

■ The protection of those with impaired capacity



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



ESTATE PLANNING TRUSTS WILLS ESTATES BENEFICIARY FUNDS

Mental capacity refers to the ability of a person to make rational decisions and to understand the consequences of his or her actions. Whether an individual has had impaired capacity since birth, or develops it later in life, he or she needs protection. There are two basic scenarios:

- The individual who never develops the power to act independently, and where the parents or guardian will always act on his or her behalf during their lifetime. Their greatest concern however, is the protection of the disabled after their demise.
- The adult individual who becomes incapable to act, due to an accident or illness.
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The parents or guardian of any person who has impaired capacity since birth or a very young age, should consider a special trust for this person, with an inheritance or life cover to be paid to the trust after their death. By activating the trust during their life time, they have the opportunity to involve and direct the trustees who will be mandated with the disabled person's welfare. Alternatively, they may decide to provide for him or her by way of a testamentary trust, in which case the nomination of the trustees is again of the utmost importance.

An adult person with full mental capacity may by way of a power of attorney authorise a third party to act on his or her behalf. A power of attorney, however, is only valid as long as the principal is competent to act for him- or herself and has contractual capacity. Due to the absence of an enduring power of attorney in South Africa, such authorisation becomes null and void when the mental capacity of either the principal or the agent is affected. This may be due to an accident or an illness, such as dementia.

Where an individual is diagnosed with a mentally incapacitating illness, it is sensible to discuss the matter with close family and/or friends and decide on a plan of action, which should include:

- an estate plan
- an updated last will and testament
- the possibility of an enabling living trust, and
- the identification of the ideal person(s) to be appointed (if necessary in future) as administrator or curator of the individual's financial and/or personal affairs.

Although a curator or an administrator will only be appointed in cases of a serious and permanent lack of capacity, if the disability is detected early enough, the patient can become an integral part of the decision-making process.

An application for curatorship is made in terms of the common law and by way of an application to the High Court. A curator bonis¹) is authorised to deal only with the assets of the person under curatorship and has no authority over any personal aspects. The court will only grant the application after reports from a curator ad litem²), as well as two medical practitioners, one of whom is a psychiatrist. The curator, who is usually a professional person, is entitled to annual fees as well as a termination fee when the curatorship comes to an end. The curator takes full control of all assets and expenditure of the person under his curatorship and reports annually to the Master of the High Court.

¹ A curator bonis manages the financial interests and assets of a person.

² A curator ad litem legally assists a person with diminished power to act, in litigation (to avoid injustice).

■ The protection of those with impaired capacity (continued)



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There are alternatives

An application for the appointment of an administrator by the Master of the High Court in terms of the Mental Health Care Act, is simpler and more accessible, and is available in cases of mentally ill individuals or those with severe or profound intellectual disability. The Master will require reports from an independent suitable person, as well as two medical practitioners, one of whom is a mental health care practitioner. The administrator is also authorised to administer only the assets of the patient - under the direct supervision of the Master.

A discretionary living trust can often fulfil an invaluable role in the estate planning process of a person who is becoming mentally incapacitated. He or she may transfer assets to a special trust to be administered for his/her benefit by the trustees. This mechanism empowers the patient to direct the way the trust fund must be managed in future and effectively protects the assets. In this way the patient enables the trustees to make sure he/she receives adequate care for the rest of his/her life – which may be beyond the life of a spouse or partner. The trust assets will also devolve in terms of the trust deed after the patient's death.

Alternatively, a third party may utilise a living or testamentary trust for the benefit of a person with limited mental capacity or with another debilitating problem. In some cases, such a trust may qualify as a special trust in terms of tax legislation. The assets vest in the trustees who will determine the allocation and application of income to the beneficiary. The trust may terminate at the death of the income beneficiary with limited capacity, and the capital is then distributed to third parties nominated by the

Take advice

Families are advised to discuss the different options with a professional fiduciary practitioner before taking action. Where a trust deed or last will and testament is drafted, only a professional should be entrusted with the task.

FISA has a directory of professional fiduciary advisers on its website.

www.fisa.net.za