

Will trusts for incapacitated persons cease to exist?

Have you ever wondered who manages the funds of a person who is incapacitated due to a road accident or medical negligence?

The two approaches that are available for these people are the following:

Firstly, the appointment of a curator bonis in terms of Rule 57 of the Uniform Rules of Court could be considered. The rule provides that a curator can be appointed for a patient, where a court declares a patient to be of unsound mind and as such incapable of managing his / her own affairs.

But what happens in cases where there is a need to protect funds without the need to take away the patient's contractual capacity? The creation of a trust was historically considered in such cases; but this could all change because the master of the high court is of the view that the estates of persons declared incapacitated would be better administered under the rules governing curatorship. The master requested guidance from the High Court, in a matter heard by a full bench, on whether it may lawfully invoke the powers conferred upon him under the provisions of the Trust Property Control Act to monitor, control, and regulate the conduct of a trustee appointed under a court order.

The master stated in its heads of argument that the "controls and oversight over trusts are less stringent". The heads further alleged that trusts are "created and used as a vehicle to evade the supervisory powers of the master."

Some of the advantages of curators mentioned during the hearing are the following:

1. The master will also have the power to direct a curator to comply with the Estates Act, and the master may inspect how the curators and tutors perform their functions.
2. The curators' fees are regulated by the Estates Act, and all expenses must be approved by the master before being incurred, except in cases of urgency.
3. A curator bonis / ad personam is more hands-on in a patient's life.

The Pretoria Attorneys Association dealt with the most prevalent criticisms against the appointment of curators:

1. Each expenditure proposed by the curator bonis for the benefit of the patient or minor must first be approved by the master. The problem is that the master does not have the capacity to provide timely responses to these unforeseen expenses, which would severely prejudice patients.
2. The costs involved in the appointment of a curator bonis are significantly more than that of creating a trust.
3. The master limits the investment of the capital, and accordingly, the growth of the capital is not good.

Some of the disadvantages of trusts that were argued during the hearing were the following:

1. The Trust Property Control Act that governs the creation of trusts provides for minimal supervision by the master.
2. The remuneration of trustees is not regulated or subject to the approval of the master.

The judges are deliberating as we write this article, and judgment will be delivered next year. It will be interesting to see what changes will be affected and the practical implication thereof.

Susan de Wet, Van Velden-Duffey Inc