

DECISION-MAKING IN ADULTS WITH IMPAIRED CAPACITY

Testamentary Capacity and Curatorship



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Legal decisions affecting
the person
property rights

GUARDIANSHIP (PROPERTY PROTECTION)

Curatorship
Testamentary Capacity

Defining the problem

- Decisions need to be made in daily life about :
 - personal welfare
 - financial affairs
 - medical treatment
- Diminished capacity may be as result of :
 - mental illness
 - intellectual disability
 - physical disability
 - ageing related issues in general
- Law must have a structure
 - within autonomy and self-determination of the individual
- Substitute decision–making may be necessary
 - with necessary protection from abuse, neglect and exploitation

Present Law criticism

CURATORSHIPS

- High costs
- Prolonged procedure
- Paternalistic in nature
- Potential for abuse

POWER OF ATTORNEY

- Terminates on incapacity of person
become incompetent in law
- Misunderstanding
unauthorised acts
personal liability of care-givers

NO PROVISIONS FOR DEGREE OF IMPAIRED DECISION-MAKING

NO PROCESS FOR TEMPORARY OR FLUCTUANT STATES

**NO DEFAULT ARRANGEMENTS WHEN NO FAMILY
OR FORMAL MEASURES NOT UTILISED**

Protection of property

- In the lessened ability of the more severely disturbed mentally ill to competently manage their own affairs and prevent potential abuse.
- The proceedings are usually initiated by the medical information available and governed by the criteria for the appointment of a guardian.
- Consideration must be given to the appointment of curator bonis and /or a curator personae.
- Appointment of an Administrator in terms of the Mental Health Care Act.

CURATOR BONIS

Means the curator for the “things, the possessions and the goods” of a person.

A curator bonis looks after the propriety interests of the patient and is in practice appointed more frequently than the curator personae.

Rule 57 of the Supreme Court Rules sets out the procedure to be followed.

The court is requested to address three aspects in its enquiry:

- (i) to declare the patient of unsound mind and incapable of managing his/her affairs;
- (ii) to appoint a curator ad litem;
- (iii) to appoint a curator bonis or curator personae or both;

It is not essential that a person be declared mentally ill in terms of the Mental Health Care Act before a curator can be appointed to his estate.

Appointment of Curators

In persons with significant estates

The **De Lunatico Inquerido, Rule 57** of the High Court lays down the procedure to be followed when the court is requested to appoint a curator bonis.

This provides that any person may apply (the applicant) to the Provincial Division of the High Court (by Notice of Motion) for an order declaring another person (the patient)

- "to be of unsound mind and as such incapable of managing his affairs".

This rule can be used to apply for a curator personae but is usually used for property applications together or separately.

Applicant

Notice of Motion and Reports

The Notice of Motion should far as is possible be supported by:

- An affidavit by a person well known to the patient.
- Affidavits from two medical practitioners, one of whom shall be an “*alienist*”

This report/affidavit must contain:

- (i) Details of the nature, possible duration and reasons why the patient is unable to manage his own affairs(or his person).
- (ii) A statement by the practitioners that they have no interest in the order and that they are unrelated to the patient.

alienist

= A psychiatrist, especially one who has been accepted by a court to assess mental competence of those appearing in a court case.

from French – aliéniste

from Latin - alienatus

- past participle of alienare (to estrange)
- from Latin alienus (alien)
- Why this word?
Because an alienist treats those who are believed to be alienated from their normal state of mind.

Procedure

Court appointment of Curator ad Litem

After hearing the application, the court may appoint a curator ad litem.

The court may also dismiss the application or make any other order it sees fit.

A curator ad litem is someone who manages a court case or court proceedings on behalf of another.

The main function of the curator ad litem is to manage the patient's interests in court and in relation to the court proceedings on the patient's behalf, because the patient is by reason of mental illness unable to do so himself.

Termination of curatorship on recovery

A patient may apply to the court for an order that he is no longer of unsound mind and incapable of managing his own affairs.

He must give the Master 14 days notice of his application.

The Master must present a report to the court which can make certain orders:

- declare that the patient is no longer of unsound mind and capable of managing his affairs;
- order his release from curatorship;
- order an enquiry by a curator ad litem or may dismiss the application in the case of an indigent estate

The application should be accompanied by a medical certificate stating the findings that a medical examination has taken place in respect of the mental condition of the applicant as well as the present and expected future ability to manage his own affairs.

Trustee

- It is the task of the trustee to administer the immovable property or business of the patient's property.
- A trust can only be created if it is established that the patient appreciates the significance of what he is doing.
- A trust cannot be created if he is unfit to manage his own affairs.
- A trustee is, from the Master's point of view, similar to a curator : (both must submit accounts, lodge security and in general account to the Master.)

Curator Personae

- The definition of a curator personae is the curator “over the person” of the patient and means the control over the patient's personal welfare.
- The usual decisions are those related to arrangements such as :
 suitable accommodation for the patient
 providing consent for an operation.
- In the case of the application for curator personae the request is that the patient be declared unable to see to his personal needs.
- Only property of the patient is really the concern of the Master of the High Court due to his dealing with "estates" which are proprietary and not personal rights.
- A curator personae is appointed with far less formality.
- He/she is in practice responsible for all decisions where money is not involved.

Administration of Property in Mental Health Care Act 2002

Chapter VIII provides for the care and administration of property of the mentally ill person or person with severe or profound intellectual disability.

Provision is made for an administrator to be appointed to administer and manage the property of a mentally ill person when the need for this arises.

Prescribed estimated property value and annual income

The estimated property value for purposes of section 60 of the Act is R200 000.

The annual income for purposes) of the Act is R24 000.

Application to Master of the High Court

Any person over the age of 18 may apply to a Master of a High Court for the appointment of an **administrator** for a mentally ill person.

Action by the Master of the High Court

The Master may :

- (a) appoint an interim administrator pending the outcome of the investigation or
- (b) appoint an administrator without conducting such investigation, if-
 - (i) the estimated property value and annual income of that person is below the prescribed amount; and
 - (ii) satisfied that sufficient good grounds exist to make the appointment.

Appeal against the decision of the Master

The applicant, mentally ill person or person with severe or profound intellectual disability may, within 30 days of receipt of the written notice, appeal against the decision of the Master.

Definition of “INCAPACITY” for legal purposes

- **Function-based** (i.e. ability to make specific decision at a specific point in time)
- Accommodates **fluctuant and temporary incapacity**
- In terms of **cognitive functioning**
- Based on **clinical evaluation**
- **Not** equivalent to **inability to communicate**
- Does **not** regard **illiteracy** as inability to communicate or make decisions
- Includes **safeguard** of interference in lives of **eccentric**
- **Not** based on a finding by a **specific person** or the court

Best interests defined with reference to :

- Must be **least restrictive** option
- Only if necessary with regard to **individual circumstances and needs**
- Adult must be **encouraged to participate**
- **Cultural environment**, values and beliefs as far as is reasonable and practicable
- **Past and present** wishes and feelings to be taken into account
- **Views of persons** with an interest in the welfare of the adult or the proposed intervention

TESTAMENTARY CAPACITY

The ability of a person to make a valid will

- mind must be clear (lucid interval)
- always : examine the patient alone (undue influence)
obtain collateral to check statements
- check : understands the nature of the act of making a will and its effects
- has a reasonable knowledge of the extent of his property
- knows and appreciates the claims to which he ought to give effect
- is not influenced in making his dispositions by any abnormal state or by any delusions

Check facts from independent source

On Mental State Examination identify symptoms of major mental disorder especially :

delusions

evidence of disorientation

impairment of memory

Review the content of the will with the testator

A person can have the capacity to make a will even if he is otherwise incapable of managing his affairs

The testator to be of “sound disposing mind and memory”.

- Must understand the nature and purpose of a will
- Must know broadly the extent of the property and possessions
- The people who might justifiably expect to benefit

A will may be challenged in :

- Cases of extreme old age
- Apparent eccentricity
- Mental illness or intellectual disability
- Frail physical state

Capacity may fluctuate and wills may be made in a “**lucid interval**”

A clinical report may be requested when a will is made or amended

A psychiatric report required when the validity is challenged after death

The criteria for assessing testamentary capacity are legal and not clinical and the **question of competency** is decided by the Court

Case 1 :

A 50 year old engineer suffered from bipolar affective disorder with 2 previous admissions in hypomanic state.

He was boarded at work and received substantial disability payout.

An episode of depression on ceasing work was followed by elevation in mood when he pursued a variety of business ventures. He made telephone calls long distance at all hours, bought advertising space and was in process of hiring a sports stadium for a pop concert.

Case 2 :

A 74 year old spinster who lived alone died from cancer of the breast with widespread secondaries. One month before her death she instructed her attorney to make a will in which she left her estate to her friend who visited her regularly for many years. A nephew, who had had no contact with the deceased for many years, challenged the will on grounds that this aunt was of unsound mind when she made the will and that she had been manipulated by her friend. The action relied on her medical records which included letters by a surgeon and an oncologist who had both treated the old lady in which they referred to her as - “decidedly odd and demented”. The surgeon wrote - ”I was never convinced that I had managed to communicate satisfactorily with her.”

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A psychiatrist instructed by the beneficiary's attorney was given access to all the medical records and statements by various witnesses who had known the deceased some of whom he was able to interview.

It became clear that mental symptoms had become manifest but only in the last few weeks of her life and these consisted of episodes of fluctuating confusion with transient misidentification of people. Until a month prior to her death although physically ill she had been alert with intact memory, good self-care and nothing to suggest progressive dementing illness.

It was suggested that the mental abnormality was probably due to episodes of delirium and not dementia. There was no evidence available to indicate her state of mind on the date of the will other than the note of the attorney, which did not refer to any abnormality in her mental functioning.

The nephew eventually withdrew the application

Case 3 :

A patient with Huntington's Disease is assessed neuropsychologically. During assessment the psychologist suggests that a curator bonis should be applied for.

The patient becomes agitated, threatening and non-compliant.

Further evaluation as to his capacity is not possible.

Case 4 :

A 30 year old married man with 2 children sustained serious head injury five years ago in a motor accident.

His condition was such that a curator ad litem and then a curator bonis were appointed to deal with the insurance claim and subsequently to manage his affairs and the substantial damages awarded.

He expresses satisfaction with the arrangements and the actions of his curator but would like to execute a will.

Case 5 :

- A 76 year old man who has been under curatorship for 10 years approaches a new lawyer and requests that the process be initiated to terminate the curator bonis.
- The lawyer is unaware of his circumstances and accepts the instruction.
- Clinical reports are provided and only optimum ones are selected

Case 6 :

A 92 year old man is brought to see you for assessment by his grandson as he wishes to change his will.

He had an episode of dizziness and a TIA 3 months ago but is otherwise well.

He confirms his intention and adds that he wishes to marry his care-giver.