

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

EXPLANATORY NOTES

THE ACT

Part 7: Miscellaneous

Section 82: Limitation of liability

389. Attorneys, guardians and others with functions under the Act are held at common law to owe a duty of care to the adult with incapacity. This duty requires the exercise of due skill and care in carrying out the functions required on the adult's behalf. Where the proxy is a professional person they must demonstrate the skill and care that would be expected of a reasonably competent member of that profession.
390. There will also be a common law fiduciary relationship between an adult with incapacity and a person acting on their behalf under the Act. A fiduciary duty is one based on trust. It is a general principle that those having fiduciary duties to discharge are not allowed to enter into engagements in which they have or can have a personal interest conflicting or which may conflict with the interests of those whom they are bound to protect. There are other fiduciary duties: the undivided loyalty rule and the confidentiality rule. The undivided loyalty rule requires those with a fiduciary duty not to place themselves in a position where their duty towards one beneficiary conflicts with the duty owed to another. A fiduciary must make available to a beneficiary all the information that is relevant to the beneficiary's affairs. The confidentiality rule requires that a fiduciary must use information obtained in confidence from a beneficiary for the benefit of that beneficiary and must not use it for his or her own advantage or for the benefit of others. These rules are of particular importance where, for example, a guardian acts for several adults with incapacity.
391. Breach of a fiduciary duty normally gives rise to liability on the part of the fiduciary. However, where a person acting under this legislation is a member of the adult's family it may be very difficult or even impossible to avoid breaches of fiduciary duty completely. In many cases those acting for the adult will be family members. Actions such as the apportionment of household expenses between them, or decisions on investments, either to generate maximum income or for capital growth, involve a conflict or potential conflict between the adult and the person acting for them.
392. This section allows breaches of common law duties of care and fiduciary duties owed to an adult with incapacity to be excused, where actions have been reasonable and in good faith, and the general principles in section 1 have been followed, without the courts being required to grant dispensations in individual instances. That would, in many cases, require repeated applications to court which would involve unnecessary expense and might in the long run be prejudicial to the appointment of family members and, indeed, others to act under the legislation.

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

393. Subsection (2) clarifies that foreign guardians and attorneys are also excused breaches of fiduciary duty, where they act in accordance with subsection (1)(a) and (b).