

CURATORS AD LITEM

Policy Proposal

1. To ask the Family Law Committee (“the Committee”) to consider a proposed draft instrument (**Paper 4.3A**) that suggests changes to the court rules that apply to the appointment of curators *ad litem* to defenders in family actions.

Timing

2. While there is no specific timeframe for implementation of the proposals, we consider that it would be helpful to have the new rules in place at the earliest opportunity in order to address the concerns raised.

Background

3. At its meeting on 10 October 2016, the Committee considered a paper prepared jointly by the Scottish Government (“SG”) and the Mental Welfare Commission (“MWC”). For ease of reference, that is provided as **Paper 4.3B**. In summary, SG and the MWC suggest that amendments are required to Ordinary Cause Rules 33.16 and 33A.16 and to Rule 49.17 of the Rules of the Court of Session (“the applicable rules”) to address difficulties that have been raised with the MWC by practitioners and litigants in relation to:
 - (i) the lack of a mechanism in the rules for the curator to check that the appointment remains appropriate;
 - (ii) the potential inappropriateness of an appointment continuing simply because a defender has a mental disorder rather than when he/she does not have capacity to instruct representation; and
 - (iii) where divorce is sought on the basis of one year’s non-co-habitation with consent and the defender has a mental disorder, the requirement for the MWC to send a report to the sheriff clerk indicating whether the defender is capable of giving consent.
4. In relation to terminology, SG and the MWC suggest that amendments are also required to remove the stigmatising words “suffering from a mental disorder”, replacing this simply with “has a mental disorder”. It has also been suggested that amendments are required to the simplified divorce and dissolution forms, to achieve consistency in the questions that they ask about mental disorder.
5. **Paper 4.3B** contains extracts of the relevant court rules and forms.

Discussion and legal advice

6. The draft instrument makes all of the changes requested by SG and the MWC. The key points for members to consider are set out below. Depending on the views expressed by members, some amendments may need to be made to the draft for consideration at February's meeting.

(i) Definition of incapable

- In an email to LPPO, the MWC has confirmed that in its view, the safest approach would be to leave “mental disorder” as the ‘gateway’ into having a curator appointed, *‘provided the person with the mental disorder can be freed of the need to have a curator once their capacity to instruct has been established. Otherwise, the court or the other side would be seeking to decide on whether to appoint/seek a curator when they may not know the level of capacity the person has.’*
- We have included a definition of “incapable”, which is based on section 1(6) of the Adults with Incapacity (Scotland) Act 2000. Section 1(6) defines incapable as: *‘incapable of (a) acting; or (b) making decisions; or (c) communicating decisions; or (d) understanding decisions; or (e) retaining the memory of decisions...by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise)’.*
- We note that the above definition of “incapable” includes physical disability. That appears to go further than the primary legislation referred to in paragraphs 5 and 6 of **Paper 4.3B**. Rather than simply importing the section 1(6) definition as it is, we have therefore adapted it to remove the reference to physical disability. Members will note that the wording about *‘human or mechanical aid’* has been retained. While it may be the case that this wording will mainly be of relevance to physical disabilities, it seems possible that it could in some cases apply to people with mental health issues. The MWC has confirmed that in its view, this is appropriate. Colin McKay has commented that *‘there are specialists such as Speech and Language Therapists who may be involved in assisting an individual with a mental disorder (particularly a learning disability) both to arrive at a decision and to communicate it, and there are a number of devices that are used for that purpose, such as Talking Mats.’*

- **Members are asked to consider the definition of “incapable” proposed in the draft instrument, and decide whether they are content with it.**
- (ii) Removal of stigmatising terminology
- As requested by SG and the MWC, we have removed all references to “suffering from” a mental disorder, and have replaced this with “has” a mental disorder.
- (iii) Removal of the role of the MWC
- Under the existing rules, where the defender has a mental disorder in cases of divorce or dissolution on the basis of one year’s non-cohabitation, the MWC is required to provide the court with a report indicating whether or not, in its opinion, the defender is capable of deciding whether or not to consent to decree.
 - As noted at paragraphs 19 and 20 of **Paper 4.3B**, the MWC is very rarely asked to provide such reports. It estimates that it has done so in about three cases in the last decade. The paper also suggests that, rather than the MWC, which will have had no prior involvement with the defender, it would be more efficient and straightforward for the curator to provide the necessary report. At October’s meeting, members appeared to agree that this was reasonable. The draft instrument therefore amends paragraph (2)(b) of each of the applicable rules accordingly.
- (iv) Timing of appointment – difference in rules
- The Ordinary Cause Rules simply state that the sheriff shall appoint a curator (see rule 33.16(2)(a)). However, rule 49.17(2) of the Rules of the Court of Session introduce a timescale, and state that the court shall appoint a curator ‘*after the expiry of the period for lodging defences*’.
 - **Members are asked for views on whether there might be a practical reason for this distinction, and whether they wish to retain it. In the event that members decide that the rules should be aligned, the square-bracketed wording at paragraph 3(3)(b) of the draft instrument could be used.**

(v) Report to be provided by the curator rather than the MWC

- As discussed above, this change is introduced by substituting a new paragraph (2)(b) into each of the applicable rules. Whereas currently, the MWC has to send a report to the sheriff clerk (or Deputy Principal Clerk of Session), it would seem more logical for the curator to lodge the report in process and intimate that this has been done to (i) the pursuer; and (ii) the defender's solicitor (if known).
- The draft instrument proceeds on the assumption that the curator's report should be based on medical evidence that the defender is "incapable". While many curators will be alert to the issue of capacity to instruct, they will not generally have the medical expertise to give a view on the matter. We note that paragraph 17 of **Paper 4.3B** states that '*in many cases, an experienced curator ad litem could reach their own view*'. However, to remove any perception of a conflict of interest, our initial view is that it would be preferable for the curator's report to be based on medical evidence.
- As discussed at annotation 49.17.2 RCS, we understand that the practice is for the pursuer to produce medical certificates. In some cases, it may be sensible and appropriate for the curator's report to be based on those. There may be other occasions where it would be necessary for the curator to obtain independent evidence (for example, where the medical evidence provided by the pursuer only addresses the defender's mental disorder, rather than his/her incapacity to instruct representation). We consider that this may be best left to the discretion of the curator, so we have not spelled it out in the rules. In practice, the court will appoint a curator on the basis of medical evidence submitted by the pursuer, so it does not seem logical to require the curator to obtain a fresh medical opinion in every case. **It would be helpful to have members' views on this point.**
- Another key point about the proposed rules is that the report on capacity would be required in *all* cases, not only where a divorce or dissolution is sought on the ground of one year's non-cohabitation with consent. This was not specifically suggested by SG and the MWC, so it is important that members decide whether or not they agree with the approach. This has been suggested because regardless of the basis of the action, it seems sensible that defenders who have a mental disorder but are capable of instructing a solicitor should not be forced to have a curator appointed to them. **Members are asked to express their views on this.**

(vi) Periodic review of need for curator's appointment

- SG and the MWC asked for an obligation to be placed on the curator to periodically review the need for his/her appointment to continue. They suggest that the test for this should be whether the defender has capacity to instruct representation, regardless of whether or not the defender has a mental disorder.
- Paragraph 18 of **Paper 4.3B** suggests that the review could perhaps take place every three months. The draft instrument does not suggest a frequency, on the basis that it might be better for the curator to have some discretion – the particular nature of the defender's mental disorder might dictate how frequently capacity should be considered. We propose the wording '*At such intervals as the curator ad litem considers reasonable having regard to the nature of the defender's mental disorder*'. It is hoped that the draft rule would be sufficiently flexible but robust, by obliging the curator to (i) determine what frequency would be reasonable; and (ii) give thought accordingly to whether there appears to have been any change in the defender's capacity.
- The draft instrument proposes to insert new paragraphs (8A) to (8C) into the applicable rules. In paragraph (8A), it is suggested that if it appears to the curator that the defender may no longer be incapable, the curator should by motion seek the permission of the sheriff/court to obtain an opinion on the matter from a medical practitioner. This is suggested primarily to keep things under the court's control, and prevent what is hopefully an unlikely situation where a curator instructs numerous expensive opinions that the pursuer will ultimately have to pay for.
- Paragraph (8C) proposes that where the medical opinion concludes that the defender is not incapable, the curator must seek discharge from appointment. We note that annotation 49.17.5 RCS states that '*the curator should seek his discharge by minute: Walls v Walls 1953 SLT 269*'.
- **Members are invited to comment on the proposals for keeping the defender's capacity under review, and to suggest any amendments that they consider desirable.**

(vii) Changes to simplified divorce forms

- In line with the suggestion in **Paper 4.3B**, the draft instrument proposes to amend all simplified divorce forms so that the wording is consistent. As requested, the question about mental disorder in the forms has been reframed to ask '*As far as you are aware*', does the defender have any mental disorder. It is also proposed that the question in the Court of Session forms be amended to refer to '*mental disorder*' rather than '*mental disability*', and to ask only about mental disorder rather than capacity to manage affairs. This reflects the views expressed by the MWC that it would be sensible for mental disorder to remain the 'gateway' to the appointment of a curator.

(viii) Difference in applicability of rules

- As **Paper 4.3B** highlights (third bullet point of paragraph 11), the Sheriff Court Rules on the appointment of curators apply to family and civil partnership actions, while rule 49.17 RCS applies only to an '*action of divorce, dissolution or separation*'. The Sheriff Court Rules are therefore potentially wider in application. For example, while a family action relating only to a section 11 order *would* be caught by the Sheriff Court Rules on curators, rule 49.17 RCS would not apply in such a case.
- **Members are asked to consider if they are aware of any practical reasons for such a distinction, or if they are of the view that the two sets of rules should be aligned.**

(ix) Vires

- In working on the draft instrument, it became clear to us that by placing obligations on curators (the duty to review, the duty to seek discharge from appointment etc), the rules would be taking on a fairly substantive character. For that reason, we considered it necessary to establish whether the Court of Session has the powers required to make such provision by Act of Sederunt.
- As members may be aware, the Court of Session's powers are set out in sections 103 and 104 of the Courts Reform (Scotland) Act 2014. Section 103 sets out the power to regulate procedure in the Court of Session, while section 104 makes similar provision in relation to the sheriff court and Sheriff Appeal Court. Section 104(1) states that the Court of Session may by Act of Sederunt make provision for or about the '*procedure and*

practice to be followed in civil proceedings... and *'any matter incidental or ancillary to such proceedings.'*

- Section 104(2) goes on to clarify that this power includes the power to *'make provision for or about'* a range of things. For present purposes, subparagraph (n) on that list is the most relevant. This allows the Court of Session to make rules relating to *'(n) the functions and rights of persons appointed by a sheriff or the Sheriff Appeal Court in connection with'* civil proceedings. Section 103(2)(n) makes identical provision in relation to civil proceedings in the Court of Session. The word "functions" is defined in Schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010. This states that "functions" *'includes powers and duties'*.
- Our view is therefore that while the proposed rule changes are fairly substantive in nature, the Court of Session does have the power to make them.

7. Compatibility with SCJC guiding principles

Principle	Compatibility
<i>The civil justice system should be fair, accessible and efficient</i>	The proposed changes will better ensure that the appointment of curators <i>ad litem</i> will only continue in cases where the defender is incapable of instructing a solicitor. This should have a positive impact for both curators <i>ad litem</i> and the defenders that they represent.
<i>Rules relating to practice and procedure should be as clear and easy to understand as possible</i>	It is considered that the proposed rules are clear and easy to understand.
<i>Practice and procedure should, where appropriate, be similar in all civil courts</i>	At present, as highlighted at paragraph 6(viii) above, there is a slight inconsistency in application between the Sheriff Court Rules and the Rules of the Court of Session.
<i>Methods of resolving disputes which do not</i>	Alternative dispute resolution is not relevant to

<i>involve the courts should, where appropriate, be promoted</i>	the proposal.
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Links to other initiatives

8. We are not aware of any links to other initiatives or work by other Scottish Civil Justice Council Committees or organisations.

Implementation

9. Implementation of the proposed amendments to rules of court will require discussion with SCTS as to operational issues, training requirements for operational staff and with the Judicial Institute for Scotland as to judicial training requirements. It is expected that operational impact would be minimal.

Consultation

10. There has been no public consultation in relation to this proposal.

Recommendation

11. The Committee is invited to:

- **consider the draft instrument (Paper 4.3A) and provide comments in relation to the points addressed at subparagraphs 6 (i), (iv), (v), (vi) and (viii); and,**
- **if members are content with the draft instrument, to approve it for submission to the Council for consideration and approval.**

LPPO and Scottish Civil Justice Council Secretariat

December 2016