

**Judgment 28/2008**

**In re X (under guardianship) – Royal Court (Civil Action  
File 1088) – 8 May 2008**

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**Guardianship or curatelle – application by curateur aux biens for approval to place assets of the incapable in a settlement – preliminary hearing on a question of law – powers of the curateur and of the Royal Court – review of customary law on curatelle – duty of the curateur to act en bon père de famille – role of curateur distinguished from that of trustee – approach of the Scottish Courts, in relation to curator bonis, adopted – held that the customary law on curatelle can be held to have developed so as to permit the disposition of the assets of an incapable in the way proposed**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

Civil 1088

The 8<sup>th</sup> day of May 2008 before Patrick John Talbot QC, Lieutenant Bailiff, sitting alone.

**IN RE X (UNDER GUARDIANSHIP)**

UPON the application of the Guardian for a declaration on a preliminary question of law;

WHEREAS THE COURT, on the 25<sup>th</sup> and 26<sup>th</sup> February, 2008, heard thereon Advocate P.M.A. Palmer, Counsel for the Guardian, Advocate M.M.E. Pullum, Counsel for the Patient and Her Majesty's Procureur, J.N. Van Leuven as Amicus Curiae and RESERVED JUDGMENT;

THE COURT, this day, handed down judgment in the terms attached hereto and RULED that the Court has the power to give authority to a *Curateur* to make a settlement of an *incapable's* assets;

AND THE COURT granted the costs and disbursements of Her Majesty's Procureur.

M A TOSTEVIN

Her Majesty's Deputy Greffier

Approved Text  
3 June 2008

IN THE ROYAL COURT OF THE ISLAND OF  
GUERNSEY

CIVIL

Thursday 8 May 2008

Before: Patrick John Talbot Esq., QC, Lieutenant-Bailiff

IN THE MATTER OF X, AN INCAPABLE

JUDGMENT  
ON A PRELIMINARY POINT  
(In anonymised form)

Advocate C J Hay representing the Guardian  
Crown Advocate M M E Pullum representing the Patient  
HM Procureur J N Van Leuven as amicus curiae

Cases:

In re L (WJG) [1966] 1 Ch. 135  
In re Count Lothair Blücher von Wahlstatt (1928)  
In re a patient (2001)  
Inland Revenue Commissioners v McMillan's Curator Bonis [1956] SC 142, at p.146  
In re F [1990] AC 1  
Morton v Paint (1996) 21 GLJ 61  
Singleton v Le Noury [1990] 9 GLJ 48  
Chapman v Chapman [1954] AC 428  
In re D's Curator Bonis, noter [1998] SLT 2  
Vaudin v Hamon [1974] AC 569  
C (A Minor) v DPP [1996] AC 1, at p. 28

Texts:

Curatelle Rules, 1989  
*Terrien*, Book II, chap. VI  
*Le Marchant*, at pages 52 and 53  
Mental Treatment Law (Guernsey) 1939  
Trusts (Guernsey) Law 1989  
Trusts (Guernsey) Law 2007  
The (English) Occupiers Liability Act 1957

THE LIEUTENANT BAILIFF:

1. This Judgment is now released to the public in an anonymised form so as to preserve the anonymity of the parties, which, in my view, is in the best interests of the parties.

2. In this Judgment I deal with a preliminary question of law raised on the application now before the Court (“the Application”) by a *curateur aux biens* (“the Guardian”) who was appointed by the Royal Court as the of the affairs of X, an adult male patient, (“the Patient”), in the year 2004. By that time the Patient had become “...unable to manage his own affairs for reasons of infirmity of mind” within the meaning of rule 1 of the Curatelle Rules, 1989, (“the Curatelle Rules”).

3. In the application the Guardian seeks

*“directions as to the conduct of the administration of the affairs of [the Patient] for approval and authority to place and to hold the assets of [the Patient] in a settlement, essentially in accordance with the draft Deed”,*

which is attached to the application. The relief sought by the Guardian is asked for under the supervisory jurisdiction of the Royal Court over *curateurs* in matters of *curatelle*, which itself is founded in customary law. A *curateur* may seek the approval of the Royal Court to, or a declaration in respect of, any proposed transaction. Applications to the Royal Court may arise in any case of dispute, for example, between a *curateur* and a *conseil de famille*, or in the case of doubt or difficulty as to the extent of the powers of a *curateur*. The Royal Court may authorise transactions to be carried out by a *curateur*, which, whilst *prima facie* in the best interests of the *incapable*, may carry a degree of risk and so might bring into consideration prospective liability on the part of the *curateur*. The practice of the Royal Court is that such transactions usually require the consent of the *conseil de famille*.

4. The Patient is aged about 70. He was married once and the marriage ended in divorce. The Patient has not remarried to Y, (“the former wife”), and he has no other children than the two adult children to whom I shall refer later in this Judgment.

5. The Patient’s *conseil de famille* (“the Family Council”) constituted for the appointment of the Guardian in 2004 comprised his former wife, their two adult sons, and a man, who was described in the evidence as the Patient’s “*personal adviser for 17 years and protector to the family trust.*” The Family Council support, and will, it appears, consent to the relief sought by the Guardian.

6. The reason given by the Guardian for issuing the application is that he wishes to achieve, on behalf of the Patient, the most efficient tax structure in relation to the assets of the Patient in

the manner summarised in a report from chartered accountants, primarily benefiting the former wife and the adult children of the Patient.

7. The question whether the proposed settlement would be both effective in achieving that aim and appropriate in the present circumstances relating to the Patient and his assets does not arise at this stage of the Application; that question would only become relevant if I were to find that the Royal Court had jurisdiction to consider the merits of the Application.
8. When the Application first came before me in September 2007, I decided that, given its unusual nature, the amount of the funds proposed to be settled, and the apparent absence of any directly relevant Guernsey cases, I should seek the assistance of HM Procureur as an *amicus curiae* on the issue of the jurisdiction of the Royal Court to make the order sought.
9. The Patient has resided in Guernsey for more than 20 years and is domiciled for personal status purposes in Guernsey. In about 2002, Counsel advised that the Patient was Guernsey-domiciled for all tax purposes. The former wife and his two adult children are all domiciled and resident in the United Kingdom.
10. The assets presently managed by the Guardian on behalf of the Patient are set out in the income and expenditure summary for the year ended in 2007, prepared by chartered accountants, on behalf of the Guardian. The Patient's personal assets were valued at something over £38,000,000 and perhaps up to £50,000,000. His assets are, therefore, very substantial.
11. The Patient made a will of personal estate on in 2002 ("the Will"), by which he revoked all former wills, declared his domicile to be Guernsey, where he stated that he had "*lived for some twelve years past*" and expressed his fixed intention to reside in Guernsey for the remainder of his life. The Patient appointed the former wife and the Guardian to be his executors, gave his two adult children legacies of £10,000,000 each, gave five further legacies totalling £2,700,000 and gave the residue of his personal estate to the former wife. No other beneficiaries were mentioned in the Will. The Patient also declared his knowledge of Guernsey's inheritance law and that the terms of the Will might, at the date of his death, conflict with Guernsey law, but he expressed the desire that his beneficiaries should respect his wishes as set out in the Will. It seems that the legacies in favour of the former wife might not have been achieved under Guernsey's forced heirship rules. The Patient does not own any realty in his own name in Guernsey. Both the house in Guernsey, in which the Patient lives, and another property in Portugal are owned by separate companies.

12. As HM Procureur helpfully expressed the position in his detailed and learned written submissions:-

*“...for all practical purposes [the Patient] will not recover, even temporarily, his mental faculties so as again to be capable of managing his affairs. Accordingly, he cannot, of his own volition, as a matter of Guernsey law, amend or revoke his will of personal estate, or make a new will.”*

But if I decide that the Royal Court has jurisdiction to hear the Application, (which is the question for decision in this Judgment,) on the hearing of the merits of the Application by the Jurats and myself at a later stage the Court will consider, *inter alia*, how, on the assumption that he had a moment in time when he was not lacking mental capacity so to decide, the Patient himself would have decided to act in relation to the proposed settlement, on the basis of the information which is then before the Court. In *In re L (WJG)* [1966] 1 Ch. 135, at pages 143-4, Mr. Justice Cross, sitting in the Chancery Division of the English High Court, considered the approach to be adopted by a Judge in determining whether and how he should exercise his discretion in regard to the making of a settlement under English Statute, where one of the aims was to avoid death duties. He said, in words which are of a persuasive and analogous impact here, that he had to consider:

*“... for whom... the Patient might be expected to provide if he were not mentally disordered. ... It seems to me, therefore, that I must assume that the Patient becomes a sane man for a sufficient time to review the situation but knows that after a brief interval of sanity he will once more be as he was before.”*

13. At such a stage, the Court would take into account any evidence about the reasons which the Patient had for coming to Guernsey, including whether, as the evidence suggests, he took up Guernsey domicile to take advantage of the local tax regime, particularly to avoid United Kingdom capital gains tax arising from the sale of his business which he sold in 1987/88. The Court would also have to consider the Patient's concern for his family and how he might have reacted to a scheme for saving his family approximately £18,000,000 United Kingdom inheritance tax.
14. Guernsey laws relating to matters of *curatelle*, that is to say the Guardianship of the affairs of adult *incapables*, (who have been shown to be incapable of managing their own affairs,) have their origins in Norman customary law, which, in turn, seems to have its origins in the Roman law of *curatela* - see *Terrien*, Book II, chap. VI, with the subsequent commentary from *Le*

*Marchant*, at pages 52 and 53, as to the extent to which Terrien's exposition on the subject was relevant to Guernsey in 1826.

15. The Curatelle Rules deal with the procedure on an application for the *appointment* of a Guardian under the Royal Court's *curatelle* jurisdiction; but the Curatelle Rules do not deal with the form of, or the procedure to be used on, an application by a Guardian for directions after his appointment has been made. Accordingly, there is no special procedure laid down in the Curatelle Rules for the hearing of the Application.
16. Nevertheless, it seems to me that, where appropriate, both a patient and a guardian may be separately represented before the Royal Court, and the Court may also hear from any member of the patient's family council in person or by his or her attorney, (who would, under our practice, usually be an Advocate of the Guernsey Bar). In this case I decided that it was appropriate for the Patient to be represented by separate Counsel from the Guardian and, at my request, HM Procureur arranged for Advocate Megan Pullum to represent the Patient. Her submissions were most helpful, and would, in my view, be likely to be of great value if the Application were, depending on the result of this Judgment, later to be considered on its merits; for, in her written submissions Miss Pullum has dealt fully, and, in my judgment, in a well-directed manner, with the present state of the Patient's physical and mental health and the care and treatment which he presently receives as well as the likely financial needs of the Patient for the rest of his life.
17. *Tutelle* and *curatelle* trace their origins, as I have said, to the Roman law of *tutela* and *curatela* and, as developed, were adopted and applied throughout France prior to the *Code Civil*. Guernsey law is founded on the customary law of Normandy, "*coutume*", and customary law, which is sometimes described as the common law of Guernsey, remains at the heart of much of Guernsey's law today, especially in land law and inheritance law. Customary law is not, however, a static or ossified source of law. It evolves in the way most appropriate to Guernsey, its population and its society. Sometimes this evolution is based, to some extent, on the development of the common law, and even the statutory law, of England and Wales, and sometimes on the laws of modern France and of Commonwealth countries. Perhaps because Guernsey has a limited, though increasing, amount of statutory law, the scope of the development of customary law is considered by some commentators to be wide. Nevertheless, any such development of customary law must be limited by the established legal principles of Guernsey law and by any statutes (Laws) and subordinate legislation in force in Guernsey from time to time. I shall return to the question of the customary law of *curatelle* and its development later in this Judgment.

18. *Tutelle* and *curatelle* are well-developed parts of Guernsey customary law, but, as HM Procureur demonstrated in his written submissions:

*“Norman customary law had little specific to say about them because, as civilian concepts, they were features of juridical administration throughout France, which retains them to this day though much modified.”*

He also showed that because *tutelle* and *curatelle* are not regimes peculiar to Norman customary law, they feature in the Norman *coutumiers* if and so far as they concern other specific issues of Norman customary law, and the *Coutume Reformée* does not deal with *tutelle* and *curatelle* as topics in their own right. There has been no statute passed into Guernsey Law in respect of *curatelle* except the public mental health treatment regime introduced by the Mental Treatment Law (Guernsey) 1939, as amended by the Mental Treatment (Amendment)(Guernsey) Law 1956, but these do not impact upon Guernsey customary law of *curatelle* insofar as is relevant to the Application.

19. There are only a few decided cases in Guernsey which have been reported on the subject of guardianship, whether the guardianship of minors (*tutelle*) or the guardianship of adult *incapables* (*curatelle*) and the leading case is ***Count Lothair Blücher von Wahlstatt*** (1928) where the learned Bailiff, Sir Havilland de Saumarez, set out the duties of a guardian in relation to the management of the affairs of his ward. This case, therefore, involved the guardianship of a minor, *i.e.* under the Royal Court’s *tutelle* jurisdiction, but it is clear, in my judgment, that the guiding principles under the customary law of Guernsey are the same whether an application relates to *tutelle* or to *curatelle*. Amongst the duties and powers of a *tuteur*, which the learned Bailiff set out in ***Count Lothair Blücher von Wahlstatt***, were:

*“(a) tous pouvoirs et autorité de tenir, posséder, gerer et administrer (agissant toujours en ‘bon père de famille’) ;*

*(b) de placer et de changer les placements des argents des dits mineurs et de passer et signer tous actes et instruments à l’effet que dessus;*

*(c) s’il est pur le bien et avantage des mineurs selon l’avis de l’autorité compétent dans la jurisdiction dont il s’agit;*

*(d) tous pouvoirs d’acquisition ... et de disposition sur les biens meubles et immeubles des dits mineurs alienation, hypothèque, et même par renonciation le cas échéance.”*

20. As the then Bailiff, Sir de Vic Carey, said in ***In re a patient***, (2001), in Guernsey an order appointing a guardian under the Curatelle Rules, 1989, is generally of unlimited duration and I shall proceed upon the basis that, on the evidence, there is no realistic chance of the Patient recovering his mental capacity, and that the order appointing the Guardian made in 2004 will be likely to remain in force until the Patient's death so long as he remains within the jurisdiction of the Royal Court.
21. Whilst the comments of the learned Bailiff in ***Blücher*** (above) did not address in very great detail the legal relationship arising as between a *curateur* and the assets of an *incapable* during *curatelle*, it is clear that the current practice in Guernsey is that, at least in general terms, the function of a *curateur* is to conserve, manage and administer the assets of the *incapable* and to ensure that the physical care of the *incapable* is properly provided for. The eminent French Jurist *Pothier* mentioned further elements in customary law then applicable relating to *tutelle*, (and, therefore, as I have said, also relating to *curatelle*,) including:
- a. the acts of a *tuteur* are those of his minor;
  - b. a *tuteur* may dispose of the assets of his minor and any such dispositive act must be an act of 'commerce' – *i.e.* for value;
  - c. a *tuteur* cannot give away his minor's assets;
  - d. because the act of the *tuteur* is the act of his minor, it must be undertaken in the management of the minor's assets; and
  - e. making a gift is not an act of management, with an exception for gifts of modest sums of money or goods, as propriety demands, for those who have rendered some service to the minor.

(The fifth point may have been amended by changes in the Law of France after Pothier wrote.) Not surprisingly, a *tuteur* is liable for fraud and also for acting beyond or contrary to the principle that he must act *en bon père de famille*, which is often understood by Guernsey lawyers to mean that he must act with prudence in managing and conserving the assets of the *incapable*.

22. When the Application first came before the Court, it was expressly made pursuant to both Section 52 of the Trusts (Guernsey) Law 1989, as amended, ("the 1989 Trusts Law"), (which Law was then in full force,) and the inherent jurisdiction of the Royal Court in *curatelle* matters. But, after due reflection, Advocate Patrick Palmer, who represents the Guardian, put the Application on the latter basis only, and eschewed any reliance upon the 1989 Trusts Law. I consider that Mr. Palmer was correct to do so.

23. In my view, there is a real distinction to be drawn between a trustee and a *curateur*. For, whilst a trustee may have full control over the assets, which have been, very frequently in an irrevocable manner, vested in him as trustee, a *curateur* appointed under an order of the Royal Court merely supersedes an *incapable* in the management of his affairs, including his assets, during the currency of his appointment. The assets of the Patient are not, as I understand the practice, transferred to, or otherwise vested in, the *curateur*, nor is the *incapable* in any way divested of his assets. To put it in another way, the assets remain the assets of the Patient, and the *curateur* has no title to them.
24. In carrying out his duties a *curateur* must act *en bon père de famille* – literally meaning ‘as a good father of the family’, but meaning, as I have said, in modern times, acting as a prudent administrator for the benefit of the *incapable*. Whilst the obligation to act *en bon père de famille* is common to the office of trustee and to the office of *curateur*, a similar obligation would ordinarily attach to a person entrusted with the management of a person’s assets as his attorney, (subject to the terms of appointment). Indeed, as HM Procureur submitted, and I accept, the role of a *curateur* is, in many respects, more akin to that of attorney than Trustee, which point emphasises the managerial nature of the office with respect to an *incapable*’s assets.
25. I consider that the approach taken by Lord President Clyde and Lord Sorn in the First Division of the Court of Session in Scotland on an analogous point raised under the Judicial Factors Act of 1849, as amended, in ***Inland Revenue Commissioners v. McMillan’s Curator Bonis*** [1956] SC 142, at p.146, is persuasive and is equally applicable in Guernsey to the distinction between a *curateur* and a trustee. The Lord President, dealing in a tax appeal with the status and function of the *curator bonis*, (an office-holder whose powers and duties at that time were not, it seems, quite the same as those of a *curateur*, but were of a similar nature,) said at pp. 146/7:

*“The essential purpose of the appointment of a curator bonis to an incapax is to supersede the latter in the management of his estates - see Lord Kinnear in Yule v. Alexander (1891) 19 R. 167 at p. 169. But they still remain his estates, and, as the Lord President said in that case (at p.168): ‘The position of a curator bonis is not that he has transferred to him, the curator bonis, the estate of the ward, nor is the ward divested of that estate. The more accurate statement is that made by Mr. Bell (Bell’s Prin., sec. 2121), viz., that the ward’s management of his estate is superseded in favour of the curator. ...’ In my view, the curator bonis is in the same category for the present purpose*

*as an agent or factor appointed by a capax to manage his affairs and ingather his estate...”*

Lord Sorn added, at p. 150:

*“..the curator remains essentially a manager, who manages the estate on behalf of the ward”.*

26. In summary, I conclude that a *curateur* is not a trustee for the purposes of the 1989 Trusts Law, (or, indeed, for the purposes of the Trusts (Guernsey) Law 2007, (“the 2007 Trusts Law”), which is now in force,) and the jurisdiction of the Royal Court to supervise and, where appropriate, intervene in the administration of a Guernsey trust simply does not apply to the Application. I accept the submissions of HM Procureur that whilst a *curateur* stands in a fiduciary position and owes fiduciary obligations to the *incapable*, because he is subject to the obligation to act *en bon père de famille* for the benefit of the *incapable*, a *curateur* is neither a trustee nor considered as such.
27. In support of his submissions, (which I accept and adopt here, paraphrasing his words,) HM Procureur pointed out several important distinctions between a trustee and a *curateur*. First, no provision of the 1989 Trust Laws or of the 2007 Trusts Law either constitutes a *curateur* as trustee of an *incapable*’s property or constitutes a *curatelle* as a trust. Secondly, a *curateur* does not take legal title to, nor does he have vested in him, the property of his *incapable*. Nor does a *curateur* ‘hold’ the property of an *incapable* in his own name. As a matter of Guernsey law and practice, the property of an *incapable* under *curatelle* usually remains vested in the name of the *incapable*. Thirdly, an *incapable*’s Guernsey real property remains in his name and is not subject to any instrument vesting in it the *curateur*, and whenever it is conveyed or charged, the *curateur* acts pursuant to the approval of the Royal Court with respect to such property which, both legally and beneficially, is, and has remained, that of the *incapable*.
28. As I mentioned earlier in this Judgment, there is, I think unsurprisingly, no authority in Guernsey, which supports the granting of relief under the *curatelle* jurisdiction of the Royal Court in the form sought in the Application. Although the jurisdiction of the Royal Court pursuant, now, to Section 57 of the 2007 Trusts Law allows the Court, in a suitable case, to approve a variation of an existing Guernsey trust under which substantial overseas tax saving will be made by virtue of the arrangements before the Court, there is no indication that Guernsey’s customary law has previously been relied upon to allow such a scheme where the

assets in question remain vested in an *incapable*, *i.e.* where there is no existing trust affecting the assets of the *incapable*. Neither Counsel for the Guardian nor HM Procureur, (the helpful researches of both of whom have been impressively wide, and considered Roman law, English law, French law, the law of Louisiana and Scots law,) were able to point to any decision of the Courts of Guernsey of any assistance. I add that, in respect of foreign law, I have also been assisted by the opinions of eminent English, Scots and French lawyers, who have been retained by the Guardian and by HM Procureur.

29. At the heart of the arguments of Counsel and HM Procureur lies what I believe to be a most important issue, namely, can the customary law of Guernsey, as it stands today, allow a *curateur* to make a settlement of a very substantial part of the assets of an *incapable*, under which, in reality for the rest of the life of the *incapable*, these assets will be placed outside the control and management of the *curateur* appointed by the Royal Court under its *curatelle* jurisdiction and vested in trustees under a new Guernsey trust? The proposed settlement would amount to a gratuitous disposition of assets of the Patient; it would not involve the preservation of those assets *as the assets of* the Patient, but would rather transfer those assets away from the Patient into a discretionary trust which is intended to last beyond his lifetime, *i.e.* to remain operating after the end of the existing *curatelle*, and under which persons not in the Patient's contemplation when he made the Will may benefit and from which the Patient himself will obtain, as HM Procureur put it in his written submissions "*no additional or equivalent benefit - and even, arguably substantially less material benefit - than at present.*"
30. I turn then again to consider, in the context of the Application, the origin, nature and extent of the jurisdiction of the Royal Court in matters of *curatelle*.
31. First, it is necessary for me to dispose of one feature of Mr. Palmer's arguments in favour of the Royal Court having inherent jurisdiction to grant the relief sought by the Guardian. Mr. Palmer submitted that the Royal Court might have assumed to itself the exercise of the Royal Prerogative over the affairs of an *incapable*, which in England and Wales was, he said, exercised by or pursuant to Crown grant or statute. Mr. Palmer relied upon a Joint Opinion from eminent English leading and junior Counsel, which helpfully discussed the basis or the use, in certain circumstances, of the Royal Prerogative as founding jurisdiction in the High Court in cases relating to mental patients and their affairs - see *In re F* [1990] AC 1, and subsequent cases. But I doubt whether such jurisdiction extends in England and Wales as far as the Application seeks to go. It seems to me that such jurisdiction relates more to the personal circumstances, rather than the financial circumstances, of a mental patient.

32. I can, however, dispose of this point more shortly. There are no Laws or subordinate legislation, such as Ordinances or Regulations, in Guernsey in respect of the jurisdiction of the Royal Court in *curatelle* matters, which in any way extend the Royal Prerogative, as it is used in England and Wales, to the Bailiwick and its Courts. In these circumstances, no recourse can, in my judgment, properly be had to the Royal Prerogative as founding in the Bailiwick an extended jurisdiction of the Royal Court in *curatelle* matters to permit the granting of relief like that sought in the Application. I accept the submission of HM Procureur that the Royal Court cannot, as a matter of Guernsey law, adopt jurisdiction by assuming the exercise of the Royal Prerogative without the prior grant of such jurisdiction by, for example, Letters Patent or statute in the form of a Law approved by Her Majesty in Council and then adopted into Guernsey law by a resolution of the States of Deliberation. HM Procureur rightly submitted as follows, and I adopt his submission as an accurate analysis of the position of the Royal Prerogative vis-à-vis Guernsey:

*“Whether the establishment of the Royal Court carried with it any jurisdiction to exercise the Royal Prerogative must be, at least, extremely doubtful; indeed, had it done so the constitution of Guernsey and Guernsey law would have developed in very different ways; and in any event, I can trace no exercise by the Royal Court judicially or administratively of a power claimed or assumed under the prerogative. The Crown has always maintained its exclusive right in the exercise of the prerogative, acting now ordinarily by and through the Privy Council, though legislation may confer exercise of aspects of the prerogative domestically as, for example, in matters of nationality and immigration.”*

33. In my judgment, the Guardian is, therefore, limited to reliance upon the customary law of *curatelle* in Guernsey as it applies today.

34. The supervisory jurisdiction of the Royal Court in relation to *curateurs* and *curatelle* is well-established and undoubted. Whilst the jurisdiction is limited, for example, the Royal Court cannot authorise a transaction which the *incapable* himself, had he retained his mental capacity, could not lawfully have carried out, it has customarily been used to authorise or direct transactions, especially relating to Guernsey real property, which can be defined as being for the clear benefit of the *incapable*.

35. The Application seeks authority from the Court under its supervisory jurisdiction for what is accurately described by HM Procureur in his written submissions as:

*“... a dispositive act involving the transfer of a substantial proportion of the Patient’s assets, reserving a life interest in the incapable, but otherwise containing wide discretionary dispositive trusts and powers, which will last beyond his lifetime (and so the duration of the curatelle) in circumstances where the Patient has (i) forced heirs and (ii) a valid will (which cannot be altered) addressing the manner in and by which the Patient’s estate is to be disposed post mortem.”*

HM Procureur submits that such a development of Guernsey law would require legislative intervention and is not to be covered by the existing Guernsey customary law of *curatelle*. I have to decide whether this submission is right or whether customary law, which it is accepted is not static or ossified, gives the Royal Court power, in suitable cases, to grant authority to a *curateur* to make a settlement of his *incapable’s* assets in a manner which will, in all likelihood, have the effect on the death of the *incapable* of very substantial tax savings being enjoyed by his former wife and his sons.

36. It is, therefore, necessary for me to consider the existing authorities on the development of customary law. In the leading case of *Morton v. Paint* (1996) 21 GLJ 61 the Court of Appeal decided that the Guernsey law of tort would follow the (English) Occupiers Liability Act 1957 thereby allowing Guernsey law to develop in the same direction as the English law of tort. Blom-Cooper JA, at p. 40, described as:

*“the very organism of the common law its constant adaptability to changing social conditions.”*

In a lengthy judgment Southwell JA considered with great care the common law of many jurisdictions, including England and Wales, and at p. 51, said that in respect of torts it has been customary for the Guernsey Courts to adapt English common law as it has been developed by the English Courts. The same, I think, can properly be said in relation to the criminal law, and there are many examples of Guernsey following England and Wales in passing statutes developing the criminal law. At p. 56 A/C, the learned Judge of Appeal said in, a very well-known, passage:

*“The coutume and common law of Guernsey has always developed by judicial decision, supplemented by statutes passed by the States of Guernsey and approved by the Privy Council. But there are fundamental parts of Guernsey common law which have been recognised as not being capable of alteration by judicial decision. In Singleton v. Le Noury [1990] 9 GLJ 48, the Court of Appeal of Guernsey considered questions relating*

*to alleged rights of way arising from a Clameur de Haro raised by the Le Noury respondents. In their judgment the Court of Appeal said this (at page 18):*

*‘...the Court is of the opinion that under Guernsey law a servitude cannot be acquired by prescription. The Court accepts that the *coûtume* does develop over the centuries. The maxim “*coûtume fait loi et la meilleure loi est la coûtume du pays*” refers to such development. But such development cannot change the fundamental and substantive common law and the principle of “*nul servitude sans titre*” and “*Droit de servitudes de vues, égouts de maisons ...*” set out in the writings of Laurent Carey, Basnage and Berault are part of our *coûtume* or fundamental common law and cannot be altered by judicial decision.’*

*That case concerned the property law of Guernsey. Longstanding and fundamental principles of property law could not be overturned by judicial decision...”*

37. In relation to *curatelle* it is not, in my judgment, appropriate for me to follow developments of the law of England and Wales relating to the assets of adult mental patients, including the exercise of statutory will-making and settlement-making powers, and apply such developments to Guernsey. The historical basis of *curatelle* is Roman law, as developed and used in France, (where it is now called *tutelle des majeurs*), especially in Normandy and in Guernsey itself, whereas the origin of the common law of England, as amended and amplified by statute, as I understand the argument and the learned opinions produced, is materially different and does not appear to have been based originally on Roman law principles of *curatela*.

38. Nor am I persuaded that it would be right to follow, in respect of *curatelle*, the approach of the House of Lords in ***Chapman v. Chapman*** [1954] AC 428, when, especially per Lord Simonds LC, their Lordships refused to hold (at p. 443 in the report):

*“... that a judge of the Chancery Division of the High Court of Justice has an inherent jurisdiction in the execution of the trusts of a settlement to sanction on behalf of infant beneficiaries and unborn persons a re-arrangement of the trusts of that settlement for no other purpose than to secure an adventitious benefit which may be and, in the present case, is, that estate duty, payable in a certain event as things now stand, will, in consequence of the arrangement, not be payable in respect of the trust funds.”*

In this extremely well-known case, the decision in which led to of the changes in the English law of trusts introduced by the Variation of Trusts Act, 1958, their Lordships, perhaps as a matter of policy, drew a line. I draw attention as well to what Lord Simonds said in the third paragraph of p. 444, without, I think, needing to set it out.

39. There is, as I have previously mentioned, a real distinction, between a trust on the one hand and the customary law institution of *curatelle* on the other hand. In my view, the distinction was well analysed by Lord Nimmo Smith, the Lord Ordinary, in **In re D's Curator Bonis, noter** [1998] SLT 2. It is useful to read the headnote, which is in the following terms:

*“A curator bonis made an application by way of note for special powers, in accordance with Section 7 of the Judicial Factors Act 1849, and rule 6.15 of the Rules of the Court of Session. He wished to enter into a tax planning arrangement in order to protect the estate of the ward in the event of her death. The ward had substantial assets and the curator was concerned about the potential effect of inheritance tax. Her only surviving relatives were her brother and nephew, who were both named in her will and who were the only persons with an interest in her estate. The curator sought authority to instruct the completion of conveyancing formalities of the ward's one half share of a house in England as a gift to her brother, and secondly to make gifts of £50,000 to her brother and £20,000 to her nephew. These gifts would not prejudice the ability of the ward's estate to support her until her death, but would result in a significant saving of inheritance tax upon her death. The application was unopposed, but the Lord Ordinary heard full submissions as there was no previously reported instance in which the court had granted an application for special powers resulting in a significant diminution of the ward's estate.”*

40. The decision of the learned Lord Ordinary is, in my view, of comparative value when considering the jurisdiction of this Court to grant relief of the nature sought in the Application, and I have found it persuasive authority from a Court of equivalent jurisdiction. The approach of the Lord Ordinary was summarised in the headnote as follows:

*“Held:*

*(1) that as the curator was in the same category as an agent or factor appointed by a capax to manage her affairs and ingather her estate, there was no need to subject the curator to the same constraints as a full trustee...*

*(2) that there was accordingly no objection in principle to his disposing of part of the ward's estate, even if that resulted in a permanent diminution of the estate;*

*(3) that a curator could legitimately have regard to the known wishes of the ward, and would in addition be entitled to form his own view of what the ward would have decided if retaining mental capacity;*

*(4) that it would also be necessary to ask what a reasonable and prudent person would decide having regard to all the relevant circumstances and to appropriate professional advice;*

*(5) that in the present case appropriate advice had been taken and a reasonable and prudent person would act as the curator proposed to do; and prayer of the note granted and curator authorised to proceed in the manner proposed by him.”*

At pp.4/5 Lord Nimmo Smith said:

*“Any question of principle can be resolved by reference to the authorities relating to the status and functions of a curator bonis.*

...

*In Fraser v. Paterson (No. 2) Lord Jauncey was considering an application for special power to a curator bonis to continue to hold shares in a family company, which were not authorised investments under the Trustee Investments Act 1961. After reviewing the authorities..., Lord Jauncey said, at [1988] SLT, p. 125: ‘From these authorities I conclude that the primary duty of a curator bonis is to preserve and manage the curatory estate for the benefit of the ward and that what may be for the benefit of the ward will not necessarily result in the maximising of the estate nor the conversion thereof into trustee investments.’*

*He went on, in reaching his decision, to have regard to what was known of the ward’s views about the continued retention of the investment.*

*In addition to cases decided in this Court, I have derived assistance from a sheriff court case. In B’s CB, Noter [1996] SLT (Sh Ct) 27 Sheriff Principal Hay had to consider an application craving authority to sign a deed of variation allowing part of the estate of the curator’s ward’s late husband to be redirected to their two sons. The sum so directed would have been exempt from inheritance tax on the death of the ward’s late husband and, by reducing the ward’s estate, would reduce the potential liability to inheritance tax on her death. The sheriff refused the crave, considering that the special power sought appeared to be totally at variance with the purposes of the appointment of a curator bonis, namely, the preservation and administration of the estate of the incapax. On appeal, however, the sheriff principal granted the application, holding that although the*

*effect of the arrangement would be to reduce the amount of the ward's estate, there was a high probability that, had the ward been able to make the decision, she would have adopted the proposed course in order to mitigate the incidence of inheritance tax on the estate which would pass to her sons on her death."*

The learned Lord Ordinary then cited at length from the decision of the sheriff principal, at p. 29 of the report in [1996] SLT (Sh Ct), where, in assessing the merits of the application before him for special power, he considered a number of factual issues of the kind which may prove relevant on any hearing of the merits of the Application in this Court.

41. Lord Nimmo Smith was dealing with a jurisdiction, which derived from the Roman law of *curatela*, and decided a question, which, in a sense, is the same as the question before me, and the learned Judge decided that a *curator bonis* did have the right to ask for special powers to make gifts, which would have the effect of making substantial tax savings. It appears from a letter to the Guardian from a Scottish solicitor, of a firm of Edinburgh Solicitors, (which I accept as admissible evidence of foreign law,) that Scottish law derives from various sources, including customary law,

*"principles developed in the civil law of Rome and accepted in Scotland through the mediation of the writings of French, German and Dutch jurists from the fourteenth to the eighteenth centuries, principles of Canon law as developed down to the Reformation, the principles of feudal law of Western Europe, and in particular Norman law, ... and some of the principles of the common law and equity of England. ... Failing guidance from any of the foregoing the courts may turn to other systems of law, particularly those founded on similar historical bases. Thus the courts may look to the civil law jurisdictions of the USA, France and Holland.*

In his letter of advice the Scottish Solicitor also helpfully addressed the distinction between general powers granted to a *curator bonis* on appointment and special powers required by a *curator bonis* in order to carry out his duties.

42. At pp. 4/5 in ***In re D's Curator Bonis*** Lord Nimmo Smith continued:

*"If, as Lord President Clyde put it in *Inland Revenue Commissioners v. McMillan's CB*, the curator is in the same category for present purposes as an agent or factor appointed by a capax to manage her affairs and ingather her estate, there is no need to regard the curator as being subject to the same constraints as a full trustee would be. A trustee must*

*of course act within the provisions of the trust deed under which he has been appointed, and he can only exercise the powers conferred by it, supplemented as necessary by the provisions of the Trusts (Scotland) Acts, otherwise his actings are ultra vires. But if a curator bonis is in the same category as an agent or factor, there is no reason in principle to regard his powers as being less than co-extensive with those of the ward. So there can be no objection in principle to his disposing of part of the ward's estate, even if that results in a permanent diminution of the estate..."*

43. Bearing in mind the need for there to be shown to be some degree of similarity between a *curator bonis* under the previous Scottish system, (which has now been replaced by statute,) and a *curateur*, I have been cautious to accept the approach of the Lord Ordinary as the right approach to take on the preliminary point, which I am to decide. I have also borne in mind both that the Scottish Law relating to the status and functions of a *curator bonis* has been, in part, developed by statute from the mid-19<sup>th</sup> century onwards, and that the concept of forced heirship does not operate in Scotland.

44. I have also taken into account that it seems to be rather doubtful, according to the expert on French law instructed by HM Procureur, that modern French law would grant the Guardian relief equivalent to that sought by him in the Application; as the expert on French law put it:

*"It would be very difficult to achieve that result under French Law."*

Furthermore, I also pay heed, as I must, to what Lord Wilberforce said in *Vaudin v. Hamon* [1974] AC 569, (a case on appeal from the Court of Appeal of Guernsey, in turn on appeal from this Court exercising its appellate jurisdiction from a decision of the Seneschal's Court of Sark):

*"If an argument based on analogy is to have any force, it must first be shown that the system of law to which appeal is made in general, and moreover the particular relevant portion of it, is similar to that which is being considered, and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter."*

45. In this context I consider it is appropriate for me to take into account the make-up of Guernsey's population and society today, and that at the present time the residents of Guernsey include amongst their number many, like the Patient, whose original home and domicile were elsewhere, but who have chosen to emigrate to Guernsey to live their lives out and enjoy all the advantages, whether social, fiscal or climatic, which they believe such

a move provides, whilst at the same time, of course, becoming subject to the laws of Guernsey including its own customary law, which includes rules as to forced heirship. Many of these residents have family members, including children, living elsewhere, including the United Kingdom, where more stringent tax regimes may well apply. This is not something which a developing customary law can, in my judgment, properly ignore. In my judgment, as the make-up of Guernsey's population and society changes, so may the customary law of Guernsey, wherever appropriate, change to meet the requirements of that population and society. The changes in the make-up of Guernsey's population and society may properly be reflected, in my view, where necessary, in the "*constant adaptability of the common law to changing social conditions*", the phrase used by Blom-Cooper JA in *Morton v Paint*, based possibly on the *dictum* of Lord Reid in *Myers v DPP* [1965] AC 1001, at pp. 1021/2:

*"The common law must be developed to meet changing economic conditions and habits of thought..."*

I also consider that the nature of the relief sought by the Guardian in the Application would result in the continuing development of the customary law of Guernsey relating to *curatelle*

*"... in a way which is consistent with the needs of the Guernsey community."*

(*per* Southwell JA in *Morton v Paint*, at p. 58F)

46. I have also taken into account the five aids to navigation propounded by Lord Lowry in *C (A Minor) v. DPP* [1996] AC 1, at p. 28, a passage cited by Southwell JA in *Morton and Paint*. Lord Lowry said:

*"I believe, however, that one can find in the authorities some aids to navigation across an uncertainly charted sea. (1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty."*

47. I consider that the solution in this case proposed on behalf of the Guardian is not a doubtful one, but one which can be applied without difficulty in practice; nor, in my judgment, would the Royal Court be imposing its own remedy. As the Scottish Courts have shown in an analogous situation relating to the powers of a *curator bonis*, customary law is a flexible law and the relief sought by the Guardian would, in my judgment, properly reflect such flexibility.
48. Secondly, in my view, the question now before me cannot be described as “*a known difficulty*”, which the States of Deliberation might have cleared up when legislating on the subject of the care and treatment of mental patients. I doubt whether the question had been considered within the legal community much, if at all, before the Application came before the Court on 1 August 2007.
49. Thirdly, I do not believe there to be a dispute “*as to matters of social policy*” in Guernsey in relation to the powers of a *curateur*, at least not one which the evidence or argument identified. In my view, it is unlikely that the social circumstances concerning the affairs of adult mental patients in Guernsey differ in any material way from those in England or Scotland.
50. Fourthly, the proposed relief would not make a substantial change, as I see it, to the fundamental customary law of Guernsey relating to the institution of *curatelle*, which would stand fundamentally unchanged, subject always to the supervisory jurisdiction of the Royal Court.
51. And fifthly, the change which this Judgment would introduce into the developing customary law of Guernsey relating to *curatelle* would, I think, achieve finality and certainty.
52. For the sake of completeness, I mention that I was directed to some reforms in French law relating to *tutelle des majeurs*, which are to take place soon; but it is not right, in my judgment, for me to take account of them as representing support for the Guardian’s argument, and I have not done so.
53. In conclusion, it is clear that under Guernsey’s existing customary law of *curatelle* the role of the Royal Court includes paying the utmost attention to what is, in my judgment, properly described by Advocate Palmer in his reply submissions as:

*“[t]he paramount concern of the Crown exercised by the Royal Court for the best interests of the incapable.”*

Doubtless, these interests will almost always overlap with what is described in Counsel’s submissions as taking heed:

*“that the directions sought are for the benefit of the Incapable.”*

In my judgment, the approach taken by the Scottish Courts in *Re D’s Curator Bonis*, and in the other cases there discussed by Lord Nimmo Smith, should be applied in Guernsey as a proper development of our customary law of *curatelle*, and I conclude that the jurisdiction of the Royal Court over matters of *curatelle* includes a power, where appropriate on the facts of a case, to give directions of the kind requested by the Guardian in the Application.

54. I add that I do not believe that there is anything which this Court can properly criticise in the aim of the Guardian, on behalf of the Patient, to minimise, so far as is lawfully possible, the impact of United Kingdom inheritance tax on the Patient’s estate at his death.
55. I conclude, therefore, that the supervisory jurisdiction of the Royal Court in *curatelle* matters includes a power to give authority to a *curateur* in suitable cases to make a settlement of his *incapable’s* assets or of a substantial part thereof in order to save tax, including inheritance tax, in the United Kingdom, or, indeed, elsewhere, which would otherwise be payable on the death of the *incapable*. I accept the reasoning of Lord Nimmo Smith as being applicable to *curatelle* in Guernsey today. In my judgment, this approach properly reflects the changes in social conditions in Guernsey to which I have referred above.
56. Whether or not this is a proper case for the grant of relief of the nature described in the Application will now fall to be decided by the Ordinary Court, including the Jurats, at the next stage of these proceedings.

Patrick Talbot QC  
Lieutenant-Bailiff  
3 June 2008