

## Problems with Power of Attorney

As a financial planner with a number of clients who are already retired, I am often asked to either draw up a Power of Attorney or even worse I am shown a Power of Attorney whereby either spouse can act on the other's behalf in cases of "diminished mental capacity". Clients see this to be good forward planning, there is however one major flaw with this reasoning. I recently came across a very good article published by Allan Gray ([Diminished Mental Capacity : What Happens to A Person's Investments by Jaya Leibowitz](#)), which explains the problem at length.

A Power of Attorney is generally used when a person is not able to sign documents or look after their affairs (normally because they are out of the country or due to illness cannot physically sign a document). South African Law however determines that a Power of Attorney ceases to be valid when the grantor is mentally incapacitated. This defeats the whole object of drawing up a Power of Attorney beforehand to make provision for when one spouse has Alzheimer's or any other disease which reduces one's ability to trade or act rationally.

If a person can't manage his own affairs, that person's family needs to then either apply for a curator or an administrator -

Curatorship is an expensive application which needs to be made to the High Court, this application generally needs to be accompanied by medical and psychological reports. Curators are entitled to charge fees of 6% per annum on the income collected as well as 2% of the value of any capital assets that are distributed or paid by the Curator.

Administratorship was created in 2002 in an attempt to make the process easier and less costly. This application is made to the Master of the High Court it is generally a lot quicker and less expensive.

Another solution to the problem, is to have all of your assets in a Trust. This does however create other problems especially regarding taxation, ownership and control. With the advent of Section 7C, it is also become a lot more difficult and expensive to move personal assets into a Trust. It is advisable to make sure that you fully understand the consequences of moving assets to a Trust.

From the above we can see that this problem is not easily solved, it is however important to discuss the various planning options with your Financial Advisor to ensure that you understand the implications of your financial plan under all circumstances.

Kind regards,



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