



INFORMATION
FOR
FAMILIES OF PERSONS
SUBJECT TO
CURATORY

THE ACCOUNTANT OF COURT

FOREWORD

The Accountant of Court is an officer of the Court of Session among whose functions is the responsibility for supervising the actions of Curators bonis and other judicial factors appointed by the Scottish Courts.

This booklet has been prepared by The Accountant for the information of relatives of persons to whom a Curator bonis has been appointed. The booklet attempts to answer the most common questions regarding the nature of the Curator and the duties of the Curator, it is not a detailed statement of law nor is it intended to be comprehensive.

Further information may be obtained from the Curator or from the Accountant (see also Chapter 6).

Contents

1. Introduction - General Information about Curatories
2. The Curator - Duties and Obligations
3. The Family and the Ward
4. The Ward's House
5. Wills and Bequests
6. The Ward's Dependants
7. Problems and Enquiries

Chapter 1

1.1 What is a Curator bonis?

A Curator bonis is a person appointed by the Court to manage the financial affairs of another person who in the opinion of the Court is unable to manage those affairs for himself or herself, or to give adequate directions to others for their management. Such incapacity may result from mental illness, mental defectiveness, brain damage or severe physical handicap. Curators may also be appointed in certain circumstances to children and young persons under the age of majority (16) and to missing persons. A person to whom a Curator bonis is appointed is referred to as a **Ward**.

1.2 What are the legal requirements on a Curator bonis?

A Curator bonis is appointed by the Court and is ultimately responsible to the Court for his actions in relation to the Ward's estate. His powers and responsibilities are governed principally by the Judicial Factors Acts of 1849, 1880 and 1889. A Curator bonis is also a trustee for the purposes of the Trusts (Scotland) Act 1921 and 1961. In the exercise of his functions the Curator bonis is accountable to and subject to the supervision of the Accountant of Court.

1.3 Who can be appointed as a Curator bonis?

The legal and accounting requirements placed on a Curator bonis are quite complex and demanding and the court therefore normally prefers to appoint a professional person, ie., a solicitor or accountant. Sometimes, however, the court will appoint a non-professional person, usually a close relation of the Ward, if satisfied that such a person is capable of properly performing all the required duties, possibly with some professional assistance.

1.4 Is the appointment of a Curator bonis always necessary when a person is incapable of managing their own affairs?

If the person's assets are very small, eg., pension and/or Social Security benefits only and if there is someone suitable to administer those assets on behalf of the person, it is not necessary to have a Curator bonis appointed. If the person is in a long stay hospital the hospital authorities are allowed to hold and administer up to £10,000 on behalf of a patient, provided the authority obtains the consent of the Mental Welfare Commission for Scotland.

1.5 When is the appointment of a Curator bonis necessary?

- (i) Where a person receives a substantial award of damages whether as a result of Court action or following a claim on the Criminal Injuries Compensations Board and that person suffers from mental incapacity, either pre-existing or as a result of the accident or injury.
- (ii) Where the recipient is a child under 16, the court or the board may insist on a Curator bonis being appointed to manage the award on behalf of the child until he or she reaches the age of majority (age 18).
- (iii) If funds are held by a Bank or Building Society or in Investments or are held by an Executor to an estate in which the mentally incapacitated person has an interest, any of these authorities may quite properly refuse to release the funds in their charge except to a Curator bonis. Also where a signature to a legal document is required, eg., if a house has to be sold, again the only person legally able to sign is a Curator bonis. Since no-one, except a hospital authority in certain circumstances, is legally entitled to handle the money or assets of a mentally incapacitated person, if these assets are substantial it is desirable to have a Curator appointed.

1.6 Is there an alternative to the appointment of a Curator bonis?

No. If there are funds to be managed and the circumstances described at 1.4 above do not apply then the appointment of a Curator bonis is essential, unless the incapax has appointed an Attorney. An Attorney is a person appointed by another (the granter) under a Contract of Mandate or agency to deal with some or all aspects of the granter's property and financial affairs. The powers conferred are usually very wide especially where the purpose of the contract is to enable the Attorney to manage the granter's property and financial affairs after the latter's incapacity. Any Power of Attorney granted since 31 December 1990 continues to be effective after the granter's incapacity unless the contract contains provisions to the contrary.

1.7 Are Curators bonis only appointed to mentally incapacitated persons?

While this is the most common reason, a Curator may also be appointed to a child under the age of 18 or to manage the financial affairs of a missing person. A Curator may also be appointed to a person who while mentally sound is so physically disabled as to be incapable of managing or directing the management of their own affairs.

1.8 How Long does a Curatory last?

If the Ward is a child the Curatory will come to an end when the child reaches the age of 16. In the case of a mentally incapacitated person the Curatory will remain in force until the Ward either recovers or dies.

1.9 Can the Curatory be recalled?

If it is considered that the Ward has recovered sufficiently to be able to manage his or her own affairs, an application for recall and discharge can be made to the Accountant, said application being supported by the appropriate medical certificate. Alternatively, an application may be made to the Court asking for the Curatory to be recalled.

1.10 Change of Curator

A new appointment must be effected if the Curator dies or wishes to resign due to retirement, ill-health etc. Normally the Curator's law agents, or his own firm if he is a solicitor himself, will attend to this but failing this the Accountant of Court will take the necessary action upon being advised that the Curator has ceased to act for whatever reason.

Chapter 2

DUTIES AND OBLIGATIONS

2.1 What are the duties of a Curator bonis?

The Curator must collect all monies due to the Ward in bank accounts, investments, pensions, awards etc. He must also claim any benefits or allowances to which the Ward may be entitled. After taking account of day to day cash requirements the Curator must then invest the remainder of the money as permitted by the Trustee Investments Act 1961. This Act is designed to limit the investment power of Curators to 'safe' investments and to protect the Ward's estate from unwise or speculative investment.

The Curator must provide money for the support and comfort of the Ward and if necessary of his or her dependants. See also Chapter 6.

2.2 What are the accounting requirements?

The Curator must present for audit by the Accountant of Court, a detailed annual account of his transactions with the Ward's estate, showing all income, payments, investment transactions etc. He must also provide documentary evidence to support the entries in his accounts. Initially, those caring for the Ward should carefully note all expenditure, so that a fixed maintenance allowance for essential items such as heating, clothing, transport, help in the home etc., can be agreed with the Curator. Apart from this agreed regular expenditure, it is important that receipts are obtained for all other purchases and expenses, as the Curator will have to submit these with his accounts. Where a fixed maintenance allowance and/or pocket money is provided it is not necessary to account in detail for the expenditure but the Curator may require a receipt and acknowledgment that the money has been received and used for the benefit of the ward.

2.3 Who is the Curator bonis responsible to?

The Curator bonis is ultimately responsible to the Court for the proper management of funds and assets in his charge but he is supervised by the Accountant of Court and must account for his actions or for his management of the funds either to the Ward or the Ward's family and is not entitled to act on their instructions, although he may take their views into account. See also Chapter 3.5.

2.4 Does the Curator get paid?

Yes he does. When the Curator presents his annual account for audit by the Accountant of Court, the Accountant decides how much the Curator should be paid out of the estate for his work in managing the Ward's funds. This is called 'Commission'. When the Curator is a relation of the Ward he or she may of course provide their services free of charge. A Curator who elects not to receive commission will of course be entitled to reclaim any actual expenses out of the Ward's estate.

2.5 Are there any other costs charged to the Ward's estate?

The Accountant of Court is obliged to charge an annual audit fee and there may be other costs if for example special powers are required. In addition there are Court and legal costs for actually making the appointment, for discharging it and if a change of Curator is required for any reason.

2.6 Does the Curator have any responsibility for the Ward's person?

- (i) No, he is responsible only for the Ward's financial affairs. However, the Curator will seek to administer these affairs in a humane way, consistent with obtaining the best quality of life for the Ward and with the duty to manage and conserve the Ward's funds so that they may be able to support the Ward for the rest of his or her life. Since most Curators are lawyers or accountants, not doctors, their attention may need to be drawn to special medical need, for example:
 - (a) In cases of incontinence, a good washing machine and additional bedding and clothing.
 - (b) In cases of poor mobility and dependence, housing adaptations and special transport.
 - (c) In many cases, extra help in the house or 'evening sitters' where the Ward cannot be left unattended.
 - (d) In most cases, additional heating.

- (ii) These examples are not conclusive and serve only as a guide to the type of expenditure which might be approved; situations vary and families should be aware that the Curator will require to obtain the approval of the Accountant of Court for all extraordinary expenditure.
- (iii) Those with responsibility for looking after the Ward should discuss with the Curator all matters involving the costs of maintenance so that agreement on expenditure on behalf of the Ward can be obtained. Apart from agreed regular expenditure, see Chapter 3.1, no decisions affecting the costs of the Ward's maintenance should be taken without the Curator's agreement or he may quite properly refuse to meet any extra costs involved.
- (iv) For their part Curators are encouraged to provide reasonable information regarding the funds available to those responsible for the care of the Ward, ie., family or the Hospital or Nursing Home authorities, as the case may be, so that sensible decisions can be made regarding levels of expenditure and to ensure that the Ward derives the maximum benefit from these funds.

Chapter 3

THE FAMILY AND THE WARD

3.1 How is money provided for the care of the Ward?

- (i) This depends on circumstances. If the Ward is in hospital the Curator may agree an appropriate amount for pocket money etc., to be paid to the hospital authorities on a regular basis etc., monthly or quarterly. If the Ward is in a Nursing Home or other Institution the Curator must meet any charges payable for accommodation and provide extra sums as appropriate for pocket money, extra comforts etc.
- (ii) When the Ward lives at home in the care of relations the Curator will pay a regular allowance to meet the costs of maintenance to the parent or other relation responsible for the care of the Ward. This allowance may include an element for the support of a dependent husband, wife or children where such support is necessary. See also Chapter 6.
- (iii) In a few cases Wards are capable of living on their own in the community or in sheltered accommodation. In such cases the Curator will make appropriate arrangements to pay charges, meet household accounts etc., and provide an allowance for food and other necessities according to need.

3.2 What about extra expenses?

Provided there are sufficient funds available and subject to the proper approval of the Accountant of Court, the Curator may also purchase or allow funds for the purchase of carpets, furniture, decoration, household appliances etc. He may also meet or contribute towards the cost of transport for the Ward, holidays, outings, etc. Before allowing any expenditure of this nature the Curator must be satisfied that it will be beneficial to the Ward or necessary for the comfort and well being of the Ward.

3.3 Can the Curator authorise gifts or donations on behalf of the Ward?

In general no. It may be possible, however, with the Accountant's approval, to authorise a gift on behalf of the Ward to mark a special occasion eg., the marriage of a child or brother or sister of the Ward. In general the Ward's estate is available only for the benefit of the Ward and to meet his or her legal obligations.

3.4 What happens if the Ward's income is insufficient to meet the cost of maintenance?

This usually happens when the Ward is in a private Nursing Home or similar Institution and the income from pensions, allowances, investments etc., after deduction of administrative expenses are insufficient to meet the accommodation charge. As a general rule the Curator has no power to encroach upon the Ward's capital or savings and can only spend the income as necessary. Encroachment on capital requires the approval of the Accountant in all cases and in most cases the special authority of the Court is necessary.

3.5 What rights does the Ward or the family have?

The family has no rights in relation to the management of the Ward's financial affairs while the Curator remains in being. However, while the Ward and the family have no legal rights, any complaints regarding the actions of the Curator *bonis* may be addressed to the Accountant of Court who will investigate such complaints and take action if necessary. It should be noted, however, that the duties of the Curator and the powers of the Accountant only relate to matters of financial management. When the Curator comes to an end the Curator may apply to the Court for a judicial discharge which frees him from all further obligation. At that time all those persons with an interest in the Ward's estate will be given notice of the application for discharge and may then object to the discharge and raise any questions regarding the Curator's actions and management of the estate.

3.6 Can the family receive information regarding the state of the Ward's funds?

The Curator will normally be willing to accede to reasonable requests for information but he is under no obligations to do so. In case of difficulty the Accountant of Court may be able to assist. See also Chapter 2.6(iv).

Chapter 4

THE WARD'S HOUSE

4.1 Can the Curator sell the Ward's house?

If the Ward no longer needs the house and there is no prospect of him or her returning to live there, the house will normally have to be sold to avoid the expense of maintaining it and the risk of deterioration and damage if it remains unoccupied. In all cases the Accountant's approval is required and in most cases the prior approval of the Court must be obtained. Except when the sale is a matter of absolute necessity eg., because urgent repairs are necessary and there are no funds to meet the costs of such repairs, or where the Ward has substantial debts, the family will be advised of the intention to sell and will have the opportunity to object.

4.2 What if members of the family are still living in the house?

If the Ward's husband or wife or elderly parents are still living in the house they may continue to do so. If other, non-dependant, members of the family occupy the house it may be necessary for them to pay a fair rent in respect of their occupation but each case will be treated on its merits.

4.3 Can the Curator buy a house for the Ward and for his or her dependants?

Yes, but the Accountant's approval is required in all cases and in some cases the prior approval of the Court must be obtained. The Court or the Accountant as appropriate must be satisfied that the purchase is necessary; that the house is suitable and not excessive to requirements and that the price to be paid is reasonable in relation to the funds available. If the house is purchased with Curatory funds then the title to the property will have to be in the Ward's name ie., the house will form part of the Curatory estate. In the event that the Ward subsequently has to be hospitalised, paragraph 4.2 above will apply.

4.4 What if the Ward's house is subject to specific bequest and is sold?

While the law in this area is not entirely straightforward, the general rule is that if a house which is subject to specific bequest is sold then the beneficiary will, upon the Ward's death, receive instead the net proceeds of sale (ie., the price received less the legal and other expenses of sale as at the date of sale, ie., the proceeds do not attract interest). If, however, the sale of the house is necessary to provide funds for the Ward's maintenance then the bequest will fall and the remaining proceeds (if any) will be added to the Ward's moveable estate and be distributed accordingly.

4.5 What happens to the contents of the Ward's house?

When the house has to be sold or tenancy given up, the contents, except for any items for which the Ward has a future use, are usually sold. In exceptional circumstances, items of particular value, family heirlooms etc., may be placed in secure storage. If the Ward has made a Will bequeathing specific items the Curator may, with the Accountant's approval, allow the beneficiaries to take possession of such items provided they sign an undertaking to the effect that they hold the articles on trust and will produce or account for them to the Ward if he or she recovers or to the executor appointed to deal with the estate after the Ward's death. In other cases it may be possible to allow members of the family to purchase items of family interest at the valuation price.

Chapter 5

WILLS AND BEQUESTS

5.1 What is the effect of the Curatory upon the Ward's Will?

On the Ward's death the estate will be handed over to his or her executors to distribute in accordance with the terms of the Will. The existence of the Curatory of itself does not affect the Will but of course any changes to the Ward's estate which the Curator is obliged to make may do so; for example, specific items bequeathed in terms of the Will might have to be sold to provide funds for the Ward's maintenance and it will be impossible in these circumstances to give effect to the bequest. So far as possible the Curator will do his best to avoid frustrating the Ward's expressed wishes if the contents of the Will are made known to him.

5.2 What happens to the Ward's estate if he or she has not made a Will?

On the Ward's death an executor will be appointed by the Court and will distribute the estate accordingly to the laws of intestacy.

5.3 Can the Ward make a Will

Any Will made by a Ward, or any amendment to an existing one, would obviously be open to challenge by any interested person who is disadvantaged by it and the existence of a Curatory when a Will was made or altered might pre-suppose that such a Will would be found invalid, although this is not necessarily the case. To avoid unnecessary expense and later difficulty, it is essential to consult the Curator and probably to obtain medical and legal advice as to the Ward's capacity if the Ward wishes to make or alter a Will. Under no circumstances can a Curator or any solicitor accept instructions from someone other than the Ward to make or alter a Will for the Ward. (It should be noted that the provisions of the Mental Health Act 1983.S96 concerning the making of statutory Wills on behalf of mentally incapacitated persons in England/Wales do not apply to Scotland).

Chapter 6

THE WARD'S DEPENDANTS

6.1 Is the Curator obliged to support the Ward's family?

An adult Ward has a legal obligation to maintain his or her dependants, ie., husband or wife and children under 18 (or under 25 if still in full-time education). The extent of this obligation depends on the means and the needs of the Ward and of the dependants.

The Curator's first duty is first and foremost to the Ward but of course if the Ward has the means and his or her dependants are in need of financial support then the Curator is obliged to provide it.

6.2 How is such support provided?

This depends on the circumstances of each case and support may be provided by allowing the dependants to live in the Ward's house rent-free, a periodic allowance may be paid and/or assistance given towards specific purchases etc.

6.3 How is the amount of assistance decided?

Sometimes it is necessary for the dependants or their representatives to raise a Court action to determine a fixed maintenance allowance or to vary an existing allowance. In most cases, however, it is possible to agree a suitable amount and form of family support without the need for Court action. All payments and allowances for family support require to be approved by the Accountant of Court.

6.4 Assistance with travelling expenses

Where the Ward is in a hospital or Nursing Home the Curator may be able to assist with the travelling expenses incurred in visiting the Ward provided the Curator is satisfied that such visits are beneficial to and appreciated by the Ward and that such assistance is necessary.

6.5 Can other members of the family benefit from the Ward's estate?

No. The estate is only available for the benefit of the Ward and as necessary for the support of his or her dependants. It is, however, recognised that there may be an incidental benefit to others in some circumstances, for example where the Ward's funds are used to purchase a house which is also lived in by other non-dependant members of the family or where a car is purchased which is not exclusively used for transporting the Ward. This is not usually a problem provided it can be demonstrated that the Ward is the principal beneficiary of the expenditure but in some circumstances the Curator may look for a contribution towards the purchase price or running costs where this seems reasonable.

Chapter 7

PROBLEMS AND ENQUIRIES

7.1 Meetings with the Accountant

Most problems with the Curatory should be resolved directly with the Curator, However, the Accountant and his staff are pleased to meet with the parents or families of Wards by prior arrangement to discuss any problems concerning the Curatory.

7.2 Correspondence and Enquiries

Correspondence should be addressed to:

The Accountant of Court
Supreme Courts
2 Parliament Square
Edinburgh EH3 1RQ

Telephone: 0131 225 2595

and should always quote the Ward's full name and the name of the Curator and the Accountant's reference number, if known.