

FAMILY LAW COMMITTEE: SCOTTISH CIVIL JUSTICE COUNCIL

CURATORS *AD LITEM* TO DEFENDERS IN FAMILY ACTIONS

Purpose

1. This is a joint paper from the Scottish Government and the Mental Welfare Commission (“the Commission”). It asks the Family Law Committee of the Scottish Civil Justice Council to consider rule changes in relation to:

- The terminology used in rules;
- Reviewing the appointment of curators *ad litem* to defenders in family actions; and
- forms on divorce and dissolution using the simplified procedure.

2. This is an **open** paper.

Background

General discussion on curators *ad litem*

3. General points have been raised previously on curators *ad litem*. For example, the Report of the Scottish Civil Courts Review discussed court appointments in family actions, including curators *ad litem*, in Chapter 5 (paragraphs 100 to 113)¹. The Faculty of Advocates suggested that the Scottish Law Commission could consider curators *ad litem* in the Commission’s ninth programme of law reform². The Scottish Government intends to consider the role of curators *ad litem* appointed to children in family cases (both public and private) as part of its Family Justice Modernisation Strategy³.

The existing legislation and rules

The primary legislation

4. This specific policy paper follows concerns raised about the appointment of curators *ad litem* to defenders in divorce actions. There is existing relevant provision in primary legislation.

5. Section 11 of the Divorce (Scotland) Act 1976 provides that “provision shall be made by act of sederunt for the purpose of securing that, where in an action for divorce the defender is suffering from mental illness, the court shall appoint a curator

¹ Volume 1 of the Report of the Scottish Civil Courts Review is at <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>

² See page 3 of this consultation response by the Faculty (under “children”): http://www.scotlawcom.gov.uk/files/4214/3160/9791/Faculty_of_Advocates.pdf The Commission did not take on work on curators *ad litem*.

³ Provisions on the appointment of curators *ad litem* in the Mental Health Tribunal, which may perhaps provide a future model for appointments in the ordinary courts, are at <http://www.legislation.gov.uk/ssi/2005/519/article/55/made>

ad litem to the defender.” Under section 4 of the 1976 Act, the provisions of section 11 also extend to actions for separation.

6. Section 117(5) of the Civil Partnership Act 2004 is on similar lines. It provides that “provision is to be made by act of sederunt for the purpose of ensuring that, where in an action for the dissolution of a civil partnership the defender is suffering from mental illness, the court appoints a curator *ad litem* to the defender”. (Although section 120 of the 2004 Act makes provision on actions of separation of civil partners, it does not appear that the primary legislation makes any provision on the appointment of curators *ad litem* to defenders in actions of separation of civil partners. In practice, actions of separation are rare).

7. The Scottish Government has noted that the primary legislation may need to be amended when a suitable legislative opportunity arises.

The rules

8. Sheriff Court Ordinary Cause Rule 33.16 (family actions) is at Annex A.

9. Sheriff Court Ordinary Cause Rule 33A.16 (civil partnership actions) is at Annex B.

10. Court of Session Rule 49.17 is at Annex C.

Points on the rules

11. There are a couple of detailed points on the rules:

- Both the Sheriff Court and the Court of Session Rules refer to “mental disorder”. The primary legislation on divorce and civil partnership refers to “mental illness”. The rules thus seem wider than the primary legislation.
- “Mental disorder” is defined in Ordinary Cause Rule 33.1(2) and in Court of Session Rule 49.1(2) by reference to section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003. “Mental disorder” is defined in section 328 as meaning any mental illness, personality disorder or learning disability.
- The Sheriff Court rules relate to family and civil partnership actions and so are wider than the primary legislation quoted above, which just relates to divorce (and separation) and dissolution. (For example, it appears that the Sheriff Court rules could apply to a defender in an action under section 11 of the Children (Scotland) Act 1995). The Court of Session Rules apply to an action of divorce, dissolution or separation but do not apply to actions for declarator of nullity.

Proposed changes to the rules

Introduction

12. The Scottish Government and the Commission propose a number of changes to the Rules, as outlined below.

Terminology

13. The Rules refer to “suffering from” a mental disorder. This is stigmatising and we suggest instead that the Rules just refer to “has” a mental disorder.

Review of the need for appointment

14. Both the Sheriff Court and the Court of Session Rules already provide that “If, at any time, it appears to the curator *ad litem* that the defender is not suffering from mental disorder, he may report that fact to the court and seek his own discharge”. However, it is not clear how the curator *ad litem* will come to this conclusion.

15. Therefore, we think that the Rules should be revised to provide some checks as to whether or not an appointment needs to continue. The test should be whether the defender has capacity to instruct representation, or act as a party litigant, regardless of whether the defender has a mental disorder. A person with a mental disorder may still be capable of instructing representation or acting as a party litigant.

16. The policy aim in is that it should be possible for the curator *ad litem* to seek discharge or be discharged at the hand of the court where it has been established that the defender has capacity to instruct representation (whether or not they have a mental disorder).

17. We suggest that, on appointment, the curator *ad litem* should satisfy himself or herself as to the capacity of the defender to instruct representation or act as a party litigant. That might sometimes require expert medical advice but in many cases, an experienced curator *ad litem* could reach their own view. If the defender has capacity, the curator *ad litem* could seek discharge or be discharged by the court.

18. Thereafter, we suggest revised Rules could provide for periodic review by the curator *ad litem* of his or her appointment. This review could perhaps take place every three months after the action has started. Within one month of the start of this review, the curator *ad litem* should either discharge him or herself or provide a note to the court justifying the continuing need for the appointment.

The role of the Commission

19. Where the application is for divorce or dissolution on the basis of one year’s non-cohabitation with consent and the defender has a mental disorder, the Commission is required by the current rules to send to the clerk of the court a report indicating whether in its opinion the defender is capable of deciding whether or not to give consent to the granting of the decree. It appears that requests for such reports are rare – the Commission haven’t been able to identify more than about three cases in the last decade.

20. The Scottish Government and the Commission fully appreciate the need to be satisfied that consent is competently given, but are not sure this is the appropriate route. In almost all cases, the Commission will have had no prior involvement with the person. As far as we are aware, there are no other situations where the

Commission provides reports to a civil or criminal court on the mental state of a participant in court proceedings. It would seem simpler and quicker for the court itself or the curator *ad litem* to obtain, where necessary, an independent medical report from a suitably qualified medical practitioner.

21. Therefore, we suggest that, when needed, the curator *ad litem* should be under an obligation to provide a report to the court.

Proposed changes to simplified divorce and dissolution forms

22. It is not clear to the Scottish Government and the Commission how the court knows that the defender has a mental disorder. In relation to divorce and dissolution through the simplified procedure, the pursuer is asked whether his or her spouse or civil partner has a mental disorder. Annex D outlines the questions asked in the various forms.

23. As Annex D shows, there is a lack of consistency in how the various forms ask the question, although the affidavit asked for by the forms does refer to “I **SWEAR** that to the best of my knowledge and belief the facts stated in Part 1 of this Application are true”.

24. The Scottish Government and the Mental Welfare Commission would suggest that all of the forms should, as some do at the moment, include the words “As far as you aware”. This reflects that:

- A pursuer who is separated from his or her spouse or civil partner may not have much knowledge of the mental capacity of the spouse or civil partner.
- In any event, the pursuer is unlikely to be able to give a definitive and authoritative view on the mental capacity of the spouse or civil partner.

25. It will take some time for changes of this nature to be considered by the Rules Rewrite Project so it seems appropriate for the Family Law Committee to consider these changes now.

26. The Committee should be aware that changes are being proposed in other areas which may have an impact on simplified divorce and dissolution forms. Separate policy papers have been or will be prepared:

- There is the on-going proposal to extend simplified divorce and dissolution to cases where there are children under 16 but no dispute about their welfare.
- Following comments from the Scottish Council of Jewish Communities, changes are proposed to the way in which the Jewish community are described in legislation on religious divorce.
- Simplified divorce and dissolution may be discontinued where the ground of divorce or dissolution is the issue of an interim Gender Recognition Certificate.

Summary and Conclusion

27. Members of the Family Law Committee are invited to:

- Agree the proposed rule change suggested at paragraph 13 on terminology in the Rules.
- Agree the proposed rule change suggested at paragraph 17 that on appointment, the curator *ad litem* should satisfy himself or herself as to the capacity of the defender to instruct representation or act as a party litigant.
- Agree the proposed rule change suggested at paragraph 18, on the curator *ad litem* regularly reviewing the need for the appointment.
- Agree the proposed rule change suggested at paragraph 21, on the curator *ad litem* obtaining any necessary medical reports rather than the Commission.
- Agree the proposed changes to simplified divorce and dissolution forms at paragraph 24 so that they all ask the pursuer whether as far as the pursuer is aware, the spouse or civil partner has a mental disorder.

Mental Welfare Commission
August 2016

Scottish Government

ANNEX A: ORDINARY CAUSE RULE 33.16**Appointment of curators ad litem to defenders (in family actions)**

- 33.16.** (1) This rule applies to a family action where it appears to the court that the defender is suffering from a mental disorder.
- (2) In an action to which this rule applies, the sheriff shall-
- (a) appoint a curator ad litem to the defender;
 - (b) where the facts set out in section 1(2)(d) of the Act of 1976 (no cohabitation for one year with consent of defender to decree) are relied on-
 - (i) make an order for intimation of the ground of the action to the Mental Welfare Commission for Scotland; and
 - (ii) include in such an order a requirement that the Commission sends to the sheriff clerk a report indicating whether in its opinion the defender is capable of deciding whether or not to give consent to the granting of decree.
- (3) Within 7 days after the appointment of a curator ad litem under paragraph (2)(a), the pursuer shall send to him-
- (a) a copy of the initial writ and any defences (including any adjustments and amendments) lodged; and
 - (b) a copy of any notice in Form G5 sent to him by the sheriff clerk.
- (4) On receipt of a report required under paragraph (2)(b)(ii), the sheriff clerk shall-
- (a) lodge the report in process; and
 - (b) intimate that this has been done to-
 - (i) the pursuer;
 - (ii) the solicitor for the defender, if known; and
 - (iii) the curator ad litem.
- (5) The curator ad litem shall lodge in process one of the writs mentioned in paragraph (6)-
- (a) within 14 days after the report required under paragraph (2)(b)(ii) has been lodged in process; or
 - (b) where no such report is required, within 21 days after the date of his appointment under paragraph (2)(a).
- (6) The writs referred to in paragraph (5) are-
- (a) a notice of intention to defend;
 - (b) defences to the action;
 - (c) a minute adopting defences already lodged; and

- (d) a minute stating that the curator ad litem does not intend to lodge defences.
- (7) Notwithstanding that he has lodged a minute stating that he does not intend to lodge defences, a curator ad litem may appear at any stage of the action to protect the interests of the defender.
- (8) If, at any time, it appears to the curator ad litem that the defender is not suffering from mental disorder, he may report that fact to the court and seek his own discharge.
- (9) The pursuer shall be responsible, in the first instance, for payment of the fees and outlays of the curator ad litem incurred during the period from his appointment until-
- (a) he lodges a minute stating that he does not intend to lodge defences;
 - (b) he decides to instruct the lodging of defences or a minute adopting defences already lodged; or
 - (c) being satisfied after investigation that the defender is not suffering from mental disorder, he is discharged.

ANNEX B: ORDINARY CAUSE RULE 33A.16**Appointment of curators *ad litem* to defenders (in civil partnership actions)**

33A.16. (1) This rule applies to a civil partnership action where it appears to the court that the defender is suffering from a mental disorder.

- (2) In an action to which this rule applies, the sheriff shall—
- (a) appoint a curator *ad litem* to the defender;
 - (b) where the facts set out in section 117(3)(c) of the Act of 2004 (no cohabitation for one year with consent of defender to decree) are relied on—
 - (i) make an order for intimation of the ground of the action to the Mental Welfare Commission for Scotland; and
 - (ii) include in such an order a requirement that the Commission sends to the sheriff clerk a report indicating whether in its opinion the defender is capable of deciding whether or not to give consent to the granting of decree.
- (3) Within 7 days after the appointment of a curator *ad litem* under paragraph (2)(a), the pursuer shall send to him—
- (a) a copy of the initial writ and any defences (including any adjustments and amendments) lodged; and
 - (b) a copy of any notice in Form G5 sent to him by the sheriff clerk.
- (4) On receipt of a report required under paragraph (2)(b)(ii), the sheriff clerk shall—
- (a) lodge the report in process; and
 - (b) intimate that this has been done to—
 - (i) the pursuer;
 - (ii) the solicitor for the defender, if known; and
 - (iii) the curator *ad litem*.
- (5) The curator *ad litem* shall lodge in process one of the writs mentioned in paragraph (6)—
- (a) within 14 days after the report required under paragraph (2)(b)(ii) has been lodged in process; or
 - (b) where no such report is required, within 21 days after the date of his appointment under paragraph (2)(a).
- (6) The writs referred to in paragraph (5) are—
- (a) a notice of intention to defend;
 - (b) defences to the action;
 - (c) a minute adopting defences already lodged; and

- (d) a minute stating that the curator *ad litem* does not intend to lodge defences.
- (7) Notwithstanding that he has lodged a minute stating that he does not intend to lodge defences, a curator *ad litem* may appear at any stage of the action to protect the interests of the defender.
- (8) If, at any time, it appears to the curator *ad litem* that the defender is not suffering from mental disorder, he may report that fact to the court and seek his own discharge.
- (9) The pursuer shall be responsible, in the first instance, for payment of the fees and outlays of the curator *ad litem* incurred during the period from his appointment until—
- (a) he lodges a minute stating that he does not intend to lodge defences;
 - (b) he decides to instruct the lodging of defences or a minute adopting defences already lodged; or
 - (c) being satisfied after investigation that the defender is not suffering from mental disorder, he is discharged.

ANNEX C: COURT OF SESSION RULE 49.17**Appointment of curators ad litem to defenders (in family actions).**

49.17.-(1) This rule applies to an action of divorce, separation, dissolution of a civil partnership, or separation of civil partners, where it appears to the court that the defender is suffering from a mental disorder.

(2) In an action to which this rule applies, the court shall, after the expiry of the period for lodging defences-

(a) appoint a curator ad litem to the defender; and

(b) where the facts set out in section 1(2)(d) of the Act of 1976 or section 117(3)(c) of the CP Act of 2004 (no cohabitation for one year with consent of defender to decree) are relied on-

(i) make an order for intimation of the ground of the action to the Mental Welfare Commission for Scotland; and

(ii) include in such an order a requirement that the Commission sends to the Deputy Principal Clerk a report indicating whether in its opinion the defender is capable of deciding whether or not to give consent to the granting of decree.

(3) Within 7 days after the appointment of a curator ad litem under paragraph (2)(a), the pursuer shall send to him a copy of the summons and any defences lodged (including any adjustments and amendments).

(4) On receipt of a report required under paragraph (2)(b)(ii), the Deputy Principal Clerk shall-

(a) cause the report to be lodged in process; and

(b) give written intimation that this has been done to-

(i) the pursuer;

(ii) the agent for the defender, if known; and

(iii) the curator ad litem

(5) The curator ad litem shall lodge in process one of the writs mentioned in paragraph (6)-

(a) within 14 days after the report required under paragraph (2)(b)(ii) has been lodged in process; or

(b) where no such report is required, within 21 days after the date of his appointment under paragraph (2)(a).

(6) The writs referred to in paragraph (5) are-

(a) defences to the action;

(b) a minute adopting defences already lodged in process; and

(c) a minute stating that the curator ad litem does not intend to lodge defences.

(7) Notwithstanding that he has lodged a minute stating that he does not intend to lodge defences, a curator ad litem may appear at any stage of the action to protect the interests of the defender.

(8) If, at any time, it appears to the curator ad litem that the defender is not suffering from mental disorder, he may report that fact to the court and seek his own discharge.

(9) The pursuer shall be responsible, in the first instance, for payment of the fees and outlays of the curator ad litem incurred during the period from his appointment until-

- (a) he lodges a minute stating that he does not intend to lodge defences;
- (b) he decides to instruct the lodging of defences or a minute adopting defences already lodged; or
- (c) being satisfied after investigation that the defender is not suffering from mental disorder, he is discharged.

ANNEX D: QUESTIONS ON MENTAL DISABILITY IN THE SIMPLIFIED DIVORCE AND DISSOLUTION FORMS

The Sheriff Court forms are at: <https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/simplified-divorce-and-simplified-dissolution-of-civil-partnership-forms>

[There also appear to be duplicate sheriff court forms in the F and CP series].

The Court of Session forms are at: <https://www.scotcourts.gov.uk/rules-and-practice/forms/court-of-session-forms> (The forms are under the heading of “Family Actions”)

In practice, the forms that will be used most often are SPA and SPB (divorce in the sheriff court using the simplified procedure on the basis of either separation of one year or separation of two years).

Form no	Basis	Form asks on mental disorder
<i>Sheriff Court – divorce</i>		
SPA	1 year separation, with consent of other party	8. MENTAL DISORDER Does your spouse have any mental disorder? (whether mental illness, personality disorder or learning disability). <i>(Tick box which applies)</i> (If yes, give details).
SPB	2 years separation	9. MENTAL DISORDER Does your spouse have a mental disorder? (whether mental illness, personality disorder or learning disability). <i>(Tick box which applies)</i> (If yes, give details below).
SPC	Interim Gender Recognition Certificate	8. MENTAL DISORDER Does your spouse have a mental disorder? (whether mental illness, personality disorder or learning disability). <i>(Tick box which applies)</i> (If yes, give details below).
<i>Sheriff Court – dissolution</i>		
SPD	1 year separation, with consent of other party	8. MENTAL DISORDER Does your civil partner have a mental disorder? (whether mental illness, personality disorder or learning disability). <i>(Tick box which applies)</i> (If yes, give details below).
SPE	2 years separation.	9. MENTAL DISORDER

		Does your civil partner have a mental disorder? (whether mental illness, personality disorder or learning disability). <i>(Tick box which applies)</i> (If yes, give details below).
SPF	Interim Gender Recognition Certificate	8. MENTAL DISORDER Does your civil partner have a mental disorder? (whether mental illness, personality disorder or learning disability). <i>(Tick box which applies)</i> (If yes, give details below).
<i>Court of Session – divorce</i>		
49.73 - A	1 year separation, with consent of other party	8. MENTAL DISABILITY Is your spouse incapable of managing his/her affairs because of a mental disorder? (whether mental illness, personality disorder or learning disability). <i>(Tick box which applies)</i> (If yes, give details).
49.73 - B	2 years separation	9. MENTAL DISABILITY As far as you are aware is your spouse incapable of managing his/her affairs because of a mental disorder? (whether mental illness, personality disorder or learning disability). <i>(Tick box which applies)</i> (If yes, give details below).
49.73 - C	Interim Gender Recognition Certificate	8. MENTAL DISABILITY As far as you are aware is your spouse incapable of managing his/her affairs because of a mental disorder (whether mental illness, personality disorder or learning disability). <i>(Tick box which applies)</i> (If yes, give details below).
<i>Court of Session – dissolution</i>		
49.80B - A	1 year separation, with consent of other party	8. MENTAL DISABILITY Is your civil partner incapable of managing his/her affairs because of a mental disorder? (whether mental illness, personality disorder or learning disability). <i>(Tick box which applies)</i> (If yes, give details).
49.80B - B	2 years separation	9. MENTAL DISABILITY As far as you aware is your civil partner incapable of managing his/her affairs because of a mental disorder? (whether mental illness, personality disorder or learning

		<p>disability). <i>(Tick box which applies)</i></p> <p><i>(If yes, give details below).</i></p>
49.80B - C	Interim Gender Recognition Certificate	<p>8. MENTAL DISABILITY</p> <p>As far as you aware, is your civil partner incapable of managing his/her affairs because of a mental disorder? (whether mental illness, personality disorder or learning disability). <i>(Tick box which applies)</i></p> <p><i>(If yes, give details below).</i></p>

Mental Welfare Commission
August 2016

Scottish Government