



HOPE Training & Consulting Services

Helping older persons & establishments

The impact of dementia on decision-making

- Many people living with dementia can make all of their own health care decisions.
- The decision-making abilities of people living with dementia vary. Some people can make some decisions. For example, they might be able to make a decision about pain medication, but not surgery.
- You can appoint a person you trust to help you with health care decisions by creating a legal document called a representation agreement.
- You, your family, and your health care team can work together to coordinate your health care decision-making at the times that work best for you. A diagnosis of dementia does not remove your right to make your own health care decisions.
- Decision-making abilities can be impacted by:
 - time of day
 - lack of support
 - grief or depression
 - medication
 - stress
 - progression of dementia

- Life is about making decisions. Making our own decisions and exercising our choice is one way to express our individuality and exert control over our lives.
- Naturally, contractual affairs also form part of our daily decision-making process.
- Our capacity to enter into legal contracts is closely tied to our mental state.
- For a transaction to be regarded as valid, the law requires that the relevant person can understand the nature and consequences of that transaction.
- We take it for granted that adults can make decisions about their welfare or financial matters.

- Unfortunately, some people are not in a sufficient mental state to make legal decisions, whether due to old age, dementia, disease, a stroke or similar.
- However, in establishing and protecting their appropriate autonomy, the individual must be protected against abuse and exploitation.
- In South Africa, the law deals with this by using Curatorship, which has been criticised by some quarters for the many frustrations it causes.

Managing legal affairs for someone with dementia?

- A dementia diagnosis doesn't necessarily mean you're unable to make important decisions at that point in time.
- But as symptoms of dementia get worse over time, you may no longer be able to make decisions about things like your finances, health or welfare. This is sometimes referred to as lacking mental capacity.
- You may want to make plans now for a person you trust to make decisions on your behalf.
- This means your wishes for your future care can be respected. It'll also help give your family peace of mind.
- When a person becomes incapable of managing his or her own affairs, especially the administration of his or her estate, it is imperative that someone be legally appointed to assist the person who has become incapable. In terms of our current legal system no person may manage the affairs of another person without the required authority to do so.

Beware the Power of Attorney

- A common misconception is that a signed Power of Attorney can authorise a family member to take control of the individual's financial affairs in perpetuity.
- Where in actual fact, a Power of Attorney is only valid as long as the person who granted it maintains "legal capacity", in other words an understanding of its implications. If and when dementia kicks in, the Power of Attorney automatically becomes invalid.
- Enduring Powers of Attorney, which continue even after someone loses legal capacity, are valid in some countries but they are not recognised in South Africa.
- Where the Power of Attorney falls away in the case of incapacity, it is essential to note that, if the agent acting on behalf of an individual does not cease to act on their behalf, then they are in fact acting without authority and risk personal liability.

What are your legal alternatives for dealing with dementia?

You will typically have three legal options available:

Curatorship



Administration



Special Trust

Curatorship:

- This involves appointing a curator bonis through a High Court order to manage the financial affairs of the person with dementia.
- (a curator ad personam may in rare cases also be needed to manage the person's personal affairs).
- This process can be complex and expensive, but in some cases it may be the only viable option available.

Administration:

- Similar to curatorship but less complex, less expensive, and quicker, this involves an application to the Master of the High Court for the appointment of an Administrator.
- It is only available when your family member is a “mentally ill person or person with severe or profound intellectual disability”, which excludes cases of purely physical frailty or disability, and suggests that in cases of mild dementia or mild cognitive impairment only curatorship is an option – but take legal advice on your specific circumstances.
- An extra element of cost and delay applies in larger estates, in that the Master must commission an investigation into any application where the assets involved are over R200,000 and the annual income is over R24,000 p.a.

- In summary, the powers granted to a Curator Bonis or Administrator are primarily to administer the estate of the person who is incapable of managing their affairs and generally include the following:
 - To receive, take care of, control and administer all the assets.
 - To carry on/or discontinue, subject to any law which may be applicable any trade, business or undertaking.
 - To acquire, whether by purchase or otherwise, any property, movable or immovable, for the benefit of the estate.
 - To apply any money for the maintenance, support or towards the benefit of the person; to invest or re-invest any funds etc.
- Once the individual dies, the curatorship or administration terminates, and the management of the personal and financial affairs are then handed over to the Executor of the deceased's estate.

Living will

- Once legal documents are filled out, the individual living with dementia, the caregiver or a trusted family member, the attorney and health care professionals should all have copies.
- A living will is also a type of advance directive that expresses how a physically or mentally incapacitated person wishes to be treated in certain medical situations.
- In a living will, the person may state, among other things, his or her wishes regarding artificial life support. This document generally comes into play once a doctor decides that a person is incapacitated and unable to communicate his or her desires regarding life-sustaining treatment.

Standard will

- A will — which is different from a living will — is a document identifying whom a person has chosen as:
- Executor: the person who will manage the estate.
- Beneficiaries: the people who will receive the assets in the estate.
- The executor named in the will has no legal authority while the person is living. A will only takes effect when a person dies.
- A will cannot be used to communicate health care preferences. However, it can offer peace of mind that a person's wishes will be fulfilled upon death. An individual living with dementia should have a signed will put in place as soon as possible, while he or she is still able to make decisions. Be sure to check local laws, as the validity of a will varies state by state.

ANY QUESTIONS ?

**You are welcome to email queries
to chantel@hopecare.africa**

Thank You !

Drive home safely!



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