Susan Mercer's Money Talk

Financial Informer

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Legal incapacity

It is a popular misconception that the simple and effective answer to an ailing loved one's ability to deal with their finances is the drafting of a power of attorney. However, you may be surprised, even shocked, to learn that the power of attorney loses all of it's power under certain circumstances that you would have imagined it was specifically designed for. What do you do when the Power of Attorney runs out of power?

Making decisions is an important part of our lives. Almost every day we make decisions relating to matters such as where we live, our health care, education, employment, social contacts and financial affairs, including the concluding of legal contracts.

For a legal transaction to be valid the law requires that the parties be able to understand the nature, purpose and consequences of their actions. Where these requirements are absent the law attaches no consequences whatever to the expressions of will by the person who purported to engage in the legal transaction. Some people cannot make legally effective decisions because of diminished mental capacity. Diminished capacity may result from a number of causes such as mental illness, intellectual disability, brain injury or disease, a stroke, dementia or incapacity related to ageing in general. The general principle is that if a person is not able to fully understand or interpret all the consequences of his actions due to a mental illness or intellectual disability, it is said that such person lacks capacity to perform a specific act and the act is consequently void. It makes no difference whether the person has not yet been declared mentally ill and a curator appointed to him or her, or that the other party to the transaction was unaware of the person's mental condition. The general rule though is that adults are presumed mentally and legally competent to manage their own affairs until the contrary is proved. The onus of proving that a transaction is invalid for lack of mental capacity normally rests on the party alleging it.

Many people, when they get older and frailer, give a general power of attorney to a trusted person, usually a family member, or their attorney, accountant or financial advisor (their agent) to transact business on their behalf. This usually includes the power to administer bank accounts and investments and to buy and sell assets, shares and immovable property. It can also include the incurrence of expenditure relating to the day-to-day living of the person who grants the general power of attorney (the principal) and his or her family. In this way the person is

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saved the trouble of having to go to the bank, or having to go to the attorney's or investment company's office, or having to do their own shopping etc. An agent has to act in good faith and in the best interests of the principal and is accountable to the principal for his or her actions.

Although the power of attorney is a handy instrument for assisting the elderly and the frail in the administration of their estate, it can only validly be used in those instances where the principal is still mentally competent of making his or her own decisions and has contractual capacity. In South Africa the power of attorney remains valid only for as long as the principal is still capable of appreciating the concept and consequences of granting another person his or her power of attorney. The moment a person becomes mentally incapacitated and is no longer capable of managing his or her own affairs, the power of attorney lapses.

The problem of a power of attorney ceasing on incapacity has been resolved in various jurisdictions elsewhere in the world by the introduction of the "enduring" power of attorney, which will remain valid and effective should the person who granted the power lose his or her mental capacity at any stage after the power has been given. This means that decisions can continue to be made without major disruption or expense. Unfortunately the enduring power of attorney does not form part of South African law despite the fact that the South African Law Commission recommended in 1988 that it should be introduced. Frequently family and caregivers of mentally incapacitated persons are under the incorrect impression that the power of attorney signed by a person in their care will be effective until that person dies and they continue to act on behalf of such person, even after that person has become mentally incapacitated.

When a person becomes incapable of managing his or her own affairs, especially the administration of his or her estate, it follows that someone should be legally appointed to assist the person who has become incapable. At present there are two legal procedures in terms of which someone can be appointed to administer the affairs of a person who is found to be incapable of managing his or her own affairs. These procedures are (1) the common law procedure for the appointment of a curator that requires an application to the High Court or (2) the appointment of an administrator as set out in the Mental Health Care Act.

In terms of common law, a High Court may declare a person incapable of managing his or her own affairs appoint a curator to the person and/or his or her property. The curator appointed to administer the estate of a person declared incapable of managing his or her own affairs is known as a curator bonis, while the curator appointed to take decisions as to the care, custody and welfare of the person, or to consent to medical treatment on behalf of such person is called a curator personae. The application to appoint a curator may be brought by any interested party and must set out the facts and circumstances relied on to show that the patient is of unsound mind and incapable of managing his or her affairs, and must include two recent reports by medical doctors. The court will then appoint a curator ad litem (who is usually an advocate) to investigate the matter and to report to the court and the Master of the High Court, the government office which administers and oversees the administration of deceased and curatorship estates. As the appointment of a curator bonis involves a High Court application, this procedure is relatively expensive, with the average costs ranging between R40 000 and R60 000. These costs are usually borne by the estate of the person in respect of whom the curator bonis is appointed.

The other procedure, in terms of the Mental Health Care Act, permits the Master of the High Court to appoint an administrator to manage the property of a person who has been positively diagnosed as mentally ill or a person with severe or profound intellectual disability. As no High Court application is required for the appointment of an administrator, the procedure is far less costly than the common law (High Court) appointment of a *curator bonis.* The applicant can lodge the application directly with the Master's office in whose area of jurisdiction the person in respect of whom an administrator is to be appointed, resides. The applicant does

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On February 1, 2008, American singer Britney Spears was placed under a conservatorship by Judge Reva Goetz, with her father, James "Jamie" Spears, and attorney Andrew M. Wallet, as conservators. The conservatorship lasted until November 12, 2021.

The management of the conservatorship by Jamie, Wallet, and Spears's former business manager Lou M. Taylor, among other parties, generated controversy almost immediately. While Spears was held on an involuntary psychiatric hold in early 2008 for alleged mental health concerns, there was initially a temporary conservatorship intended to last only days. It was extended to months and eventually made permanent, against the objections of Spears.

***Britney vs Spears** is a 2021 American documentary film directed by Erin Lee Carr, that follows American singer-songwriter Britney Spears and her life over several years of her career and her conservatorship. It was released on September 28, 2021, on Netflix.*

Erin Lee Carr spent two years researching and investigating the Spears' conservatorship dispute. Carr had attempted to reach out to Britney Spears through her representatives, but did not receive a response, instead writing her a letter about the film. The film initially was supposed to revolve around the conservatorship and the media's treatment of her, but following the release of Framing Britney Spears, it changed the structure of the film.

not need to work through an attorney, although in practice applicants often call upon attorneys for assistance with the lodging of the application with the Master. Because there is no application to the High Court, this procedure is far less costly than having a Curator Bonis appointed. However, one of the requirements for an Administrator to be appointed is that the patient's assets do not exceed R200,000 in value. If the individual's assets exceed this amount and their income is above R24 000 per year, the Master of the Court will insist on a further investigation before an Administrator is appointed. This process may cost up to R15,000. Any person over the age of 18 may make an application, and the patient must be diagnosed by at least two independent medical or mental health practitioners.

The duties of a curator bonis or administrator are to take care of and administer the property of the person for whom he or she is appointed and to carry on any business or undertaking of that person.

The curator bonis or administrator must keep detailed records of his or her administration of the estate and must lodge administration accounts, together with proper vouchers and receipts for all entries in the account, with the Master of the High Court, annually.

The fees *of a curator bonis* and administrator are prescribed in the Administration of Estates Act. It is 6% on the annual income of the estate and 2% on the value of the capital assets of the estate at termination of the Curatorship. A curator bonis or administrator may be called upon by the High Court or the Master to furnish security for the proper administration of the estate for which he or she has been appointed. In such instances the curator or administrator is required to lodge a bond of security by an approved financial institution for the full value of the property which he or she is required to administer, with the Master of the High Court, before letters of authority are issued to the said curator or administrator.

Chapter Four

10 years to retirement? The actions you take in the final decade before you quit working are crucial to getting the next phase off to a smooth start. Here are 5 things you must do. Follow these tips and make it easy

After 30-plus years of working and saving, you can finally see retirement on the horizon. But it's not time to coast just yet.

1. See if you're saving enough. If you haven't recently, take stock of where you are and where you need to be. For example, to replace 70% of your earnings by age 65, you'll need to accumulate 12 times your pay at 65. But even if you're playing catch-up, you can still make it to the finish line with what you need. Your choice: Seriously power-save, or work a bit longer while saving less. Say you have five times your income; you could save 33% a year for the next 10 years, or delay retirement 24 months while banking 20%. Either way, don't miss out on catch-up contributions!

2. Stagger your retirement with your spouse. Among two-income couples, nearly one in five retires in the same year, and another 30% within two years of each other, reports the Urban Institute. But quitting in tandem isn't necessarily the best move. If one spouse works just a few years longer, you can draw less from your portfolio in those initial years.

3. Don't automatically quit on your share portfolio. To achieve returns to sustain a 30-year retirement, you need to still be investing for growth. Investments should make up 50% to 60% of your allocation, with the rest in a stable portfolio. The caveat: those within 10% of their ultimate savings goal can choose to dial back to 40%.

4. Be mortgage wise. Of course you don't want to carry credit card debt into retirement, but what about the mortgage? The old advice was to settle it before you left work, but in today's low-rate environment, maybe not. Assuming that your rate is less than 9.75% and that you'll be able to afford

the payments from guaranteed-income sources in retirement—or if you're planning to move—there's no rush. You may do better by investing money you would have put toward the loan.

5. Make friends with the young'uns. Sure, you still want to dazzle your boss, but you'd better be working just as hard to make allies below you. Your younger co-workers are likely to move up the ranks over the next 10 years and have a say in whether you stay or go. Hanging onto your job for the next decade will be essential to keeping your plan on track. So train subordinates, mentor up-and-comers, and look into a "reverse mentorship" in which a junior colleague teaches you something new.

When life turns up the heat

Fear of the unknown has been with us since time immemorial. Team building specialist David Roppo says, "You can't rise from the ashes if you refuse to walk through the fire". That may be so but surviving a dread disease makes that walk difficult without financial support. None of us like to consider the consequences of a severe illness however a lack of planning will make the journey a difficult one.

It is estimated that one in five people will suffer from a serious illness at some stage in their life, and one in eight will contract cancer before the age of 65. Deciding on whether or not to take out dread disease cover is a difficult decision for many as it can be costly. Understanding how this cover works and what to consider when assessing the need for this cover in your insurance portfolio is vital.

The basics

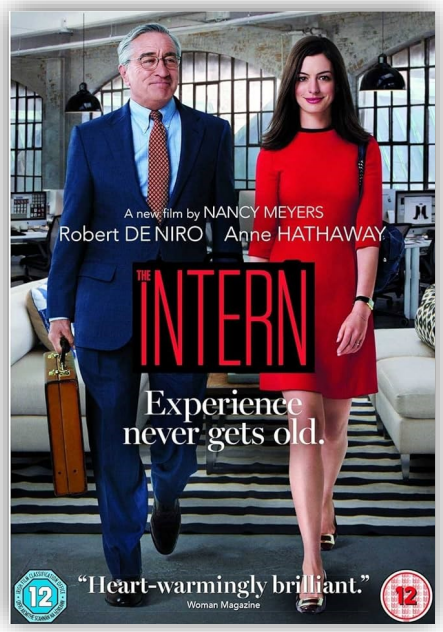
Critical illness, also referred to as dread disease cover or severe illness cover, is offered by most long-term insurance companies, and provides financial protection in the event that you are diagnosed with a debilitating illness, whether terminal or not. It takes the form of a tax-free, lump sum payment on diagnosis of a listed illness and must be made by a registered medical professional. Humans are living longer but sometimes with severe, sometimes terminal, illnesses. This makes dread disease cover more relevant than ever before.

What does it cover?

Most dread disease policies cover cancer, stroke, heart attacks and coronary bypass graft surgery, which are regarded as the Big 4 when it comes to dread disease, although cancer remains the leading cause of dread disease claims. However, it is advisable that you do your research into each insurer and determine exactly what conditions are covered and to what extent they are covered. As a rule of thumb, dread disease policies provide cover for conditions such as kidney failure, major organ transplants, chronic liver failure, loss of sight, rheumatoid arthritis and respiratory failure. Get a complete list of the conditions covered with a clear explanation of how the disease is covered.

Many insurers offer different levels of cover from basic plans that cover a handful of conditions to more comprehensive cover including a wide-ranging list of conditions. If there is a concern about a genetic family history of a specific illness be sure to check the conditions of cover before signing.

The better insurers also offer 'catch-all' benefits which could provide cover for diagnosis of a disease which is not listed in any other benefit category which results in an impairment. The level of payment in such a case is usually dependent on the level of severity of the impairment and may extend their dread disease offerings to include additional benefits such as ICU benefits, early cancer, cancer relapse benefits, and child critical illness benefits. Your financial advisor will be in a position to talk you through the pros and cons of these extended benefits and the costs thereof. With the help of your advisor you should be able to craft a



Seventy-year-old widower Ben Whittaker (Robert de Niro) has discovered that retirement isn't all it's cracked up to be. Seizing an opportunity to get back in the game, he becomes a senior intern at an online fashion site, founded and run by Jules Ostin (Anne Hathaway).

How to Starve Cancer

After being given a terminal diagnosis with only a few weeks to live, Jane dug up research, some decades old, in her quest to survive. Rather than aiming to cure cancer, which in many cases is unachievable, Jane's approach was to stop it growing. Remarkably her approach not only stopped it growing, it disappeared altogether. There are now clinics following her protocol, achieving remarkable successes. This book is a game-changing new dawn in the treatment of cancer.

An international publishing sensation. This page-turning inspirational read is updated with a new 'Metro Map', Jane's unique and revolutionary route map to starving cancer. A glossary and index will

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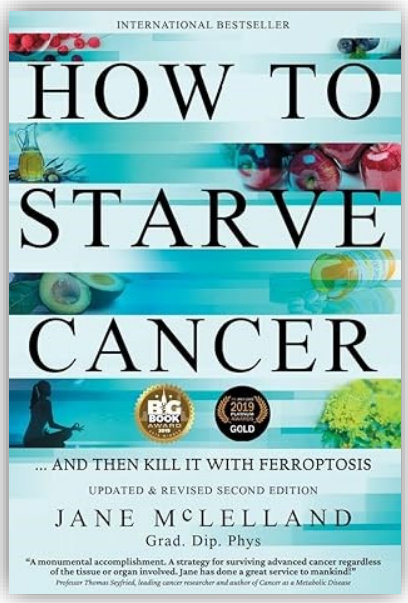

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also be included. Written in two sections, in Part 1 Jane intertwines her remarkable life story of 'terminal cancer' to full recovery, describing how she discovered a unique cocktail of off label drugs (drugs usually prescribed for other conditions) and supplements that effectively starve the cancer stem cell, the cell left behind by conventional treatment. Treatment for the stem cell is hailed as the Holy Grail, so this book plugs the missing piece into why we do not have a cure for cancer. Top oncology centers are now using this book as a guide. Testimonials abound from happy and delighted recovered patients and from oncologists who use her methods. National press, TV and radio have already covered Jane's ground-breaking research. Much more is in the pipeline with two documentaries and a possible movie in the future. Jane won the 'Amazing Women Global' Lifetime Achievement 2019 and the New York Big Book Award 2019

package that will address your specific concerns.

Why do we need it?

As a lump sum payment, dread disease cover is designed to provide financial relief soon after diagnosis of a severe illness. Once the claim has been paid, you are free to use the money as you see fit. You may want to use the money to make home modification and lifestyle adaptations, settle debt or cover medical expenses not paid for by your medical aid. It can also be used to cover the costs of home care, travel costs for treatment overseas, or to supplement your loss of income.

What types of cover are available?

There are two, namely accelerated and stand-alone benefits. The type of cover you choose can have a significant impact at claims stage. If your benefits are accelerated, it means that the value of a dread claim will effectively reduce your life insurance benefit by the same amount. For instance, if you have life cover of R2 million, and you claim R500 000 from your dread disease benefit, your life cover will reduce to R1 500 000. On the other hand, stand-alone benefits do not have the effect of reducing your life cover and can be sold separately or in conjunction with life cover. Naturally, stand-alone benefits are generally more expensive than accelerated benefits as your insurer stands to pay out more in respect of claims.

For your information

Unfortunately, not everyone will be able to secure dread disease cover. The underwriting of your application for cover will take into account your current health status including your personal medical history, mental health issues, and chronic conditions that you may have suffered from in the past. The insurer will also access your current lifestyle in terms of smoking, drinking, exercise habits and hazardous pursuits. Your application is likely to also include questions about your family's health as many diseases are hereditary. Your age, gender and occupation will also play an important role in the underwriting process. The reality is that the likelihood of contracting a dread disease increases with age and the earlier you take out cover the better, as later in life you may be considered a higher risk and may become uninsurable. If you have already suffered from a dread disease, you may find you receive an exclusion for this pre-existing condition, or your application maybe be declined entirely.

How long?

Most insurers provide the option to take out dread disease cover for whole of life. This makes sense because many diseases are linked to old age and your risk of contracting a severe illness increases with age. However, be sure to check the manner in which your premiums escalate on an annual basis because, if you have high premium escalation, your cover may become unaffordable over time.

What if?

A claim for dread disease is normally accessed according to a severity level and offer a percentage-based pay-out depending on the progression of the illness. This also allows for multiple claims as the condition worsens. For instance, if you are diagnosed with stage 1 cancer, the insurer will pay out 25% of your claim. If your cancer progresses to stage 4, the insurer will then pay out the remaining 75% of your benefit. On the other hand, most insurers offer a comprehensive or top-up version of their dread disease benefit which will pay out the full amount on diagnosis of the above mentioned Big 4. Bear in mind that lump sum payments in respect of dread disease cover are tax-free.

How much?

How long is a piece of string? Dread disease cover is generally quite expensive, so it is important to give careful thought to the cover you need. In determining the correct level of cover for your needs, give consideration to how comprehensive your medical aid is, whether you have gap cover in place, and the extent of your disability insurance. Other factors include what type of support system (like family) you have in place should you fall ill, the level of your emergency funding and any discretionary funding that you have access to. Determining the most appropriate level of cover is a balancing act between your affordability and risk protection. Your financial adviser will be able to guide you through the process. It isn't pleasant but the alternative is worse.