (a) That the power of attorney should-
  - . be in writing and dated;
  - . be signed by the principal;
  - . contain an express provision that the power of attorney will endure notwithstanding any subsequent mental incapacity of the principal;
- (b) that a power of attorney which does not comply with the requirements indicated in (a) should continue to be valid as an ordinary power of attorney;
- (c) that a simple statutory form of enduring power of attorney should be developed;
- (d) that the power of attorney should terminate when the principal is placed under curatorship;
- (e) that the power of attorney should establish a fiduciary relationship between the principal and the agent and that all remedies available to a trust beneficiary should also be available to the principal or his successors;

---

10 LRC of British Columbia 21.

- (f) that the principal or his successors may, upon the termination of the power of attorney, require the agent to account for his management;
- (g) that the provisions relating to the power of attorney may not be waived by agreement or otherwise;
- (h) that the power of attorney be deemed to create a trust for purposes of the Public Trustee Act.

## Australia

### The Australian Capital Territory

3.14 This Territory's Law Commission was satisfied that the recommendations of Ontario should be followed and merely recommended that provision should be made "along the lines of the Ontario Powers of Attorney Bill to enable a person to execute a power of attorney which is expressed to continue to be effective despite his incapacity."<sup>11</sup>

### New South Wales

3.15 The Law Reform Commission of New South Wales also recommended that an irrevocable power of attorney be introduced into their legislation.<sup>12</sup> Unlike the above-mentioned law reform bodies however, this Commission recommended that not only the mental incapacity of the principal, but also the fact that a person is a patient, protected person or an incapable person within the meaning of the Mental Health Act, 1958, should not terminate the power of attorney.<sup>13</sup>

---

11 LRC of the Australian Capital Territory 14.

12 Law Reform Commission of New South Wales Report on powers of attorney 9.

13 Ibid on 25.

3.16 The Commission also considered it unnecessary to provide for protective measures in legislation, but did however make certain recommendations for the protection of the actions of the agent and other persons.<sup>14</sup>

3.17 In general the Commission's view was that the common law should be departed from as little as possible and that registration of the power of attorney should be optional.

#### South Australia

3.18 This jurisdiction's Law Reform Commission also felt that an enduring power of attorney would be of great advantage in their legal system.<sup>15</sup> The recipient of such a power of attorney should be subject to the same duties and liabilities as a trustee, and when the principal is declared mentally ill, the agent should be accountable to both the appointed fiduciary and the principal.

3.19 It was furthermore recommended that an ordinary power of attorney exercised by an agent without knowledge of the principal's mental incapacity should be binding on the principal as well as a third party concerned.

3.20 Finally it was recommended that an agent's affidavit stating that he was unaware of the principal's mental incapacity should create a rebuttable presumption that the power was not terminated.

#### Tasmania

3.21 Some of this law reform body's recommendations were to the following effect:<sup>16</sup>

---

14 Ibid on 25 and 26.

15 LRC of South Australia.

16 Law Reform Commission of Tasmania Report on powers of attorney.

- (a) The enduring power of attorney should contain an expression of intention by the principal that the power of attorney is to endure any subsequent mental incapacity of the principal;
- (b) two independent witnesses should be present at the execution of the instrument;
- (c) the power should be filed at the Supreme Court;
- (d) registration of the power should terminate the principal's capacity to conduct his own affairs;<sup>17</sup>
- (e) the principal should be able to revoke the power of attorney at any time prior to his becoming incapacitated or when he recovers from his incapacity;
- (f) any person who, in the opinion of the Supreme Court, has an interest in the matter should be able to apply to court for an order requiring that the agent's records and accounts be produced and audited;
- (g) the duties of an agent in the exercise of the power of attorney should be similar to those of a trustee;
- (h) the parties to an enduring power of attorney should not be able to contract out of the legislation.

### England

3.22 The English Law Commission considered the question whether the rule that a donor's mental incapacity terminates a power of attorney should

---

17 The report does not indicate when the power of attorney should be filed and registered, i.e. after execution or after the principal's mental incapacity has come to the knowledge of the agent.

not simply be abolished.<sup>18</sup> The Commission was however hesitant to take such a far-reaching step and preferred to introduce a new type of power, an enduring power of attorney, into the English Law.

3.23 The Commission recommended the institution of comprehensive safeguards in relation to enduring powers of attorney, including an active role for the court in the execution of such a power. Some of the Commission's recommendations were to the following effect:

- (a) that the power of attorney should be in a prescribed form and contain certain particulars;
- (b) that the agent should apply to court for the registration of the power of attorney as soon as he has reason to believe that the principal is mentally incapable;
- (c) that the court should have wide powers with regard to the execution and administration of the power of attorney;
- (d) that the principal should not be capable of revoking a registered power of attorney unless the court consents thereto;
- (e) that an agent who is unaware of the principal's mental incapacity and who acts on the strength of the power of attorney should not incur liability, and that such an act should be binding on third parties;
- (f) that the power of attorney should be terminated, inter alia, when steps are taken against the principal in terms of the Mental Health Act 1983.

3.24 In the strength of the Commission's recommendations the Enduring Powers of Attorney Act, which was modelled on the Commission's draft bill, was passed in 1985.

---

18 Law Com 11.

United States of America: California

3.25 In California a Uniform Durable Power of Attorney Act has already come into operation on the recommendation of the state's law reform body.<sup>19</sup> Section 2400 of the Californian Civil Code reads as follows:

A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal", or "This power of attorney shall become effective upon the disability or incapacity of the principal", or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.

3.26 In a subsequent proposal it was suggested that this legislation relating to durable powers of attorney should be amended in order to make express provision for a durable power of attorney for health care decisions,<sup>20</sup> in terms of which a principal may nominate a confidant to take decisions in respect of his medical treatment.

3.27 The Californian example provides that the power of attorney should continue not only after the principal's mental incapacity, but also in the event of the principal's incapacity to contract - in other words the power should remain in force although the principal might have become, for example, unconscious.

Summary

3.28 The enduring power of attorney is already used to good effect in certain jurisdictions as an alternative to the relatively expensive procedure involved in the appointment of curators, trustees or guardians. Most jurisdictions consider that comprehensive safeguards should be applied to

---

19 California Law Revision Commission Recommendation relating to durable powers of attorney for health care decisions 105; hereinafter "LRC of California."

20 LRC of California 105.

obviate the element of fraud and other undesirable practices, but some<sup>21</sup> feel that such safeguards should not be provided for by legislation.

---

21 Cf LRC of New South Wales – par 3.16 above.

#### 4. SUMMARY OF PROBLEM AREAS

4.1 The crux of the problem under discussion is the availability or otherwise of someone who is legally competent to take decisions and perform acts on behalf of mentally ill or handicapped persons. The current law does in fact provide for the appointment of curators to these persons, but the efficiency of the way in which these appointments are made is questioned.

4.2 The problems that have come to light may be summed up as follows:

(a) If a person becomes mentally ill, any power of attorney which he may have granted some other person to perform a specific act, or acts in general, on his behalf, terminates. It would seem that a power of attorney should remain in force when the principal so desires, provided that adequate provision can be made for the protection of the principal against exploitation. Such a power, which would remain valid notwithstanding the principal's mental illness, might obviate the necessity of appointing a curator in certain instances.

(b) There are probably many people in the community who are mentally ill or handicapped and who are incapable of managing their own affairs, yet to whom no curators have been appointed. Such people are, for instance, adult mentally retarded persons, aged people who have become senile and others with some or other mental disorder who are not being cared for in an institution. There are various reasons why curators are not appointed to these persons; the main reasons being the following:

(i) Ignorance of the legal requirements. In most cases the persons concerned are looked after by their families. It appears that the relatives who undertake this care are in many cases unaware that their acts, done in kindness and good faith on behalf of such persons, may have serious legal



implications. The same ignorance appears to exist on the part of the staff of old-age homes where the aged are cared for.

- (ii) The expense involved in the appointment of a curator seems to be an important factor. Many of the persons concerned have few assets and a small income, for example a disability allowance or an old-age pension. The appointment of a curator by the Supreme Court can cost up to R2000.
  - (iii) It is true that the expense of appointing a curator may indeed be avoided if the person concerned is certified to be mentally ill and admitted to an institution. Not all persons who are incapable of managing their affairs are however certifiable as mentally ill. Moreover, many people feel that there is a stigma attached to certification which they would rather avoid if possible. Furthermore it is right and proper that the persons concerned should be cared for in the community for as long as possible.
  - (iv) The courts regard the appointment of a curator to the person of a mentally ill person as a serious step which is not to be taken lightly, precisely because it so drastically diminishes a person's status.
- (c) There are also mentally ill persons who are homeless and have no curator.
  - (d) There is always a danger of exploitation or physical neglect of a mentally ill person who has no curator.
  - (e) Apparently many acts are performed on behalf of mentally ill persons by people under the misapprehension that their acts are permissible while they are in fact not in conformity with the law at all. A simple example which often occurs is that of an aged

person who authorises someone to draw and take receipt of his pension. When the aged person becomes so mentally ill that he is in fact mentally incapacitated, the authorised person continues to draw the pension notwithstanding the invalidity of the power of attorney. A person who acts on behalf of a mentally ill person runs the risk of incurring delictual liability.

4.3 There appears to be need, therefore, for a simpler and more effective way of protecting the interests of a mentally ill person. Two possibilities present themselves. The first is to make statutory provision for a power of attorney to remain in force in certain circumstances, despite the fact that the principle has become mentally incapacitated since the power of attorney was granted. The second is to devise a simple and inexpensive procedure by which some person is authorised to perform certain acts on behalf of a mentally ill person. These two possibilities will be discussed below.

## 5. RECOMMENDATIONS

### (a) The enduring power of attorney

5.1 An enduring power of attorney can of course be introduced only if the common law rule that a power of attorney terminates upon the mental incapacity of the principal, is amended. The ratio underlying the common law rule is that the agent only does the will of the principal, as expressed in the power of attorney. The principal may at any time (except in a few cases referred to above) revoke the power of attorney. Should he become mentally incapacitated, however, he is no longer capable of performing legal acts or legally expressing his will. Consequently he may no longer exercise control over the agent or revoke the power. For this reason the law intervenes by providing that the power of attorney is terminated ipso iure. In principle this rule should not be waived except if the principal did in fact foresee the possibility of his mental incapacitation and wanted to provide for someone to be able to act on his behalf in that event, and further, unless provision is made for the control which the principal may no longer exercise over the agent to devolve upon some other person or authority.

5.2 It is obvious that an enduring power of attorney will not offer a solution to all cases where there is no competent person to act on behalf of a mentally ill person. It will only be applicable in cases where the principal, when he was still capable of doing so, granted a legal power of attorney to an agent. For instance, an adult person who has suffered from a mental handicap since childhood may not grant such a power. Nor does it offer a solution to those persons who postpone the granting of such a power of attorney until it is too late, for example elderly people whose mental condition is deteriorating progressively. Those with sufficient foresight to provide for such an eventuality by means of an enduring power of attorney will probably be few in number. Most people prefer not to think of the unpleasant possibility of becoming mentally ill one day. Furthermore, probably few people would be prepared to leave their personal affairs in the hands of another by means of a power of attorney, even though the person may be a friend or relative. Nevertheless there would appear to be room for such an enduring power of attorney, even though its

scope will probably be limited. Such a power of attorney could be particularly suitable for a narrowly defined power, for example taking receipt of a principal's monthly pension and paying it over to an old-age home or institution for the care of the principal.

### Proposed bill

5.3 Annexure A contains a draft bill which provides for enduring powers of attorney. The bill should at this stage be regarded as merely a proposal on which comment is desired, first, regarding the question whether enduring powers of attorney should be provided for at all, and if so, then on the contents of the bill. Furthermore, the bill should be regarded as supplementary to the proposals made below regarding the appointment of curators.

5.4 The principle of an enduring power of attorney is embodied in clause 2 of the draft bill. As has been suggested, it should rest upon the wishes of the principal. Two possibilities are provided for: the case where the power of attorney is already in force and should merely continue in the event of mental illness; and the case where the power of attorney should come into operation in that event.

5.5 The formalities pertaining to a power of attorney, as prescribed by clause 3, require no explanation. The signing of the power in the presence of two witnesses is desirable to prevent disputes concerning the principal's mental capacity at the time of execution of the power.

5.6 Clause 4(1) represents the first step in the process of exercising control over the agent. There should be openness in the management of the incapacitated person's affairs. The clause, as worded at present, may give rise to uncertainty regarding the question when the agent should register the power of attorney. Cases will always occur where the layman cannot say with certainty whether a person is mentally ill to such a degree that he is incapable of managing his own affairs. However, with this informal procedure, one would not wish to resort to medical examinations in order to establish beyond reasonable doubt whether a principal is in fact mentally ill. The idea is that the proposed power of attorney should be

used only when the person concerned is manifestly incapable of managing his own affairs. Comment in this regard would nevertheless be appreciated.

5.7 Although, as a rule, the Master is not a trier of fact, it is nevertheless felt that he should be able, in most cases, to decide without difficulty whether or not he should register a power. Clause 4(3) none the less empowers him to make further enquiries in order to inform himself properly of any matter.

5.8 Clause 4(4) speaks for itself. The endorsement and returning of a copy of the power of attorney serves to provide the agent with written proof of his authority to act under the power of attorney.

5.9 In regard to clause 5 the intention is not that the Master should call for security in every case where exemption has not been granted, but only in cases where he, in the circumstances, deems it necessary.

5.10 Clause 6 should serve as a control measure which may be applied when there is reason to believe that the agent is exceeding his powers or enriching himself at the expense of the principal or squandering or neglecting his assets. Compulsory accounting on a regular basis would probably entail excessive and unnecessary administration.

5.11 In regard to clause 7 it is felt that the court should have wide powers to revoke a power of attorney and that the Master's powers should be narrowly defined so that he would not be expected to evaluate facts unnecessarily.

5.12 The power to act in terms of an enduring power of attorney should endure only as long as no curator has been appointed to exercise that power. Clause 8 provides for this.

(b) A simplified procedure for the appointment of a curator

5.13 There appears to be a need for an alternative procedure for the appointment of curators for a specific category of persons. This category

embraces persons who need not be admitted to mental institutions since they are efficiently cared for in the community, but who are none the less incapable, owing to mental illness, of managing their own affairs. Under this category also fall persons who do not possess sufficient assets or income to afford the appointment of a curator by means of an application to the Supreme Court, especially elderly and adult mentally handicapped persons.

5.14 The proposed alternative procedure is intended to empower the Master to appoint a curator in certain cases where a person has not been declared mentally ill in terms of the Mental Health Act, 1973. The Master should nevertheless be satisfied that the person concerned is incapable, on account of his mental illness, of managing his own affairs. In order to satisfy the Master, it is proposed that a formal application should be addressed to the Master, setting out the facts relied on in the form of an affidavit or solemn declaration. The application should be accompanied by further independent evidence concerning the person's mental condition. The Master furthermore has the power, if he deems it necessary, to obtain further information and to call for an investigation and recommendation by a magistrate.

5.15 It is not the intention that the proposed procedure should replace the present one. It is therefore recommended that the Master may only make appointments under the proposed procedure if the assets of the person concerned do not exceed R20 000 and his income does not exceed R1 500 per month. The amounts may be fixed at a higher or lower level, but they are suggested tentatively taking the present costs of an application to the Supreme Court for the appointment of a curator into account.

5.16 The proposed alternative procedure for the appointment of a curator is embodied in the accompanying draft bill (Annexure B). The bill is self-explanatory. In clause 2 it is recommended that a curator appointed in terms of section 56A should only in exceptional cases be required to furnish security. The amounts which the curator will handle will be small.

5.17 It will be noted that the proposed simplified procedure for the appointment of a curator merely provides for the appointment of a curator to perform acts in respect of the property of a mentally ill person. As has been mentioned, the representations which gave rise to this investigation also suggested that better provision should be made for the appointment of a curator to the person of a mentally ill person. It would appear however that there is not such a real need for the appointment of a curator personae. Cases of mentally ill people who are homeless and have no one to look after them are probably rare, but where they do occur, the existing procedure may be employed to admit them to an institution for the mentally ill.

5.18 It seems that the need to appoint a curator personae mainly arises when a mentally ill person has to undergo medical treatment requiring somebody's consent. A mentally ill person who is in an institution for such persons presents no problem - section 60A of the Mental Health Act lays down who may consent. In the case of a person who is not in an institution, the court will have to appoint a curator and, as has been said, the courts are reluctant to appoint curatores personae. If it can be avoided one would not wish to delegate this function to the Master or some other authority. Costs may naturally also be the decisive factor in such a case. Cases of this nature are however apparently rare. There seems to be no reason why an application on behalf of an indigent mentally ill person may not be financed by means of legal aid.

5.19 At this stage special regulations in respect of the appointment of a curator personae appear to be unnecessary. Comment and recommendations in this regard will nevertheless be appreciated.

DRAFT BILL

To provide that the powers granted to an agent by a power of attorney may in certain circumstances be exercised after the principal has become mentally ill, and to provide for matters incidental thereto.

---

To be introduced by the Minister of Justice

---

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

**Definitions.**

1. In this Act, unless the context otherwise indicates -

"court" means a provincial or local division of the Supreme Court of South Africa;

"Master" means a Master, Deputy Master or Assistant Master of the Supreme Court of South Africa, appointed in terms of section 2 of the Administration of Estates Act, 1965 (Act No 66 of 1965).



### **Power of attorney may endure after mental illness of principal.**

2. If a power of attorney which otherwise complies with all the requirements of a valid power of attorney provides that the powers granted therein to the agent shall remain in force or, shall come into force, as the case may be, if the principal should become mentally ill to such a degree that he is no longer capable of taking rational decisions or of managing his own affairs, then, subject to the provisions of this Act, such power of attorney shall remain in force or come into force, as the case may be, if the principal thus becomes mentally ill.

### **Formalities for validity of enduring power of attorney.**

3. A power of attorney referred to in section 2 shall be in writing and shall be signed by the principal or some person acting on his instructions in the presence of two competent witnesses who shall also sign the power of attorney in each other's presence and the presence of the principal and any person who signs it on the instructions of the principal.

### **Registration of power of attorney.**

4. (1) If it comes to the knowledge of an agent in terms of a power of attorney referred to in section 2 that the principal is mentally ill as contemplated in that section, he shall not act in terms of such power of attorney before he has filed it for registration with the Master within whose jurisdiction the principal is ordinarily resident and the Master has endorsed the power of attorney to the effect that it has been registered.

(2) An agent who files a power of attorney for registration with the Master shall together therewith file an affidavit stating that the principal is in his opinion, on account of mental illness, incapable of managing his own affairs and stating the facts upon which his opinion is founded.

(3) The Master may, if he deems it necessary, call for further evidence regarding the principal's mental condition.

(4) If the Master is satisfied that the principal is, on account of his mental illness, incapable of managing his own affairs, he shall register the power of attorney and return a copy of the original power of attorney, endorsed to the effect that it has been registered in his office, to the agent.

#### **Security.**

5. The Master may, before registering and endorsing a power of attorney, require the agent to find security to his satisfaction for the proper execution of the instruction, unless the agent has been exempted from furnishing security under the power of attorney.

#### **Master may call agent to account.**

6. It shall be compulsory for any person who is an agent in terms of a registered power of attorney, when called upon in writing by the Master to do so, to account to the Master to his satisfaction and in accordance with

his instructions for his carrying out of the instruction in terms of the power of attorney.

### **Withdrawal of power of attorney**

7. (1) A court may at any time upon the application of the Master or any interested person withdraw a power of attorney registered in terms of this Act and direct that the registration thereof be cancelled if the court is of opinion that sound reasons exist for doing so.

(2) The Master may withdraw a power of attorney registered in his office in terms of this Act and cancel the registration thereof if the agent -

- (a) indicates in writing that he is no longer willing or able to carry out the instruction;
- (b) refuses or fails to comply within a reasonable time with a legal request by the Master in terms of this Act.
- (c) is convicted of an offence of which dishonesty is an element;
- (d) is sequestered;
- (e) is received as a patient in an institution for mentally ill persons or if a curator is appointed in respect of his person or property in terms of the Mental Health Act, 1973 (Act No 18 of 1973).

(3) If a registered power of attorney is withdrawn, the agent shall without delay return the power of attorney to the Master in whose office it was registered.

**Termination of power of attorney.**

8. If a curator is appointed in respect of the person or property of a mentally ill person, any power which an agent may have in terms of a power of attorney granted by the mentally ill person shall terminate in so far as such power may be exercised by the curator.

**Short title.**

9. This Act shall be called the Enduring Powers of Attorney Act,  
19 .

DRAFT BILL

To make further provision for the appointment of curators to mentally ill persons, and to provide for matters incidental thereto.

---

To be introduced by the Minister of Justice

---

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:

**Insertion of section 56A in Act 18 of 1973.**

1. The following section is hereby inserted after section 56 of the Mental Health Act, 1973 (Act No 18 of 1973):

**Appointment of curator to other mentally ill persons.**

56A. (1) Any person who is competent in terms of section 8 to apply for a reception order may apply to the Master for the appointment of a curator to a person who is not being detained as or has not been declared to be mentally ill or is not being detained as a mentally ill prisoner or a President's patient, but whom he believes to be suffering from mental illness to such a degree that such person is incapable of

managing his own affairs: Provided that the estimated value of the property of such person does not exceed R20 000 in respect of the corpus thereof or R1 500 per month in respect of income.

(2)(a) An application referred to in subsection (1) shall be addressed to the Master within whose jurisdiction the person in respect of whom the application is made is ordinarily resident and shall-

- (i) set out the grounds on which the applicant believes that the person concerned is mentally ill to such a degree that he is incapable of managing his own affairs;
- (ii) state the degree in which the applicant is related by consanguinity or affinity, as the case may be, to the person in respect of whom the application is being made, and if the applicant is not the husband or wife or a near relative of such person, the reason why the application is being made by the applicant instead of by the husband or wife or a near relative;
- (iii) state the estimated value of the property and income of the person in respect of whom the application is being made; and
- (iv) state that the applicant has, within the seven days immediately preceding the date on which the application is signed, personally seen the person in respect of whom the application is being made.

(b) The particulars stated in the application shall be verified by the applicant by affidavit or solemn declaration and shall be handed or sent to the Master within seven days after it has been signed by the applicant.

(c) The application shall be accompanied by a medical certificate or other evidence relating to the mental condition of the person in respect of whom the application is being made and his inability to manage his own affairs.

(3) The Master may, in respect of the mental abilities or financial state of the person in respect of whom the application for the appointment of a curator is being made, call for such further information as he may deem necessary and he may, in particular, request the magistrate of the district in which such person finds himself or in which he is ordinarily resident, to report to him in respect of those matters and to make a recommendation concerning the appointment of a curator in respect of such person.

(4) The Master may, if satisfied that the person in respect of whom the application for the appointment of a curator is being made-

(a) is a person who is not being detained as or has not been declared to be mentally ill or is not being detained as a mentally ill prisoner or a President's patient;

(b) is mentally ill to such a degree that he is incapable of managing his own affairs;

(c) does not possess property the estimated value of which exceeds R20 000 or does not receive an income exceeding R1 500 per month,

appoint a curator to perform or execute on his behalf any particular act or specified acts or acts in general in respect of his property or income.

(5) The provisions of section 56(2) shall apply mutatis mutandis to the appointment of a curator under this section."

**Amendment of section 57 of Act 18 of 1973.**

2. Section 57 of the Mental Health Act, is hereby amended by the substitution of the following subsection for subsection (3):

"(3) A curator (including a curator bonis appointed under section 56(2)), shall find security to the satisfaction of the Master and, unless the court directs otherwise, such security shall be given at the expense of the estate: Provided that the Master shall require security from a curator appointed under section 56A only if he is satisfied that, in the circumstances of the case, it is necessary to do so."

**Amendment of section 77 of Act 66 of 1965.**

3. Section 77 of the Administration of Estates Act, 1965 (Act No 66



of 1965), is hereby amended by the substitution of the following subsection for subsection (1):

"(1) Every person appointed or to be appointed tutor or curator as provided in section 72(1)(d) or (2) or under section 73 or 74, shall, subject to the proviso to section 57(3) of the Mental Health Act, 1973 (Act No 18 of 1973), before letters of tutorship or curatorship are granted or signed and sealed, or any endorsement is made, as the case may be, and at any time thereafter when called upon by the Master to do so, find security or additional security to the satisfaction of the Master in an amount determined by the Master, for the proper performance of his functions."

**Short title.**

4. This Act shall be called the Mental Health Amendment Act, 19 .

