

(B829/10)

**JUDGMENT OF
SHERIFF PRINCIPAL EDWARD F BOWEN QC**

**in the appeal
in the cause**

GORDON HENDERSON

against

**MENTAL HEALTH TRIBUNAL & GRANT
PAGAN**

Act: Henderson, Solicitor (Curator ad Litem)

Alt: Hunter, Solicitor

Edinburgh 23 July 2010

The Sheriff Principal having resumed consideration of the cause dismisses the appeal as incompetent; finds no expenses due to or by either party in respect of the appeal proceedings.

(signed) **E Bowen**

Sheriff Principal of Lothian and Borders

NOTE:

1. Section 320(2) of the Medical Health (Care and Treatment) (Scotland) Act 2003 provides that: "a "relevant party" to proceedings before the Tribunal may appeal to the Sheriff Principal against a decision to which this section applies". In this case the patient, RM, was made the subject of a compulsory treatment

order granted by a mental health Tribunal on 23 March 2010. Such an order, being a decision under section 64 of the Act, is a decision to which section 320 applies.

2. Subjected to certain exceptions and qualifications which do not apply in the present case, the term "relevant party" is defined in section 320(5) as meaning (a) the person to whom the decision relates, (b) that person's named person, (c) any guardian of the person, (d) any welfare attorney of the person, (e) the mental health officer and (f) that person's responsible medical officer.
3. The present appeal is brought by and in name of the curator ad litem to RM who was appointed to that office by a mental health Tribunal on 18 March 2010. That appointment was made by virtue of rule 55(1) of the Mental Health Tribunal For Scotland (Practice and Procedure)(No.2) Rules 2005 (SSI 2005/519). This provides for the appointment of a curator ad litem in certain circumstances which are defined in paragraph (2). Those circumstances are: (a) that the patient does not have the capacity to instruct a solicitor to represent the patient's interests in proceedings before the Tribunal; (b) that where the Tribunal or a convenor has made a decision not to disclose a document or report or part of it to the patient under rule 47, and the patient does not have a representative to represent their interests; or (c) that the patient has been excluded from any hearing or part of it under rule 68 or 69 and the patient does not have a representative to represent their interests. The appointment in the present case was made by virtue of the circumstances specified in paragraph 2(a).
4. The present appeal is based on a number of grounds of law which do not require to be specified. It is sufficient to say that they are based on the proposition that the appellant had insufficient opportunity to meet the patient in advance of the hearing on 23 March and that the Tribunal erred in proceeding to deal with the application before he could do so. The appeal is not opposed on the merits. What the first defenders contend is that the

appellant has no title to bring an appeal. They maintain that he is not a "relevant party" within the meaning of section 320(2), and that he is no longer "curator ad litem" to RM. I was informed by Mr Hunter who appeared on behalf of the Tribunal that the status of curators in proceedings of this nature was a matter of uncertainty because of the terms of section 320(5) and that the purpose of opposing the present appeal was to obtain clarification.

5. Mr Hunter's position in submissions may be summarised as follows. He pointed to the terms of section 320(5) and to the absence of reference to a curator ad litem as a "relevant person". It was reasonable to assume that if parliament had intended that a curator ad litem should have a right of appeal that would have been reflected in what was otherwise an exhaustive list of named parties. A curator could not fall to be regarded as "the person to whom the decision related". Mr Hunter drew attention to a passage at paragraph 2.64 in the recent book "The Scottish Mental Health Tribunal Practice and Procedure" by Derek Auchie and Ailsa Carmichael wherein the authors state: "It is incorrect to regard a curator as a substitute for the patient even in cases where he (the curator) is legally represented. The curator himself is a representative of the patient so it is illogical to regard him as if he is the patient". On a broader front, the general principle was that the duty of a curator ad litem was to "protect or safeguard the interests of the incapax so far as they are affected by a particular suit or litigation" (see Lord Hunter in *Drummond's Trustees v Peel's Trustees 1929 SC 484* at 504). The order of the Tribunal appointing the present appellant as curator ad litem specified that this was to represent the interests of the patient "in these proceedings before the Tribunal". Whilst it might be generally understood that the duty of a curator extended to giving advice in relation to an appeal, there was no authority, nor any example, of a situation where a curator had power to refer a matter from one Tribunal to a quite distinct level of judiciary. Moreover it was not to be inferred that a curator necessarily stood in the place of a person to whom a decision related by reason of the fact that such a person was incapax. Curators

might be appointed to individuals who are not incapax in other situations which were identified in rule 55. In those situations patients could exercise their own right of appeal.

6. In response, Mr Henderson, the curator ad litem, founded on the terms of paragraph 2.85 of Auchie and Carmichael where it is observed that a curator has, on the face of it, no right of appeal under the 2003 Act against a Tribunal decision. The authors proceed to say: "however, given that the patient has a right to appeal it would seem reasonable to assume that parliament intended that the curator as a representative of the patient could appeal". References were made to the case of *Hughes v Mental Health Tribunal for Scotland (2007 MHLR 29)* a case of my own in which I was not required to reach a decision as the patient died while the matter was at avizandum. The authors of Auchie and Carmichael appeared to suggest that the question of title had been raised in that case. It did not appear on the face of the judgement that it had, and in that case the Mental Health Tribunal, which was represented by senior counsel with considerable experience in this field, took no issue with the title of a curator ad litem to bring the proceedings. Mr Henderson also founded on the same passage in Lord Hunter's opinion in *Drummond's Trustees*. The interests of the patient were plainly "affected" by the decision of the Tribunal. The duty of the curator was to protect or safeguard the interests of the patient in that respect, and he had a duty to appeal if the circumstances warranted it. There was never any doubt in general litigation that a curator ad litem had a right of appeal. The case of *Bailey's Trustees and Others v Bailey and Others 1955 SLTN 21* provided one such example. In any event, the suggestion that a curator did not have a right of appeal, which would effectively deny an appeal at the instance of the patient, would be contrary to his right to a fair determination in terms of Article 4 of the European Convention of Human Rights. In terms of section 3 of the Human Rights Act the court should read section 320 in a manner which was compatible with the convention right. Such a reading would infer a right of appeal at the instance of a curator ad litem.

7. Having considered this matter I have come to the conclusion that Mr Hunter's submissions are to be preferred. It appears to me that the omission of a reference to a curator ad litem in section 320(5) must have been deliberate. There are several sections in the 2003 Act where lists of persons appear, and where those identified are qualified to make applications or are afforded an opportunity to be heard: sections 1(7), 50(3), 64(3), 102(3), 166(3), 193(9), 215(7), 264(10) and 268(10). Had it been the intention of Parliament to grant a right of appeal to a curator ad litem, I would have expected the section 320(5) list to be in similar terms to those other provisions. The fact that they are not mentioned leads me to conclude that a conscious decision was taken not to include curators ad litem in the appeal process.
8. The explanation for this may lie in the fact that, as Mr Hunter suggested, a curator ad litem is appointed only for the purposes of proceedings before the Tribunal. There may be significance in the fact that the other provisions referred to do not simply mention "the patient's curator ad litem", but use the term "a curator ad litem appointed by the Tribunal in respect of the patient". The view may well have been that the involvement of a curator ad litem, appointed by the Tribunal for the purposes of the proceedings before it, ceases at the conclusion of those proceedings.
9. Although I can see that difficulties may arise in some cases, the patient is not necessarily left without a remedy. An appeal could be marked by his named person, or by a guardian or welfare attorney where such appointments have been made. If necessary a curator ad litem could be appointed by the court to safeguard the patient's interests in the appeal proceedings.
10. In these circumstances I am of the view that an appeal at the instance of RM's curator ad litem was not competent and the appeal is accordingly dismissed.