

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

EXPLANATORY NOTES

THE ACT

Part 6: Intervention Orders and Guardianship Orders

Joint and substitute guardians

Section 62: Joint guardians

262. This section allows for two or more individuals to be appointed as joint guardians to an adult.
263. Subsection (1) sets out the two manners in which joint guardians might be appointed – either by an initial application by more than one individual, or by adding a further individual to act jointly with the existing guardian or guardians.
264. Subsection (2) states that normally joint guardians will only be appointed where they are close relatives of the adult, namely parents, siblings or children. Only where the sheriff is satisfied that there is a particular need, would individuals who are not relatives of the adult be appointed as joint guardians.
265. Subsection (3) provides that the appointment of joint guardians will follow the same steps as appointing a single guardian. The sheriff will have the same options to dispose of applications as are detailed in section 58 and will use the same criteria to decide whether to appoint the applicants, as described in section 59.
266. Subsection (4) provides for the application of an individual to be an additional guardian to act alongside the existing guardian. The sheriff must be satisfied, using the criteria described at section 59(2) to (4), that the individual is suitable to be appointed as guardian of the adult concerned.
267. Subsection (5) provides the procedure for notification of the appointment of an additional guardian. The sheriff court will inform the Public Guardian of the appointment, who will enter the details in his register, and, when the new appointee has obtained insurance against liability if required, will issue a certificate of appointment. The existing guardian will be issued with a new certificate of appointment, which will indicate the joint guardianship.
268. Subsection (6) states that joint guardians can, subject to the requirements of subsection (7), act individually. Joint guardians are however liable for damage due to their acts or omissions, as a single guardian would be, and also for that caused by their fellow joint guardian, where they have failed to take reasonable steps to prevent it. In the case where two or more joint guardians are liable for loss or injury caused to the adult concerned, their liability is joint and several. For example, if one of the joint guardians, entered into a financial arrangement on behalf of the adult, all of the joint guardians could be liable if the arrangement turned out to have been incompetent.

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Act 2000 (asp 4) which received Royal Assent on 9 May 2000*

269. Subsection (7) places a duty on joint guardians to consult each other before acting. This consultation can be waived if it is impractical. For example, one of the joint guardians could freely act if the other was abroad and out of ready communication. It can also be waived by agreement of the joint guardians. For example, two joint guardians might agree that only one would be involved in the adult's everyday finances.
270. Subsection (8) provides for recourse to the sheriff court if joint guardians cannot agree.
271. Subsection (9) establishes that third parties when dealing with a joint guardian can, unless they know anything to the contrary, rely on the authority of one of the guardians as they would on a single guardian, without seeking further confirmation.

Section 63: Substitute guardian

272. This section provides for the appointment of a substitute guardian who will replace the original guardian if they die, or have to stop acting. For example, this might be particularly relevant where a guardian is elderly: the guardian may themselves lose capacity.
273. Subsection (1) states that the sheriff can, on application, appoint a substitute guardian who meets the same criteria that govern the appointment of the original guardian, that is to say, those in section 59.
274. Subsection (3) provides that a substitute guardian's appointment expires at the same time as the appointment of the original guardian. At that point, the need for guardianship will be reviewed by the court and renewed provision for a substitute guardian can be made in any resulting guardianship order.
275. Subsection (4) establishes that an application for the appointment of a substitute guardian can be made at the same time as the appointment of the original guardian or later. This allows a substitute to be appointed when the circumstances of the original guardian alter. Alternatively, a suitable individual who was not eligible at the time of the original application may apply, for example, if a child of the adult concerned reaches adulthood.
276. Subsection (5) requires a person appointed as substitute guardian to find caution or insurance against liability. Where the substitute guardian's powers will relate to property or financial affairs, caution will be required by the sheriff unless the substitute guardian is unable to get such insurance, in which case, if the sheriff is still satisfied that the person is appropriate for appointment, the requirement can be waived.
277. Subsection (6) establishes that when a substitute guardian replaces an original guardian, they should be referred to as the "original guardian" for the purposes of this section, to allow for the appointment of a replacement substitute guardian.
278. Subsection (7) states that when a substitute guardian is appointed, other than in the original guardianship order, it is the duty of the court to notify the Public Guardian. The Public Guardian must notify those listed in subsection (7)(b), and record the appointment of the substitute guardian in the public register.
279. Subsection (8) states the duties of a substitute guardian on the death or incapacity of the original guardian. They must notify the Public Guardian, providing a death certificate where the original guardian has died. The substitute guardian must also state at this stage whether they will accept the appointment as guardian. This means that even if the substitute guardian does not wish to accept the appointment, it is still their duty to inform the Public Guardian if the original guardian can no longer act by reason of incapacity or death.
280. Subsection (9) provides for the Public Guardian to authorise the substitute guardian to act in the place of the original guardian, after notification under subsection (8) has

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occurred. The new guardian's details will be entered in the public register, a certificate will be issued and the adult and the appropriate statutory bodies will be notified.

281. Subsection (10) establishes that the scope of a substitute guardian's powers is the same as those of the original guardian, unless the sheriff has specified otherwise.