

2017 No. 132

COURT OF SESSION

SHERIFF COURT

**Act of Sederunt (Rules of the Court of Session 1994 and Sheriff
Court Rules Amendment) (Curators ad litem) 2017**

<i>Made</i> - - - -	<i>26th April 2017</i>
<i>Laid before the Scottish Parliament</i>	<i>28th April 2017</i>
<i>Coming into force</i> - -	<i>1st June 2017</i>

In accordance with section 4 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013(a), the Court of Session has approved draft rules submitted to it by the Scottish Civil Justice Council with such modifications as it thinks appropriate.

The Court of Session therefore makes this Act of Sederunt under the powers conferred by sections 103(1) and 104(1) of the Courts Reform (Scotland) Act 2014(b) and all other powers enabling it to do so.

Citation and commencement, etc.

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (Curators ad litem) 2017.

(2) It comes into force on 1st June 2017.

(3) A certified copy is to be inserted in the Books of Sederunt.

Amendment of the Ordinary Cause Rules 1993

2.—(1) The Ordinary Cause Rules 1993(c) are amended in accordance with this paragraph.

(2) In rule 33.1(2) (interpretation of Chapter 33)(d), after the definition of “Gender Recognition Panel”, insert—

““incapable” means incapable, by reason of mental disorder, of—

(a) acting;

(b) making decisions;

(a) 2013 asp 3. Section 4 was amended by the Courts Reform (Scotland) Act 2014 (asp 18), schedule 5, paragraph 31(3) and the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (asp 2), schedule 1, paragraph 1(4).

(b) 2014 asp 18.

(c) The Ordinary Cause Rules 1993 are in schedule 1 of the Sheriff Courts (Scotland) Act 1907 (c.51). Schedule 1 was substituted by S.I. 1993/1956 and was last amended by S.S.I. 2017/130.

(d) Rule 33.1(2) was last amended by S.S.I. 2006/207.

- (c) communicating decisions;
- (d) understanding decisions; or
- (e) retaining the memory of decisions,

but a person is not incapable by reason only of a lack of deficiency in a faculty of communication where that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise);”.

(3) In rule 33.16 (appointment of curators *ad litem* to defenders)(a)—

- (a) in paragraph (1), for “is suffering from”, substitute “has”;
- (b) in paragraph (2)—
 - (i) after “shall”, insert “, after the expiry of the period for lodging a notice of intention to defend”; and
 - (ii) for subparagraph (b), substitute—
 - “(b) make an order requiring the curator *ad litem* to lodge in process a report, based on medical evidence, stating whether or not, in the opinion of a suitably qualified medical practitioner, the defender is incapable of instructing a solicitor to represent the defender’s interests.”;
- (c) for paragraph (4), substitute—
 - “(4) On lodging a report under paragraph (2)(b), the curator *ad litem* must intimate that this has been done to—
 - (a) the pursuer; and
 - (b) the solicitor for the defender, if known.”;
- (d) for paragraph (5), substitute—
 - “(5) Within 14 days after the report required under paragraph (2)(b) has been lodged, the curator *ad litem* must lodge in process one of the writs mentioned in paragraph (6).”;
- (e) for paragraph (8), substitute—
 - “(8) At such intervals as the curator *ad litem* considers reasonable having regard to the nature of the defender’s mental disorder, the curator *ad litem* must review whether there appears to have been any change in the defender’s capacity to instruct a solicitor, in order to ascertain whether it is appropriate for the appointment to continue.
 - (8A) If it appears to the curator *ad litem* that the defender may no longer be incapable, the curator *ad litem* must by motion seek the sheriff’s permission to obtain an opinion on the matter from a suitably qualified medical practitioner.
 - (8B) If the motion under paragraph (8A) is granted, the curator *ad litem* must lodge in process a copy of the opinion as soon as possible.
 - (8C) Where the opinion concludes that the defender is not incapable of instructing a solicitor, the curator *ad litem* must seek discharge from appointment by minute.”; and
- (f) in paragraph (9)(c), for “is not suffering from mental disorder”, substitute “is not incapable of instructing a solicitor”.

(4) In rule 33A.1(2) (interpretation of Chapter 33A)(b), after the definition of “Gender Recognition Panel”, insert—

““incapable” means incapable, by reason of mental disorder, of—

- (a) acting;
- (b) making decisions;
- (c) communicating decisions;
- (d) understanding decisions; or

(a) Rule 33.16 was last amended by S.S.I. 2012/188.

(b) Chapter 33A was inserted by S.S.I. 2005/638. Rule 33A.1 was last amended by S.S.I. 2006/207.

- (e) retaining the memory of decisions,
but a person is not incapable by reason only of a lack of deficiency in a faculty of communication where that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise);”
- (5) In rule 33A.16 (appointment of curators *ad litem* to defenders)(a)—
- (a) in paragraph (1), for “is suffering from”, substitute “has”;
 - (b) in paragraph (2)—
 - (i) after “shall”, insert “, after the expiry of the period for lodging a notice of intention to defend”; and
 - (ii) for subparagraph (b), substitute—
 - “(b) make an order requiring the curator *ad litem* to lodge in process a report, based on medical evidence, stating whether or not, in the opinion of a suitably qualified medical practitioner, the defender is incapable of instructing a solicitor to represent the defender’s interests.”;
 - (c) for paragraph (4), substitute—
 - “(4) On lodging a report under paragraph (2)(b), the curator *ad litem* must intimate that this has been done to—
 - (a) the pursuer; and
 - (b) the solicitor for the defender, if known.”;
 - (d) for paragraph (5), substitute—
 - “(5) Within 14 days after the report required under paragraph (2)(b) has been lodged, the curator *ad litem* must lodge in process one of the writs mentioned in paragraph (6).”;
 - (e) for paragraph (8), substitute—
 - “(8) At such intervals as the curator *ad litem* considers reasonable having regard to the nature of the defender’s mental disorder, the curator *ad litem* must review the defender’s capacity to instruct a solicitor, in order to ascertain whether it is appropriate for the appointment to continue.
 - (8A) If it appears to the curator *ad litem* that the defender may no longer be incapable, the curator *ad litem* must by motion seek the sheriff’s permission to obtain an opinion on the matter from a suitably qualified medical practitioner.
 - (8B) If the motion under paragraph (8A) is granted, the curator *ad litem* must lodge in process a copy of the opinion as soon as possible.
 - (8C) Where the opinion concludes that the defender is not incapable of instructing a solicitor, the curator *ad litem* must seek discharge from appointment by minute.”; and
 - (f) in paragraph (9)(c), for “is not suffering from mental disorder”, substitute “is not incapable of instructing a solicitor”.
- (6) In Appendix 1(forms)—
- (a) in Form F31 (form of simplified divorce application under section 1(2)(d) of the Divorce (Scotland) Act 1976)(b), in question 8 of Part 1, for “Does”, substitute “As far as you are aware, does”;
 - (b) in Form F33 (form of simplified divorce application under section 1(2)(e) of the Divorce (Scotland) Act 1976)(c), in question 9 of Part 1, for “Does”, substitute “As far as you are aware, does”;

(a) Rule 33A.16 was last amended by S.S.I. 2012/188.
 (b) Form F31 was last amended by S.S.I. 2014/302.
 (c) Form F33 was last amended by S.S.I. 2014/302.

- (c) in Form F33A (form of simplified divorce application under section 1(1)(b) of the Divorce (Scotland) Act 1976)(a), in question 8 of Part 1, for “Does”, substitute “As far as you are aware, does”;
- (d) in Form CP29 (form of simplified dissolution of civil partnership application under section 117(3)(c) of the Civil Partnership Act 2004)(b), in question 8 of Part 1, for “Does”, substitute “As far as you are aware, does”;
- (e) in Form CP30 (form of simplified dissolution of civil partnership application under section 117(3)(d) of the Civil Partnership Act 2004)(c), in question 9 of Part 1, for “Does”, substitute “As far as you are aware, does”; and
- (f) in Form CP31 (form of simplified dissolution of a civil partnership application on grounds under section 117(2)(b) of the Civil Partnership Act 2004)(d), in question 8 of Part 1, for “Does”, substitute “As far as you are aware, does”.

Amendment of the Rules of the Court of Session 1994

3.—(1) The Rules of the Court of Session 1994(e) are amended in accordance with this paragraph.

(2) In rule 49.1(2) (interpretation of Chapter 49)(f), after the definition of “Gender Recognition Panel”, insert—

““incapable” means incapable, by reason of mental disorder, of—

- (a) acting;
- (b) making decisions;
- (c) communicating decisions;
- (d) understanding decisions; or
- (e) retaining the memory of decisions,

but a person is not incapable by reason only of a lack of deficiency in a faculty of communication where that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise);”.

(3) In rule 49.17 (appointment of curators *ad litem* to defenders)(g)—

(a) in paragraph (1)—

- (i) for “an action of divorce, separation, dissolution of a civil partnership, or separation of civil partners”, substitute “a family action”; and
- (ii) for “is suffering from”, substitute “has”;

(b) for paragraph (2)(b), substitute—

“(b) make an order requiring the curator *ad litem* to lodge in process a report, based on medical evidence, stating whether or not, in the opinion of a suitably qualified medical practitioner, the defender is incapable of instructing a solicitor to represent the defender’s interests.”;

(c) for paragraph (4), substitute—

“(4) On lodging a report under paragraph (2)(b), the curator *ad litem* must intimate that this has been done to—

- (a) the pursuer; and

(a) Form F33A was inserted by S.S.I. 2006/207 and was last amended by S.S.I. 2014/302.

(b) Form CP29 was inserted by S.S.I. 2005/638 and was last amended by S.S.I. 2006/207.

(c) Form CP30 was inserted by S.S.I. 2005/638 and was last amended by S.S.I. 2006/207.

(d) Form CP31 was inserted by S.S.I. 2005/638 and was last amended by S.S.I. 2006/207.

(e) The Rules of the Court of Session 1994 are in schedule 2 of the Act of Sederunt (Rules of the Court of Session 1994) 1994 (S.I. 1994/1443, last amended by S.S.I. 2017/131).

(f) Rule 49.1(2) was last amended by S.S.I. 2014/302.

(g) Rule 49.17 was last amended by S.S.I. 2006/206.

- (b) the solicitor for the defender, if known.”;
- (d) for paragraph (5), substitute—
 - “(5) Within 14 days after the report required under paragraph (2)(b) has been lodged, the curator *ad litem* must lodge in process one of the writs mentioned in paragraph (6).”;
- (e) for paragraph (8), substitute—
 - “(8) At such intervals as the curator *ad litem* considers reasonable having regard to the nature of the defender’s mental disorder, the curator *ad litem* must review the defender’s capacity to instruct a solicitor, in order to ascertain whether it is appropriate for the appointment to continue.
 - (8A) If it appears to the curator *ad litem* that the defender may no longer be incapable, the curator *ad litem* must by motion seek the court’s permission to obtain an opinion on the matter from a suitably qualified medical practitioner.
 - (8B) If the motion under paragraph (8A) is granted, the curator *ad litem* must lodge in process a copy of the opinion as soon as possible.
 - (8C) Where the opinion concludes that the defender is not incapable of instructing a solicitor, the curator *ad litem* must seek discharge from appointment by minute.”; and
- (f) in paragraph (9)(c), for “is not suffering from mental disorder”, substitute “is not incapable of instructing a solicitor”.
- (4) In the Appendix (forms)—
 - (a) in Form 49.73-A (form of simplified divorce application under section 1(2)(d) of the Divorce (Scotland) Act 1976)(a), in question 8 of Part 1—
 - (i) for “MENTAL DISABILITY”, substitute “MENTAL DISORDER”; and
 - (ii) for “Is your spouse incapable of managing his/her affairs because of a mental disorder”, substitute “As far as you are aware, does your spouse have any mental disorder”;
 - (b) in Form 49.73-B (form of simplified divorce application under section 1(2)(e) of the Divorce (Scotland) Act 1976)(b), in question 9 of Part 1—
 - (i) for “MENTAL DISABILITY”, substitute “MENTAL DISORDER”; and
 - (ii) for “is your spouse incapable of managing his/her affairs because of a mental disorder”, substitute “does your spouse have any mental disorder”;
 - (c) in Form 49.73-C (form of simplified divorce application under section 1(1)(b) of the Divorce (Scotland) Act 1976)(c), in question 8 of Part 1—
 - (i) for “MENTAL DISABILITY”, substitute “MENTAL DISORDER”; and
 - (ii) for “is your spouse incapable of managing his/her affairs because of a mental disorder”, substitute “does your spouse have any mental disorder”;
 - (d) in Form 49.80B-A (form of simplified dissolution of civil partnership application under section 117(3)(c) of the Civil Partnership Act 2004)(d), in question 8 of Part 1—
 - (i) for “MENTAL DISABILITY”, substitute “MENTAL DISORDER”; and
 - (ii) for “Is your civil partner incapable of managing his/her affairs because of a mental disorder”, substitute “As far as you are aware, does your civil partner have any mental disorder”;
 - (e) in Form 49.80B-B (form of simplified dissolution of civil partnership application under section 117(3)(d) of the Civil Partnership Act 2004)(e), in question 9 of Part 1—
 - (i) for “MENTAL DISABILITY”, substitute “MENTAL DISORDER”; and

(a) Form 49.73-A was last amended by S.S.I. 2014/302.

(b) Form 49.73-B was last amended by S.S.I. 2014/302.

(c) Form 49.73-C was last amended by S.S.I. 2014/302.

(d) Form 49.80B-A was inserted by S.S.I. 2005/632 and was last amended by S.S.I. 2006/206.

(e) Form 49.80B-B was inserted by S.S.I. 2005/632 and was last amended by S.S.I. 2007/7.

- (ii) for “is your civil partner incapable of managing his/her affairs because of a mental disorder”, substitute “does your civil partner have any mental disorder”; and
- (f) in Form 49.80B-C (form of simplified dissolution of civil partnership application under section 117(2)(b) of the Civil Partnership Act 2004)(a), in question 8 of Part 1—
 - (i) for “MENTAL DISABILITY”, substitute “MENTAL DISORDER”; and
 - (ii) for “is your civil partner incapable of managing his/her affairs because of a mental disorder”, substitute “does your civil partner have any mental disorder”.

Saving

4. The amendments made by this Act of Sederunt do not apply to a curator *ad litem* appointed before 1st June 2017.

CJM SUTHERLAND
Lord President
I.P.D.

Edinburgh
26th April 2017

(a) Form 49.80B-C was inserted by S.S.I. 2005/632 and was last amended by S.S.I. 2007/7.

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt amends the rules that apply to the appointment of curators *ad litem* to defenders in certain family actions. Paragraph 2 amends Chapters 33 and 33A of the Ordinary Cause Rules 1993. Paragraph 3 amends Chapter 49 of the Rules of the Court of Session 1994.

On appointment, the curator *ad litem* will be ordered to lodge in process a report, based on medical evidence, stating whether or not the defender is incapable of instructing a solicitor. A definition of “incapable” is inserted into the rules for this purpose.

This Act of Sederunt also places an obligation on the curator *ad litem* to periodically review whether there has been any change in the defender’s capacity, and to seek discharge from appointment where the defender is no longer incapable.

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