

## Practice concept

# A durable power of attorney for older South Africans

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### Abstract

*As an individual grows old, his/her mental faculties may diminish, sometimes to an extent that the individual is no longer capable of managing his/her affairs. It then becomes necessary to appoint another person to act on the individual's behalf. Under existing South African law, the procedures available for appointing a person to manage another's affairs are either expensive or of limited use. What is needed is a simple, inexpensive and effective means for a caregiver to be appointed as an agent for an older person who is no longer regarded as competent in the eyes of the law. This paper suggests that an appropriate instrument is the durable power of attorney.*

### Introduction

As individuals grow old, their mental faculties may diminish, sometimes to an extent that they are unable to manage their affairs. They then become dependent on others to manage their affairs for them. For example, an older person may be the registered owner of a property and may need to deal with tenants and the municipality; if he/she is physically and/or mentally no longer able to look after his/her interests, the individual needs to appoint a trustworthy agent to do so for him/her. At present the only means available to clothe another person with the requisite authority to act on behalf of an older person is an application to the High Court (the former Supreme Court) to appoint a *curator ad litem* and thereafter a *curator bonis* to manage the affairs of the person. These applications are both time consuming and costly, and are usually made at the stage when the individual becomes incapacitated, which means that he/she has little or no say in the choosing of the person who will act as curator.

It is possible for an older person to appoint an agent to act on his/her behalf by executing a power of attorney. This is a document which declares that the agent shall have the power to perform on the signer's behalf such acts as are set out in that document. There are two types of power of attorney, namely the general and the special. The general power of attorney authorises the agent to act in all matters where the maker of the power of attorney can be represented. The special power of attorney expressly authorises an agent to perform a certain act or acts.

As a general rule, no specific formalities are required for powers of attorney as such, although there are formal requirements when powers of attorney are used for certain purposes, e.g. the purchase of land, but such cases are beyond the scope

of this paper. A General Power of Attorney form can be purchased for a relatively small amount from a stationer and completed and witnessed without legal assistance.

When an individual appoints an agent by way of power of attorney, and that agent enters into a contract on the individual's behalf, the rights and obligations arising from that contract are those of the individual and not of the agent. In other words, assuming that the agent has the requisite authority, it is the individual (the maker of the document) and not the agent who is a party to that contract. A properly authorised agent who validly enters into a contract on behalf of another is therefore protected from any liability arising from that contract. On the other hand where an agent purports to be authorised to enter into the contract but acts without the requisite authority, the other party to the contract can hold that agent liable for breach of warranty of authority. Alternatively, the third party can prevent an individual (on whose behalf the agent purported to act) from denying liability on that contract. In the latter instance, the individual would then have an action against the agent for acting without a mandate. This is cold comfort if the agent has no security and assets.

### Capacity

As it is the individual and not the agent who is ultimately the party to the contract entered into by the agent, it is clear that the individual must have the capacity to enter into a contract. By capacity is meant that, legally speaking, a party to a contract must have sufficient mental competence and a level of intelligence and maturity to fully understand the implications of entering into that contract. If this is not the case, the law states that there can be no contract as there has not been a "meeting of the minds" between the parties to that contract.

By making a power of attorney and thereby authorising an agent to act on one's behalf, one is performing a juristic act – in other words, an act that has legal consequences. Therefore at the time of making the power of attorney, an individual must have the requisite capacity, namely the necessary mental competence to understand the legal implications of his/her actions. However, and here is the rub, the continuing validity of the power of attorney is directly dependent on that individual's continued competence.

This is the difference between an agent and a curator or trustee. An agent is authorised to act in the name of another competent person, whereas the curator or trustee acts in his or her own name for the benefit of another, usually an incompetent person. The power of attorney creates agents, not

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trustees, and therefore the maker of the power of attorney must be competent for that power of attorney to be effective and binding. For example, an older person cannot authorise another person to conclude a contract on his/her behalf where he/she does not have the capacity to conclude that contract in the first place.

### **Powers of attorney and the older person**

Older persons are often at risk of incurring substantial financial loss if their property is not maintained and protected from unscrupulous people, including family members, who are quick to take advantage of the older person's increasing frailty and diminishing mental faculties. In discussions with caregivers of older persons who must perform certain acts on their behalf, e.g. financial transactions or the signing of documents, it is frequently apparent that caregivers are under the impression that the power of attorney signed by a person in their care will be effective until that person dies, even in cases where the person had severely diminished mental faculties and is therefore incompetent in the eyes of the law. In effect what this means is that these caregivers are concluding contracts and performing other acts, ostensibly on behalf of the older person, which are not authorised and are therefore legally unenforceable. There is a danger therefore that if someone planned to wrest control of an older person's estate from him/her, this person could do so by having declared invalid the transactions carried out on the authority of the invalid power of attorney. My immediate advice is that there is no need for concern as in practice this would not make much difference as the acts would for all purposes remain valid unless challenged, and the majority of unscrupulous persons would not draw attention to their immoral plans by publicly challenging actions carried out in good faith. However, this is clearly an unsatisfactory position as it means that caregivers are putting themselves at material risk by performing unauthorised acts for which they could be held personally liable, e.g. if they entered into a financial transaction and the older person had insufficient funds. In other words, they cannot regard themselves as agents and therefore cannot rely on the protection afforded by the law of agency.

In terms of current South African law, the only route available to a caregiver in this instance is to make application to the High Court for the appointment of a curator to that legally-incompetent older person. The curator will act in his/her own name on behalf of the older person, as opposed to being an agent. The time and costs attached to these applications have already been mentioned.

What is needed therefore is an easy, inexpensive and effective means for caregivers to continue being the authorised agent of an older person who is no longer regarded as competent in the eyes of the law.

### **The durable power of attorney**

A durable power of attorney is so named in that it remains valid even after its maker loses his or her legal capacity. As in the general power of attorney, legal capacity must exist at the time that the durable power of attorney is first executed.

There are many Commonwealth territories, e.g. Great Britain, Canada and Australia, which have statutes which provide for durable powers of attorney in some form or the other. In the United States of America, durable powers of attorney are almost exclusively governed by state law and some of these statutes even contain prescribed forms. There is thus a wealth of precedent that South African lawmakers can look to in drafting local legislation.

The statutes of the various countries governing the creation of a durable power of attorney are essentially similar in content, and it is therefore not proposed to deal with any of these in detail.

A relatively simple example of such a statute is the Massachusetts Uniform Durable Power of Attorney Act, which defines the durable power of attorney as

*a power of attorney by which a principal, in writing, designates another as his attorney and the writing contains the words, 'This power of attorney shall become effective upon the disability or incapacity of the principal' or 'This power of attorney shall not be affected by subsequent disability or incapacity of the principal' or similar words showing the intent of the principal that the authority conferred shall continue notwithstanding the subsequent disability or incapacity of the principal. (Section 1)*

The statute further provides that any act done pursuant to the power of attorney but after the principal has become incapacitated or disabled shall have the same effect and shall bind the principal as if the principal was competent (Section 2).

The statute is simple and brief, a mere two pages. The statutes with precedents of a durable power of attorney are understandably longer, e.g. the Official Code of Georgia. I would argue that it is preferable not to have a binding precedent but rather have an act along the lines of the Massachusetts statute, which envisages an ordinary power of attorney save for the phrase or phrases described in its definition section, which transforms an ordinary power of attorney into a durable power of attorney. Powers of attorney are personal instruments, and an older person should be able to have one tailor-made if he/she wishes. Standard forms could still be available at a stationer.

### **Potential problems**

The first potential problem associated with a durable power of attorney is not unique to the power of attorney but must be raised as a consideration. Although witnesses are required to be present at the signing of a power of attorney, there are no formalities which act as a safeguard once the power of attorney is executed. It is simply a document in the custody of the named person which can be used by that person to perform legally-binding acts in the name of the signer of that document. It is therefore practically difficult to effectively control the actions of the agent, or even to revoke the powers of the agent, especially where the powers conferred are general or very wide. It is therefore essential that a trustworthy person be used as an agent. This becomes extremely important in the case of a durable power of attorney, where the maker of the document might lack the competence to even comprehend that the agent is either exceeding or abusing his or her mandate. As mentioned, this problem is not unique to powers of attorney, and is also a consideration in the appointment of a guardian, a curator or a trustee. Caretakers must be trustworthy and dependable people. Abuses are not the fault of the law, they are the consequences of human nature. However, although it cannot always prevent the abuse at the outset, the law is expected to provide the means to curb that abuse, once it has been brought to the attention of the relevant authority. This problem will be discussed in more detail later.

The other potential problem is similar to one encountered in the so-called "living will," which is a document whereby the maker purports to refuse medical treatment, save for the administration of painkillers, or any measures to sustain his/her life where it is clear that he/she is in a terminal stage of illness or is in a persistent vegetative state. The previous

Supreme Court (in the case of *Clarke v Hurst NO 1992 (4) SA 630*) has criticized the concept of the "living will" in that it does not indicate anywhere on the document whether the maker, at the moment of euthanasia, still wants to die. Therefore, where a living will was signed by a person and slipped into a wallet where it remains for potentially a very long time, can that document still be said to reflect the intention of its maker at the time when a decision arises whether to place that person on life support? The same problem arises with the durable power of attorney. Once a person's mental faculties are impaired to an extent that the person no longer has legal capacity, the powers conferred in the durable power of attorney are essentially irrevocable, unless it is discovered that the agent is abusing his or her powers and the High Court, upon application by an interested party, acts to annul those powers. If the agent, in good faith, follows the directions set out in the durable power of attorney, it is very difficult to know on what legal basis these powers can be revoked, unless of course the provisions set out in the durable power of attorney are *per se* illegal or contrary to public morals or public policy.

The Americans have attempted to solve this problem by providing that in the event of an application for a curator, in other words the High Court application previously mentioned, the agent acting in terms of a power of attorney shall be answerable to that curator, who shall have the same powers as the original maker to revoke or amend that power of attorney (Section 3 of the Massachusetts Uniform Durable Power of Attorney Act). Whilst this seems to provide an additional safeguard, the obvious problem is that this implies that a High Court application will be made. In reality this application will only occur if relatives or interested parties have some reason (and the funds) to challenge the authority of the agent acting in terms of an existing power of attorney.

### **The report of the South African Law Commission**

In 1987 the South African Law Commission (a legal "think-tank" consisting of judges, academics and legal practitioners which makes recommendations to Parliament concerning the desirability of particular legislation) published a working paper entitled "Enduring powers of attorney and the appointment of curators to mentally incapacitated persons." In this document, the commission attempted to solve various problems associated with the durable power of attorney, including those previously mentioned.

The commission studied examples of enduring powers of attorney created by statute in Australia, New Zealand, Canada, England and various American states. In brief, the commission made recommendations and suggested a draft bill, which it named the Enduring Powers Of Attorney Bill.

Two possibilities are provided for: First, the situation where the power of attorney is already in force and continues in the event of mental incapacity; and second, where the power of attorney comes into operation at the same time of mental incapacity.

The commission suggests that 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 signing the power, as it is crucial that the individual has the requisite capacity to execute the power for it to be subsequently valid. The commission is somewhat vague concerning the procedures involved for determining the mental incapacity of an individual, but provides that the proposed power of attorney only be used where the person concerned is manifestly incapable of managing his/her own affairs (1987: 46-47).

The procedure proposed by the commission in its draft bill is that when it comes to the knowledge of the agent that the principal is mentally incapacitated, he/she shall file the power of attorney (either an existing power or one created for this eventuality) with the Master of the High Court and the agent shall not act until the Master has endorsed the power of attorney to the effect that it has been registered (1987: 51).

The agent who files the power of attorney must also lodge an affidavit with the Master at the time of application to the effect that the principal is in his opinion, on account of mental illness, incapable of managing his/her own affairs and stating the facts upon which this opinion is founded (1987: 52). Although the bill does not specify this, it is suggested that a further safeguard would be to require the certificates of two psychiatrists to accompany the affidavit.

On this note, the bill does stipulate that if the Master deems further evidence of the principal's mental condition to be necessary, he shall call for further evidence. The Master can also call on the agent to provide security for the proper execution of his/her duties (1987: 52). Once satisfied, the Master shall register the power of attorney and shall return an endorsed copy to the agent. This has the effect of authorising the agent to act on behalf of the incapacitated individual whilst avoiding the risk of personal liability for those acts. The Master can call on the agent, in writing, to account for his/her actions or to carry out a particular instruction. It is hoped that this watchdog function will encourage accountability and prevent abuse.

The draft bill further provides that upon application to the Court by the Master or any interested party, the Court may direct that the registration of a power of attorney be cancelled if the Court is of the opinion that sound reasons exist for doing so. In addition the Master himself may withdraw the registration of a power of attorney. This will occur if the agent requests this, or if the agent refuses or fails to carry out a legal request by the Master, or if the agent is convicted of an offence involving dishonesty, or finally, if the agent is sequestered or declared mentally incompetent (1987: 53).

The draft bill finally provides that if a curator is appointed to the mentally-incompetent individual, then any powers granted by that individual to an agent in terms of a registered power of attorney shall terminate (1987: 54).

### **Conclusions**

There are some criticisms of the enduring power of attorney, the most obvious being that legal decision making is an ongoing and dynamic process which requires competence and capacity at the time of making a decision, and that the idea of a durable power of attorney is misconceived. However, it may be argued that in the case of an older person, particularly a person who cannot afford to make a High Court application, the durable power of attorney can provide an inexpensive and effective means of carrying out their wishes once the person has lost the capacity to do so himself/herself.

It would seem that the proposed Enduring Powers of Attorney Bill as formulated by the South African Law Commission goes a long way towards solving the problem of the policing of an agent acting under an enduring power of attorney. In most instances, this watchdog function is carried out by a caregiver or a relative, but what is important is that these interested parties are provided with an effective and accessible mechanism whereby an agent can, if necessary, be quickly restrained. The bill does however assume that the Master's office is capable of this type of policing, whereas it might be desirable to have a special agency created, rather than leaving it in the hands of an already overburdened

Master's office. An Ombud for Older Persons might be a more suitable agency.

As far as the protection of the agent is concerned, for example the caregiver acting in good faith on behalf of an incapacitated older person, the draft bill does provide protection for that agent provided that the agent ensures that the power of attorney is registered with the Master's office. This registration has the effect of clothing the agent with the necessary mandate and consequent protection.

It is unclear why the legislature failed to act on the Law Commission's report. Perhaps it was reluctant to introduce what could be perceived as a radical innovation into our law of agency. It is not within the scope of this paper to debate whether the concept of an enduring power of attorney does constitute such a radical innovation; suffice it to say that the Law Commission found that there was no existing device in our law which even resembled the concept of an enduring power of attorney. The "principle of enduring powers of attorney is completely foreign to South African law" (1987: 30).

The legislature has often been called on by our courts to practise statutory innovation where our common law is inadequate to meet the needs of a particular situation. It is recommended that the legislature resuscitate the report of the Law Commission with a view to formulating appropriate legislation, as there is clearly a need for the enduring power of attorney, particularly in the case of older persons.

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