The distinction between living wills and powers of attorney

Introduction

The purpose of a living will is to guide the family and doctors when you are in a medical state from which you cannot recover, and due to your condition, are no longer able to make medical decisions. In South Africa, the Living Will Society defines a living will more narrowly by noting that its main function is to aid in the "refusal of artificial life support when dying".[1]

A power of attorney however, allows persons close to you to sign documents or enter into transactions on your behalf when you cannot do so yourself; effectively appointing someone to act in your stead and to be your agent.

Powers of attorney

The matter of a power of attorney specifically given in anticipation of incapacity is not a simple matter.

According to the Living Will Society of South Africa another concept in addition to the living will (which only directs and does not appoint someone else to act in your stead), being an advance directive, may also take the form of a lasting power of attorney (also referred to as a "proxy directive") which allows the patient to appoint someone else as a healthcare proxy. For example, a trusted friend or relative could act under power of attorney to make healthcare decisions on the patient's behalf or sign documents / enter into transactions on someone's behalf when they no longer have the capacity to do so.[2]

Further to that, according to the common law a power of attorney may generally be executed by any person having legal capacity to do so in order for another to sign any document on their behalf.[3] This principle was confirmed in the case of *Pheasant v Warne 1922 AD 481*, with reference to *Molyneux v Natal Land Company 1905 AC 555*, where it was held that a power of attorney cannot be granted by someone who, because her mental faculties have been impaired by old age, had not been in a

[1] S Afr Fam Pract 2012 vol 54 no 6: 507.
[2] http://www.livingwill.co.za/about.htm: accessed 07/05/2013.
[3] Pienaar v Pienaar's Curator 1930 OPD 171 at 174-175.

position to understand what the particular legal proceedings instituted against her were about.

Thus, where becoming incapacitated is a reality such as the case of diabetics, cancer patients and even for purposes of decision - making when unconscious due to a motor vehicle accident for instance, executing a conditional or enduring power of attorney may be a practical manner of dealing with your affairs promptly and more effectively. The most obvious challenge with the approach of the enduring power of attorney is 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 an enduring power is thus, in the view of many authors, misconceived.[4] This school of thought supports the approach of a competent court for the application for appointment as *curator bonis*. The said application is time consuming and expensive and thus cumbersome.

On the other hand, the concept of the Enduring Power of Attorney (EPA) and a Lasting Power of Attorney (LPA) in the United Kingdom (UK), is still acceptable and needs to be registered with the Office of the Public Guardian in the UK.

Under common law a power of attorney could also be granted subject to a suspensive condition (that it will be effective only on the occurrence of an uncertain future event), most powers of attorney that are given are effective immediately upon execution thereof by the principal.[5] The problem with this approach is that the exact time upon which the power of attorney becomes effective may not be certain or may even be challenged in court. Naturally the latter in addition to the appointment of a *curator bonis*.

Writers have long since commented upon these issues and several have suggested that these foreign models where legislation regulates the parameters be replicated locally to overcome the common law problem.[6] In terms of section 39(1)(c) of our Constitution, South African courts may consider foreign law when interpreting the Bill of Rights. It cannot be overemphasised though that these practices have not been

[4] Van Dokkum 1997 Southern African Journal of Gerontology 19.

[5] Cf Joubert 93-94, 102; Schlesinger and Scheiner 1992 Trusts and Estates 40.

[6] C Neumann "Curatorship – a Test of Endurance" in De Rebus June 1998 61-64 and the SA Law Commission Discussion Paper 105 Project 122 on Assisted Decision-making: adults with impaired decision making capacity January 2004 http://salawreform.justice.gov.za/dpapers/dp105.pdf: accessed 5 June 2013.

tested in our courts as yet and we have no indication of how our courts will view them. As such, they represent a certain risk which needs to be recognised.

Living will

The ostensible jurisprudential basis for a living will is that of "informed consent" by the grantor which is both a common law and constitutional right. The word "informed" implying that the person executing same is aware of all the attendant risks involved.

The living will thus speaks in instances where the author or patient is unable to do so themselves.

According to the Living will Society of South Africa, for a living will to be ethically valid, four conditions must be met:

- The patient must have issued the directives when they were aged 18 or over.
- You must be sure that the patient had the mental capacity to make their own medical decisions at the time of issuing the directives.
- A patient may only refuse consent to treatment if they have been fully informed about their condition and proposed treatment.
- You must be satisfied that the patient did not change his or her mind after issuing the directive. [7]

The South African Medical Association (SAMA) and the Health Professions Council of South Africa (HPCSA) have both issued guidance stating that all patients have a right to refuse treatment. The HPCSA is established in terms of Health Professions Act, No. 56 of 1974 to govern the activities of healthcare professionals[8]. Their guidelines also state that patients who have living wills in place have the constitutional right to expect their living wills to be honoured.[9] In this respect, doctors are expected to always act in the best interests of their patients even if it means withholding treatment in accordance with their wishes; a living will should be regarded as a patient's wish; doctors will have to rely on their professional judgment to decide on the applicability of the advance directive to a particular situation; doctors who are aware of the existence of a living will, should make all reasonable efforts to

[7] http://www.livingwill.co.za/about.htm: accessed 07/05/2013.
[8] HPCSA CONDUCT & ETHICS - ETHICAL RULES & REGULATIONS http://www.hpcsa.co.za/board_meddent.php
[9] HPCSA Ethical Guidelines - Guidelines for Witholding and Withdrawing of Treatment.

acquaint themselves with its contents except in the cases of emergency; doctors with a conscientious objection to withhold treatment in any circumstance are not obliged to comply with an advance directive and may be replaced by another doctor and also if a living will is discovered late it should not be disregarded. This should however be balanced with the measure of reasonableness in the actions by the professional aka doctor involved.

For this reason we recommend that clients separate living wills from their last will and testament, given that the latter only becomes legally enforceable after death [see *Estate Orpen v Estate Atkinson 1966 4 SA 589 (A)*]

Notwithstanding the above and because it is predominantly a medical consideration from the view of our law, SAMA and the HPCSA, a living will can be ignored by the family and attending doctors if there is the remotest chance of recovery. It is, however, generally accepted as permissible to comply with a living will where the patient is in a permanent vegetative state. In all other instances, a doctor who is uncertain whether or not to comply may approach the court for guidance.

It should therefore be noted that this does not imply the legalisation of euthanasia in South Africa. Seeing as the End of Life Decisions Act of 1999 was never passed, euthanasia remains unlawful in South Africa.[10]

S v Hartmann 1975 (3) SA 532 (C) is a leading criminal case in connection to the legality of euthanasia in South Africa. In this case, a doctor helped his father who was suffering increasingly and terminally from secondary cancer. The accused was charged with murder because for legal purposes, he possessed *dolus directus* (indirect intention) as he was fully aware that his actions would ultimately end his father's life. It was established by the court that consent of the deceased to die is no defence to murder and therefore the accused was convicted of such crime. Despite the conviction of murder, the court accentuated the element of mercy in this particular case. It found that this was indeed a situation where full measure must be taken to mercy in so far as it is not unfair to society. As a result, the accused was to serve one year in prison, of which nearly all was suspended.

[10] Draft Bill. SALC report project 86. See http://www.justice.gov.za/salrc/media/1999_prj86_media.pdf: accessed 07/05/2013.

Conclusion

It is important that the distinction between a living will and powers of attorney are clearly drawn and professionally drafted. The power of attorney either given conditionally or as an enduring power of attorney is therefore possible but risks still exist. Accordingly, having same professionally drafted may limit this risk but not extinguish it as approaching the relevant court, notwithstanding the power of attorney, may be necessary and the appointment of a curator to handle the affairs of the person who is unable to do so himself may be the only remedy in such a situation. This until the law has evolved as it has abroad.

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