

# **ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000**

---

## **EXPLANATORY NOTES**

### **THE ACT**

#### **Part 6: Intervention Orders and Guardianship Orders**

##### **Guardianship orders**

##### *Section 57: Application for guardianship order*

230. This section sets out how applications can be made for guardianship orders, who may apply for an order and what documents must accompany applications.
231. Subsection (1) establishes that an application to the sheriff for a guardianship order can be made by anyone with an interest, including the adult. The application can be made about any or all aspects of the property, financial affairs or personal welfare of the adult concerned.
232. Subsection (2) places a duty upon the local authority to apply for a guardianship order under certain circumstances, where it appears that an order is necessary but nobody else is applying for one. In assessing whether the order is required, there must be no other lesser measure that could safeguard the adult's interests sufficiently. A guardianship order would only be appropriate where no other measures were possible or sufficient, for example, an intervention order.
233. Subsection (3) establishes the evidence which must accompany an application for guardianship. Evidence is required in relation to the incapacity of the adult, the need for a guardianship order and the suitability of the person nominated in the order.
234. Subsection (3)(a) requires assessment of the adult concerned to be by two medical practitioners. Their examinations must have been within the 30 days prior to making the application, which ensures recent and specific assessments.
235. Where mental disorder is being assessed, one of the medical practitioners must be approved under section 20 of the Mental Health (Scotland) Act. Section 20 doctors are approved by Health Boards as having special experience in the diagnosis or treatment of mental disorder. They are mainly psychiatrists but may include other medical practitioners who have the necessary special experience.
236. Where the guardianship application covers any aspect of the personal welfare of the adult, subsection (3)(b) requires a report from the mental health officer of the relevant local authority on the appropriateness of the order sought. Where the incapacity of the adult is due only to an inability to communicate, the report is the responsibility of the chief social work officer. Again the report must be based on a recent assessment. The opinion of the mental health officer or chief social work officer is also sought on the suitability of the nominated guardian.

*These notes relate to the Adults with Incapacity (Scotland)  
Act 2000 (asp 4) which received Royal Assent on 9 May 2000*

237. Subsection (3)(c) provides for a similar report to (3)(b) where a guardian with powers covering only property or financial affairs is sought. The report must be from somebody with sufficient knowledge of the adult and the applicant. This may be a social worker, but might also be a relative, carer or professional involved with the adult. They will assess whether guardianship is an appropriate order to make, and the nominated guardian is suitable, by interviewing the adult concerned. Again the assessment must be carried out in the 30 days prior to lodging the application.
238. Subsection (4) requires an individual when applying for a guardianship order covering welfare matters, to inform the chief social work officer of his intention. The chief social work officer or mental health officer, as the case may be, will then be obliged to make their report within 21 days, ensuring that the report will be available for the application to proceed.
239. Subsection (5) establishes that the sheriff may, in the period between receiving an application for a guardianship order, and deciding whether to grant the order, appoint an interim guardian. This measure might be required if the property or financial affairs of the adult required urgent administration, or the adult needed someone to take welfare decisions on their behalf before an order could be granted.
240. Subsection (6) limits the period of the appointment of an interim guardian to until a guardian has been appointed, or three months from the date of appointment, or any earlier date on which the sheriff recalls it. This ensures that interim guardians do not have authority for extended periods, as they would not have been subject to the full scrutiny required to protect adults on the appointment of a guardian.

***Section 58: Disposal of application***

241. This section sets out how the sheriff will deal with an application for a guardianship order and the process of notification of such an order.
242. Subsection (1)(a) requires the sheriff to ascertain that the adult's incapacity relates to the powers proposed for the guardian, and that the incapacity is likely to continue. Subsection (1)(b) ensures that the principle of least intervention is adhered to and a guardian is only appointed where no other available measure would sufficiently safeguard or promote the adult's interests.
243. Subsection (2) ensures that a sheriff shall consider any previous orders relating to the adult made under Part 6 of the Act when considering an application for a guardianship order. This will avoid conflicting orders being made and inform the sheriff about measures that have been taken in the past.
244. Subsection (3) allows the sheriff to decide that an intervention order would be more appropriate than guardianship and to treat the original application as an application for an intervention order. This will avoid the delay of having to reapply for an intervention order, and the sheriff having to consider the case twice.
245. Subsection (4) provides that the sheriff will normally appoint a guardian for 3 years, but has discretion to vary this, including making the appointment indefinite.
246. Subsection (5) provides that two or more guardians may be appointed jointly with separate powers, for example, one for welfare matters and one for financial matters. This is different to the provision at section 62 for guardians to be appointed to exercise the same powers jointly.
247. Subsection (6) provides that the sheriff shall order a person granted a guardianship order relating to property or financial affairs to provide caution or insurance against liability. This is to protect the adult from any mishandling of their affairs, ensuring that recourse to compensation is possible. The sheriff will require caution to be found unless the person appointed as guardian proves unable to find caution, in which case, if the sheriff

is satisfied that the person is still suitable to be appointed as guardian, the sheriff can waive the requirement.

248. Subsection (7) states that it is the court's duty to inform the Public Guardian of a guardianship order. It also sets out the duties of the Public Guardian on receiving notification of the guardianship order. The details must be entered in the public register, and when satisfied that the guardian has found insurance against liability, if the sheriff has required it, the Public Guardian will issue a certificate to the guardian, giving him authority to act.
249. Subsections (7)(c) and (d) provide for the Public Guardian to notify the appointment of a guardian to the adult and the appropriate statutory bodies. The terms of the interlocutor, that is to say, the details of the appointment, must be notified to the statutory bodies.

### ***Section 59: Who may be appointed as guardian***

250. This section sets out who the sheriff may appoint as a guardian to an adult and factors they should consider in making an appointment.
251. Subsection (1) establishes the categories of people suitable for appointment as guardians. The chief social work officer of the local authority can be appointed as an adult's guardian only with respect to their welfare. Otherwise, any individual whom the sheriff considers to be suitable and is willing can be appointed.
252. The chief social work officer of the local authority can be appointed as an adult's guardian only with respect to the adult's welfare. Subsection (2) clarifies that where a guardianship order is to relate to property, financial affairs and welfare, the chief social work officer may be appointed as a joint guardian with powers relating only to the adult's welfare.
253. Subsection (3) provides for the sheriff to ensure that an individual understands the adult's requirements, and a guardian's duties before appointing them.
254. Subsection (4) sets out the points that the sheriff should consider to assess the suitability of an individual to be appointed guardian. It is important that the guardian is easily and regularly accessible to the adult. Subsections (4)(c), (d) and (e) are important to prevent an appointment that fails to benefit the adult. These provisions are not intended to prevent close relatives or a person residing with an adult being appointed their guardian, as stated in subsection (5). Subsection (4)(f) allows the sheriff to take into account any other matter if appropriate.

### ***Section 60: Renewal of guardianship order by sheriff***

255. Subsection (1) provides that at any point before a guardianship order expires, a renewal application can be made, and that this will have the effect of continuing the period of guardianship until the renewal has been decided. For example, if a renewal was requested a week before the guardianship order expired and it took six weeks for the sheriff to make a decision, the guardianship would continue uninterrupted until that decision was made.
256. Subsection (2) provides that it is the duty of the local authority to apply for the renewal of a guardianship order where nobody else does, and that in such a case the guardianship order will continue until the application has been determined. This protects the adult against a lapse in their protection.
257. Subsection (3) provides that an application to renew a guardianship order should require the same reports on the incapacity of the adult as the original order required, as set out in section 57. This means that a sheriff will be fully informed as to the current state of the adult's incapacity, and whether a guardianship order is still appropriate, and, where an individual is the guardian, whether they are still a suitable person to act.

*These notes relate to the Adults with Incapacity (Scotland)  
Act 2000 (asp 4) which received Royal Assent on 9 May 2000*

258. Subsection (4) provides for sheriffs to follow the same procedure for disposing of renewal applications as other applications, as described in section 58.
259. Subsection (4)(b) provides for the renewal of a guardianship application to normally be for 5 years, as opposed to the 3 years suggested for an initial appointment. The sheriff may, however, set another period where appropriate – this could be short if the adult’s condition was subject to change, or indefinite where no improvement was expected.
260. Subsection (5) applies to cases where the sheriff refuses to renew the guardianship order. In this case it is the duty of the court to inform the Public Guardian, who must record this in the public register, and notify the adult and the appropriate statutory bodies.

***Section 61: Registration of guardianship order relating to heritable property***

261. This section makes the same provision for registering a guardianship order relating to heritable property with the Keeper of the Registers of Scotland, as for intervention orders under section 56. The provision ensures that any conveyancing search of the Registers would reveal the existence of the guardian for the purposes of transactions with the property. See section 56 for further explanatory notes.