

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

EXPLANATORY NOTES

THE ACT

Part 6: Intervention Orders and Guardianship Orders

Termination and variation of guardianship and replacement, removal or resignation of guardian

Section 71: Replacement or removal of guardian or recall of guardianship by sheriff

332. This section provides that the sheriff may order a guardian to be replaced, removed (where a substitute or joint guardian exists who would act or continue to act) or have their powers recalled (where a guardian is no longer required or appropriate).
333. Subsection (1) provides that the adult or any other interested party can make an application to the sheriff under this section. On granting any application, the court will notify the Public Guardian and the other statutory bodies, where appropriate.
334. Subsection (1)(a) provides for replacement where the application nominates another individual or office-holder to be appointed. Before appointing the new guardian, the sheriff must consider their suitability as set out in section 59.
335. Subsection (1)(b) allows a sheriff to remove a guardian from office, where another guardian exists who is prepared to act, or continue to act: either a substitute guardian, or a remaining joint guardian or joint guardians where the guardian being removed was a joint guardian. This would involve the sheriff deciding whether the application is justified and, if so, removing the powers of the existing guardian.
336. Subsection (1)(c) provides for a guardianship order to be recalled in situations where a guardian is no longer needed, for example, if the adult has recovered capacity, or another measure than guardianship would be more appropriate, for example, one or more intervention orders.
337. Subsection (2) provides for a new guardian appointed under this section to be required by the sheriff to find caution or insurance against liability. The sheriff will order that caution must be found by a guardian with powers relating to property or financial matters, unless the guardian proves unable to find caution, in which case, if the sheriff is satisfied that they are still suitable to be appointed, the requirement can be waived.
338. Subsection (3) sets out the actions of the Public Guardian on notification of a decision under subsection (1). The details of the sheriff's decision will be entered in the public register.
339. Subsection (3)(b) provides that when satisfied that any new guardian has found caution if required by the sheriff, the Public Guardian will issue a new certificate of

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appointment. After issuing a certificate of appointment, the Public Guardian will notify the adult and relevant statutory authorities, according to subsection (3)(c).

340. Subsection (4) provides that the sheriff may recall a guardianship order under this section and make an intervention order. An intervention order may be the most appropriate replacement for guardianship, according to the minimum intervention principle in section 1.
341. Subsection (5) clarifies that foreign guardians may be replaced or removed, or have their powers recalled, by the sheriff under this section, if their appointment is recognised in Scotland.

Section 72: Discharge of guardian with financial powers

342. This section provides for the Public Guardian to discharge a guardian with financial powers, following that guardian's recall, resignation, removal, replacement or death, or the death of the adult concerned. This gives a guardian, or after the guardian's death, their representative, an exoneration from any future challenge relating to their handling of the adult's financial affairs.
343. Subsection (1) establishes that under all the circumstances listed, the Public Guardian may, on application from the former guardian, or his representative where the former guardian has died, grant a discharge. This would cover all of the former guardian's activities in managing the adult's affairs.
344. Subsection (2) provides that when the Public Guardian receives an application for the discharge of a former guardian, he will notify the people stated, and give them a period in which to object. Where objections are made, the Public Guardian must give the objector an opportunity to be heard.
345. Subsection (4) states that where the Public Guardian is considering refusing an application for discharge, he must notify the former guardian or his representative. They will be given time to object to this decision and only after hearing their objections can the Public Guardian refuse the application.
346. Subsection (5) provides for the Public Guardian to remit an application for discharge to the sheriff for a decision. He may do this at the request of the applicant or any person objecting to the granting of the application, or at his own discretion.
347. Subsection (6) concerns appeals against decisions of the Public Guardian. These can be made to the sheriff on three counts: the Public Guardian's decision to grant or refuse the discharge, or to grant or refuse the application, or to refuse to remit the application to the sheriff. In each case, the decision of the sheriff cannot be appealed against.

Section 73: Recall of powers of guardianship

348. This section provides for the Public Guardian, Mental Welfare Commission or local authority to recall, or in other words terminate, the powers of a guardian, either on application or at their own instance.
349. Subsection (1) establishes that the Public Guardian can recall a guardian's property or financial powers. Any person claiming an interest, including the adult, may apply to the Public Guardian for a recall.
350. The Public Guardian can recall the powers of a guardian on either of two grounds: firstly, that the reasons for appointing a guardian no longer apply, for example, where the adult has regained capacity. Secondly, that another and less intrusive measure than guardianship would be as satisfactory, for example, an intervention order, or access to the adult's funds under Part 3 of the Act.
351. Subsection (2) provides for the Public Guardian to update the public register and notify the adult and other interested parties where he has recalled the powers of a guardian.

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352. Subsection (3) establishes that the Mental Welfare Commission or the local authority can recall welfare guardianship powers on the same grounds provided at subsection (1). This can be done at their own instigation, for example, where an adult has no other interested person prepared to apply; or where another party claiming an interest in any of the adult's affairs, including the adult themselves, has applied to them. The relevant local authority is the one in which the adult lives. Where the chief social work officer of the local authority has been appointed guardian, welfare powers cannot be recalled by the local authority. If a local authority thinks that powers conferred on their chief social work officer should be recalled, they can apply to the Mental Welfare Commission under this section.
353. Subsection (4) provides for the Public Guardian to be informed of recall of guardians' powers under subsection (3), to allow the update of the public registers, and to notify the adult and guardian. The local authority and Mental Welfare Commission must notify each other of recalls that they make.
354. Subsection (5) provides for the Public Guardian, Mental Welfare Commission or local authority to notify the adult and other interested parties, as listed, when considering recalling a guardians' powers, either at their own instance, or on application from a third party. All parties notified will be given a prescribed period to lodge objections, and no recall will be made without giving an objector an opportunity of being heard.
355. Subsection (7) provides that where the Public Guardian, Mental Welfare Commission or local authority intend to refuse an application for recall, they will inform the applicant and the adult and give a prescribed period in which they can object. The application will not be refused until any objections have been heard.
356. Subsection (8) allows the Public Guardian, Mental Welfare Commission or local authority to choose to, or on the request of an applicant or any person objecting to recall, decide to, remit the matter to the sheriff.
357. Subsection (9) provides for appeals to the sheriff against decisions by the Public Guardian, local authority and Mental Welfare Commission on recall or to remit or not to remit an application to the sheriff. The sheriff's decision is final and cannot be appealed against. While an appeal to the sheriff is in progress, the decision on the application to recall will remain in force.
358. Subsection (10) gives the Scottish Ministers the power to make regulations prescribing the procedures for recall by the Mental Welfare Commission or the local authority. Such a power exists in relation to recall by the Public Guardian under section 7.

Section 74: Variation of guardianship order

359. Subsection (1) establishes that the sheriff has the authority to vary a guardianship order, or any related order. This would allow the sheriff, for example to alter the powers conferred on a guardian. Any interested party, including the adult, can apply to the sheriff for a variation to a guardianship order.
360. Subsection (2) provides for the sheriff to require caution to be found when varying any powers relating to an adult's property or financial affairs, in the same terms as it is required under section 58(6), when a guardian is appointed. This provides protection for an adult in a case where the variation has increased a guardian's responsibilities for the adult's property or financial affairs.
361. Subsection (3) provides for the sheriff to consider any previous orders, variations to orders or ancillary orders made under Part 6 of the Act when considering an application for a variation. This will ensure the sheriff is aware of past or existing orders, informing of what has been appropriate in the past and ensuring an informed decision is taken on this application.

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362. Subsection (4) prohibits using section 74 to extend the powers of a welfare guardian to matters relating to property or financial affairs, or those of a financial guardian to welfare matters. A change as important as this should be made through a new application for a guardianship order under section 57.
363. Subsection (5) provides that the sheriff court will notify the Public Guardian of any variation to a guardianship order, allowing the public registers to be updated, the appropriate parties notified and a new certificate of appointment issued to the guardian.

Section 75: Resignation of guardian

364. This section sets out the procedure for a guardian to resign. To protect the adult from an interval in which no guardian is acting, resignation cannot become effective until the appropriate notifications and appointment of another guardian have been completed.
365. Subsection (1) establishes that a joint guardian, or a guardian where a substitute guardian has been appointed, may resign by notifying the Public Guardian, the local authority and, where appropriate, the Mental Welfare Commission.
366. Subsection (2) qualifies subsection (1) with the provision that resignation shall not be effective unless the remaining guardian, whether joint or substitute, is willing to act under the new circumstances. If this is the case, the resignation is effective from the time the Public Guardian has received the written resignation of the guardian, and evidence that the substitute or remaining joint guardian is prepared to act.
367. Subsection (3) provides for the Public Guardian, to update the public registers, issue a new certificate of appointment and notify the adult and others of the new arrangement. In the case of a remaining joint guardian, the Public Guardian will already be satisfied that they have caution (insurance against liability) where required, and can issue a new certificate straight away. A substitute guardian will not have required caution before; however the sheriff will have made a decision to require caution or not when they were appointed, and if it was required, they must now demonstrate they have caution before a certificate of appointment can be issued.
368. Subsection (4) provides for substitute guardians, who have not been called upon to act, to resign. This will not affect an adult's affairs and is therefore effective simply by notifying the Public Guardian, local authority and, where appropriate, the Mental Welfare Commission, in writing. The Public Guardian will notify the guardian and the adult, and update the public register.
369. Subsection (5) covers the circumstances in which a guardian wishes to resign but no substitute or joint guardian is available to take over. Subsection (5)(c) includes guardians where the remaining joint guardian or substitute guardian is unwilling to act. Resignation will only be effective after a replacement guardian has been appointed, using section 71. Therefore a guardian seeking to resign with no joint or substitute guardian willing to act could apply to the sheriff under this section, but would also have to ensure that an application for a replacement guardian was made.

Section 76: Change of habitual residence

370. This section provides for notifications where an adult moves from one local authority area to another, where the adult's guardian is the chief social work officer of their local authority.
371. Subsection (1) requires the chief social work officer of the first local authority to notify their counterpart in the second local authority. On receiving notification, the latter becomes the guardian and is then obliged to notify the relevant parties within 7 days. This provides that there is little or no interim period when the guardian's powers are not being exercised.

372. Subsection (2) provides that the Public Guardian will update the public registers and notify the adult within 7 days.
373. Subsection (3) provides for notifying the adult of the officer of the second local authority who will be responsible for acting as guardian on behalf of the chief social work officer, within 7 working days of the local authority receiving notification of the adult's move.
374. Subsection (4) allows notification to the adult to be withheld where, in hearing the original application for guardianship, the sheriff decided that intimation would pose a serious risk to health.

Section 77: Termination of authority to intervene and guardianship on death of adult

375. Subsection (1) states that when the adult dies, any existing intervention order or guardianship order is terminated. For example, this means that a guardian with powers over an adult's property and financial affairs could not continue to act after the adult's death. This is essential because such an action could not benefit the adult. The situation with respect to the adult's estate should be the same as if a person with no guardian had died.
376. Subsections (2), (3) and (4) allow those who work with guardians and the guardian themselves to carry out valid transactions without having to double check that a guardianship is still valid, unless there is a particular reason to doubt it. For example, if a third party were aware that an application to remove the guardian was pending in the court, they should confirm with the guardian that their appointment was still valid. These provisions apply similarly to people authorised to act under intervention orders.
377. Subsection (2) provides that a guardian or person authorised under an intervention order who acts in good faith, carrying out their functions, when their authority has actually terminated, including through the death of the adult, should be entitled so to act.
378. Subsection (3) protects third parties who deal with those whose authority has ended, providing they are unaware of the termination of authority.
379. Subsection (4) provides specific protection where heritable property has changed hands after the authority of a person authorised to intervene or a guardian has come to an end, provided there was no other fault in the transaction.
380. Subsection (5) provides that foreign guardians are to be treated in the same way under this section as guardians appointed in Scotland.

Section 78: Amendment of registration under section 61 on events affecting guardianship or death of adult

381. This section deals with action required when there are changes affecting guardianship orders that relate to heritable property. Where such orders have been made, and recorded or registered under section 61, any subsequent amendments, for example, recall of guardianship, must also be recorded or registered in the Register of Sasines or Land Register of Scotland. Otherwise an out of date guardianship order would be found in a conveyancing search of a property.
382. Subsection (1) provides that the Public Guardian shall apply to the Keeper of the Registers to record any change to a guardianship order that has previously been recorded in the Registers under section 61. The change could be due to one of the circumstances referred to in subsection (1)(a), for example, recall of guardianship by the sheriff, or it could be, as in subsection (1)(b), the death of the adult and consequent termination of the guardianship order. Applications to the Keeper must be accompanied by evidence of the reason for amendment.

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383. Subsection (2) provides for the Keeper of the Registers to record or register the change in the Register of Sasines or Land Register, as appropriate.

Section 79: Protection of third parties: guardianship

384. This section provides protection for third parties who, in good faith, acquire heritable property from a guardian. If the order appointing the guardian turns out to be invalid on grounds of procedure, or the guardian lacked the power to act as they did, the third party will retain the property or interest in property that they bought in good faith.
385. Without this protection, third parties would be reluctant to deal with guardians, as it would have added risks. Similar protection is provided for acquisitions from those authorised under an intervention order in section 53(13).