

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

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## **EXPLANATORY NOTES**

### **THE ACT**

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

##### **Functions etc. of guardian**

##### ***Section 64: Functions and duties of guardian***

282. Subsection (1) defines the powers that a guardian may be given by the order of the sheriff court appointing them. Powers may be granted over specific aspects of the property, financial affairs and the personal welfare of the adult. Alternatively, the guardian may be given power over all areas of personal welfare, all of the adult's property and finances, or both.
283. Subsection (1)(c) allows the guardian to be given the power to act in relation to a declarator of nullity of marriage, divorce or separation in the adult's name. This power has to be specifically set out in the guardianship order.
284. Subsection (1)(e) provides for the guardian to authorise the adult to control certain parts of his affairs, for example, small amounts of money. This agrees with the general principles outlined in section 1 of encouraging the adult to use their existing skills and develop new skills, and being the least restrictive measure to the adult's freedom.
285. Subsection (2) provides that a guardian cannot authorise the detention of an adult in a hospital for the treatment of mental disorder, nor can they consent to any of the excepted treatments for which specific provisions are made under section 48.
286. Subsection (3) allows a guardian to act as the legal representative of the adult, where the matter relates to an area within the guardian's powers, unless the court has specifically ruled this out. For example, the guardian might instruct a solicitor on the adult's behalf.
287. Subsection (5) allows a financial guardian to use the adult's estate, both their income and capital, including any savings or investments of the adult, as set out in the Act. The purpose must be to enhance the adult's quality of life. This is subject to any conditions the court has imposed, the management plan required at schedule 2, and the provisions for buying and selling property also in that schedule.
288. Subsection (6) allows a guardian to delegate duties to other people, for example, to give a primary carer funds to manage day to day expenses. However, the guardian cannot transfer powers conferred by the guardianship order to another person. This means that the guardian remains responsible for all areas covered by the order, until their appointment is terminated.
289. Subsection (7) gives the Public Guardian the general function of supervising and directing financial guardians. This would, for example, allow the Public Guardian to

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require a guardian to desist from using the adult's funds in a particular way. The Public Guardian may apply to the sheriff for an order where the guardian has not complied with an order issued by him.

290. Subsection (8) safeguards an adult who has an interim guardian with welfare or financial powers. Monthly reports must be made by the interim guardian to allow extra supervision of the exercise of interim guardianship powers since they were appointed without the safeguards required when a permanent guardian is appointed. These reports will be made to the local authority in the case of welfare powers and the Public Guardian in the case of financial powers.
291. Subsection (9) applies where the chief social work officer has been appointed as an adult's guardian. It is likely that another official will actually exercise the day to day responsibilities of the guardian, and this provision ensures that those who would be informed about guardianship are informed quickly of who the nominated official is at any particular point.
292. Subsection (11) provides for the scope and conditions of a guardian's powers to be prescribed in Regulations.
293. Subsection (12) provides for schedule 2, which gives detailed conditions for guardians managing aspects of the estate of an adult, to take effect.

**Section 65: Records: guardians**

294. This section requires a guardian to keep a record of their actions. The code of practice for guardians will include information on record-keeping.

**Section 66: Gifts**

295. There is no implied power for a guardian to make gifts out of the adult's estate. Subsection (1) states that guardians with powers over an adult's property and financial affairs cannot make gifts on the adult's behalf unless the Public Guardian has authorised the gifts.
296. Subsection (2) provides for the Public Guardian to authorise specific gifts to be made, or give general authorisation for a particular type of gift. For example, the Public Guardian could authorise a series of birthday presents of specified value to be made to specified people.
297. Subsection (3) provides for the Public Guardian to inform the persons listed in this subsection, who have an interest in the adult and their estate, about applications by the guardian to make gifts. They will be given a period in which to object to the gift being granted. If any objections are made, the Public Guardian is required to hear these objections, before making a decision.
298. Subsection (4) allows the Public Guardian to make an exception to the requirement for intimation, where he thinks that the value of the gift is not significant.
299. Subsection (6) says that where the Public Guardian is considering refusing an application, the guardian must be told and has the right to be heard by the Public Guardian before a final decision is made.
300. Subsection (7) establishes that the Public Guardian may refer an application to make a gift to the sheriff for a decision, at his own instigation or that of the guardian or any person objecting to authorising the gift. This would allow the sheriff rather than the Public Guardian to make the decision.
301. Subsection (8) provides for decisions of the Public Guardian to be appealed to the sheriff. There is no further appeal against decisions of the sheriff.

**Section 67: Effect of appointment and transactions of guardian**

302. This section makes various provisions about the exercise of a guardian's powers.
303. Subsection (1) clarifies that the adult may not enter into transactions on matters within the guardian's authority and any decision of the adult on such a matter is invalid. For example, if a guardian was appointed with powers over the adult's property, the adult could not sell their house. However, the guardian may choose to delegate to the adult if the terms of their appointment allow this.
304. The appointment of a guardian does not imply that the adult loses capacity in an area that the guardianship order does not cover. In particular, the appointment of a guardian need not affect the adult's legal capacity to make a will, or enter into a valid marriage.
305. Subsection (2) provides that the certificate of appointment that a financial guardian receives from the Public Guardian, gives the guardian authority to manage the adult's moveable and immovable property and to receive any relevant payments due to the adult.
306. Subsection (3) establishes that a welfare guardian can act even when the adult is outside Scotland.
307. Subsection (4) deals with the liability of a guardian. Guardians are not personally liable for transactions where it is made clear that they are acting as guardian, and within the scope of their authority. In those circumstances, the guardian is a representative of the adult and the adult's estate is liable. If, however, the guardian has not made it clear that they are acting as guardian, then they are personally liable. However, where their actions are within the authority granted them, they can be reimbursed for costs incurred in this way, from the adult's estate. This provision is necessary to ensure that guardians are not deterred from carrying out their duties because they might unintentionally fail to clarify their authority to a third party.
308. Subsection (4)(b) provides that the guardian is personally liable if they act outwith the scope of their authority.
309. Subsection (5) provides for the validity of the adult's actions, where the guardian delegated matters under section 64(1)(e), despite the adult's incapacity, but provided that the third party involved is aware that the guardian has delegated to the adult.
310. Subsection (6) provides protection for third parties who enter into transactions for value and in good faith with a guardian, for example, by buying something belonging to the adult. That transaction will not be invalidated because the guardian has acted outwith their authority, incorrectly or was appointed invalidly. Without this protection, third parties might be reluctant to deal with guardians.
311. Subsection (7) provides that where the appointment of a foreign welfare guardian is recognised in Scotland, they are covered by subsections (3) and (4).

**Section 68: Reimbursement and remuneration of guardian**

312. This section sets out whether and how a guardian may be remunerated for work done performing duties as a guardian and reimbursed for expenses so incurred.
313. Subsection (1) states that a guardian is entitled to reimbursement, with the restriction that it should only be for expenses that the guardian incurred carrying out his function as a guardian. Reimbursement will come from the adult's estate.
314. Subsection (2)(a) provides for the guardian to be reimbursed for items and services they provide that are not part of their functions as a guardian. For example, if the guardian was also the adult's solicitor, this allows them to continue to be paid by the adult for services provided that are not included in the appointment as a guardian.

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315. Subsection (2)(b) protects the adult from being subject to extra local authority charges due to the appointment of a local authority guardian. If services provided would be free of charge to someone not under guardianship, a charge cannot now be made for those services.
316. Subsection (3) relates to costs that a local authority may be reimbursed, where it applies for appointment of the chief social work officer as a guardian. It differentiates between guardianship orders covering property and financial affairs, and those covering welfare matters. Only in the former case can the local authority be reimbursed. Where an order covers both finance and welfare matters, it is at the sheriff's discretion to apportion the costs between the adult and the local authority respectively. The effect of this subsection is that an adult's estate will bear the cost of administering it properly, but that the protection of the adult through the appointment of a local authority welfare guardian will not cost the adult anything.
317. Subsection (4) also distinguishes remuneration (or pay) for welfare guardianship from that relating to property and financial affairs. Only where the sheriff decides that special cause is shown and has taken the value of the adult's estate into account, and never where the chief social work officer is exercising the role, should welfare guardians be paid for exercising their functions. The sheriff might, for example, consider remuneration for a guardian who was the adult's carer and dependent on the adult, with no other means of support.
318. Subsection (4)(b) states that financial guardians will normally be remunerated out of the adult's estate for exercising their functions, which may be more onerous and involve considerable responsibility. However, the sheriff may remove this provision, perhaps where the adult's estate is very small, and the task of managing it is straightforward.
319. Subsection (5) establishes that the work involved in administering the adult's estate, and the estate's value will be determining factors for the sheriff to use in allowing remuneration of a financial guardian.
320. Subsection (6) provides for the Public Guardian to set the level of remuneration, where the sheriff has allowed it, and outlays which will be reimbursed, for each guardian. The Public Guardian will determine the level of remuneration granted, taking into account the level of the adult's resources. Where accounts are submitted by the guardian, levels of remuneration and reimbursement of expenses will be determined at the end of each accounting period.
321. Subsection (7) allows the Public Guardian to award interim remuneration to a guardian if it is unreasonable to wait for the end of an accounting period, for example, where the guardian has spent a considerable time carrying out his financial duties, the accounting period is long, and it could cause hardship to withhold remuneration.
322. Subsection (8) concerns appeals against decisions of the Public Guardian. The decision to award remuneration, or reimburse outlays or to award an interim payment can be appealed to the sheriff, whose decision is final.

***Section 69: Forfeiture of guardian's remuneration***

323. This section provides for forfeiture of the guardian's remuneration where there is misconduct or the guardian has not performed duties properly. Any interested party, for example, the adult, or the local authority, can apply to the sheriff, bringing the guardian's conduct to the court's attention, and the sheriff can forfeit all or part of the guardian's remuneration.

***Section 70: Non-compliance with decisions of guardian with welfare powers***

324. This section sets out the measures a welfare guardian can take to ensure that certain decisions are implemented.

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325. Subsection (1) provides for where the adult or another person does not comply with a reasonable decision by the welfare guardian. The guardian can apply to the sheriff for an order or warrant to make the adult or another person comply with their decision. The sheriff would have to be satisfied that the order would benefit the adult, that the adult or other person could reasonably be expected to obey the decision and it was the only reasonable way of achieving that benefit.
326. Subsection (1)(a) provides for the sheriff to issue an order specifically instructing the adult or a third party to implement the guardian's decision.
327. Subsection (1)(b) provides for situations where the adult does not comply with the decision of the welfare guardian as to where they are to live. In this case, the sheriff can issue a warrant for a police officer to arrest the adult and remove them to the place that the guardian requires. Section 117 of the Mental Health (Scotland) Act 1984 sets out a similar provision for removal to a place of safety of a mentally disordered adult who is being ill-treated or is unable to care for himself.
328. Subsection (2) provides for cases where a third party has refused to comply with a decision of a welfare guardian. The guardian may apply to the sheriff, who can make an order to the third party, where the guardian's decision is justified and it is reasonable to expect the third party to comply with the decision.
329. Subsection (3) provides for the court to notify any persons against whom the order or warrant is made, including the adult concerned, that an application has been made. They must be given a prescribed period to object, and any objections must be heard, before any order or warrant is granted. However, the sheriff is not bound to take objections into account in deciding to grant the application.
330. Subsection (5) permits a constable executing a warrant granted according to subsection (1)(b) to use reasonable force if required. The constable must be accompanied by the guardian, or another person authorised by the guardian.
331. Subsection (6) provides that a foreign welfare guardian whose appointment is recognised in Scotland, shall have the same rights and restrictions under this section as a welfare guardian appointed in Scotland.