



# Adults with Incapacity (Scotland) Act 2000

2000 asp 4

## PART 6

### INTERVENTION ORDERS AND GUARDIANSHIP ORDERS

#### *Intervention orders*

#### **53 Intervention orders**

- (1) The sheriff may, on an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult, if he is satisfied that the adult is incapable of taking the action, or is incapable in relation to the decision about his property, financial affairs or personal welfare to which the application relates, make an order (in this Act referred to as an “intervention order”).
- (2) In considering an application under subsection (1), the sheriff shall have regard to any intervention order or guardianship order which may have been previously made in relation to the adult, and to any order varying, or ancillary to, such an order.
- (3) Where it appears to the local authority that—
  - (a) the adult is incapable as mentioned in subsection (1); and
  - (b) no application has been made or is likely to be made for an order under this section in relation to the decision to which the application under this subsection relates; and
  - (c) an intervention order is necessary for the protection of the property, financial affairs or personal welfare of the adult,they shall apply under this section for an order.
- (4) Section 57(3) and (4) shall apply to an application under this section and, for this purpose, for the reference to the individual or office holder nominated for appointment as guardian there shall be substituted a reference to a person nominated in such application.
- (5) An intervention order may—

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- (a) direct the taking of any action specified in the order;
  - (b) authorise the person nominated in the application to take such action or make such decision in relation to the property, financial affairs or personal welfare of the adult as is specified in the order;
- (6) Where an intervention order directs the acquisition of accommodation for, or the disposal of any accommodation used for the time being as a dwelling house by, the adult, the consent of the Public Guardian as respects the consideration shall be required before the accommodation is acquired or, as the case may be, disposed of.
- (7) In making or varying an intervention order the sheriff may, and in the case of an intervention order relating to property or financial affairs shall, except where—
  - (a) the person authorised under the intervention order is unable to find caution; but
  - (b) the sheriff is satisfied that nevertheless he is suitable to be authorised under the order,
 require the person authorised under the order to find caution.
- (8) The sheriff may, on an application by—
  - (a) the person authorised under the intervention order; or
  - (b) the adult; or
  - (c) any person claiming an interest in the property, financial affairs or personal welfare of the adult,
 make an order varying the terms of, or recalling, the intervention order or any other order made for the purposes of the intervention order.
- (9) Anything done under an intervention order shall have the same effect as if done by the adult if he had the capacity to do so.
- (10) Where an intervention order is made, the sheriff clerk shall forthwith send a copy of the interlocutor containing the order to the Public Guardian who shall—
  - (a) enter in the register maintained by him under section 6(2)(b)(v) such particulars of the order as may be prescribed; and
  - (b) notify the adult, the local authority and (in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder and the intervention order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission.
- (11) A transaction for value between a person authorised under an intervention order, purporting to act as such, and a third party acting in good faith shall not be invalid on the ground only that—
  - (a) the person acted outwith the scope of his authority;
  - (b) the person failed to observe any requirement, whether substantive or procedural, imposed by or under this Act or by the sheriff or by the Public Guardian; or
  - (c) there was any irregularity whether substantive or procedural in the authorisation of the person.
- (12) A person authorised under an intervention order may recover from the estate of the adult the amount of such reasonable outlays as he incurs in doing anything directed or authorised under the order.

- (13) Where a third party has acquired, in good faith and for value, title to any interest in heritable property from a person authorised under an intervention order that title shall not be challengeable on the ground only—
- (a) of any irregularity of procedure in the making of the intervention order; or
  - (b) that the person authorised under the intervention order has acted outwith the scope of the authority.
- (14) Sections 64(2) and 67(3) and (4) shall apply to an intervention order as they apply to a guardianship order and, for this purpose, for any reference to a guardian there shall be substituted a reference to the person authorised under the order.

#### **54      Records: intervention orders**

A person authorised under an intervention order shall keep records of the exercise of his powers.

#### **55      Notification of change of address**

After particulars relating to an intervention order are entered in the register under section 53 the person authorised under the intervention order shall notify the Public Guardian—

- (a) of any change in his address; and
- (b) of any change in the address of the adult,

and the Public Guardian shall enter prescribed particulars in the register maintained by him under section 6(2)(b)(v) and notify the local authority and (in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder and the intervention order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission.

#### **56      Registration of intervention order relating to heritable property**

- (1) This section applies where the sheriff makes an intervention order which vests in the person authorised under the order any right to deal with, convey or manage any interest in heritable property which is recorded or is capable of being recorded in the General Register of Sasines or is registered or is capable of being registered in the Land Register of Scotland.
- (2) In making such an order the sheriff shall specify each property affected by the order, in such terms as enable it to be identified in the Register of Sasines or, as the case may be, the Land Register of Scotland.
- (3) The person authorised under the order shall forthwith apply to the Keeper of the Registers of Scotland for recording of the interlocutor containing the order in the General Register of Sasines or, as the case may be, for registering of it in the Land Register of Scotland.
- (4) An application under subsection (3) shall contain—
- (a) the name and address of the person authorised under the order;
  - (b) a statement that the person authorised under the order has powers relating to each property specified in the order;
  - (c) a copy of the interlocutor.

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- (5) Where the interlocutor is to be recorded in the General Register of Sasines, the Keeper shall—
  - (a) record the interlocutor in the Register; and
  - (b) endorse the interlocutor to the effect that it has been so recorded.
- (6) Where the interlocutor is to be registered in the Land Register of Scotland, the Keeper shall update the title sheet of the property to show it.
- (7) The person authorised under the order shall send the endorsed interlocutor or, as the case may be, the updated Land Certificate or an office copy thereof to the Public Guardian who shall enter prescribed particulars of it in the register maintained by him under section 6(2)(b)(v).

### *Guardianship orders*

## **57 Application for guardianship order**

- (1) An application may be made under this section by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult to the sheriff for an order appointing an individual or office holder as guardian in relation to the adult's property, financial affairs or personal welfare.
- (2) Where it appears to the local authority that—
  - (a) the conditions mentioned in section 58(1)(a) and (b) apply to the adult; and
  - (b) no application has been made or is likely to be made for an order under this section; and
  - (c) a guardianship order is necessary for the protection of the property, financial affairs or personal welfare of the adult,
 they shall apply under this section for an order.
- (3) There shall be lodged in court along with an application under this section—
  - (a) reports, in prescribed form, of an examination and assessment of the adult carried out not more than 30 days before the lodging of the application by at least two medical practitioners one of whom, in a case where the incapacity is by reason of mental disorder, must be a medical practitioner approved for the purposes of section 20 of the 1984 Act as having special experience in the diagnosis or treatment of mental disorder;
  - (b) where the application relates to the personal welfare of the adult, a report, in prescribed form, from the mental health officer, (but where it is in jeopardy only because of the inability of the adult to communicate, from the chief social work officer), containing his opinion as to—
    - (i) the general appropriateness of the order sought, based on an interview and assessment of the adult carried out not more than 30 days before the lodging of the application; and
    - (ii) the suitability of the individual nominated in the application to be appointed guardian; and
  - (c) where the application relates only to the property or financial affairs of the adult, a report, in prescribed form, based on an interview and assessment of the adult carried out not more than 30 days before the lodging of the application, by a person who has sufficient knowledge to make such a report as to the matters referred to in paragraph (b)(i) and (ii).

- (4) Where an applicant claims an interest in the personal welfare of the adult and is not the local authority, he shall give notice to the chief social work officer of his intention to make an application under this section and the report referred to in subsection (3) (b) shall be prepared by the chief social work officer or, as the case may be, the mental health officer, within 21 days of the date of the notice.
- (5) The sheriff may, on an application being made to him, at any time before the disposal of the application made under this section, make an order for the appointment of an interim guardian.
- (6) The appointment of an interim guardian in pursuance of this section shall, unless recalled earlier, cease to have effect—
  - (a) on the appointment of a guardian under section 58; or
  - (b) at the end of the period of 3 months from the date of appointment, whichever is the earlier.

## **58 Disposal of application**

- (1) Where the sheriff is satisfied in considering an application under section 57 that—
  - (a) the adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare, and is likely to continue to be so incapable; and
  - (b) no other means provided by or under this Act would be sufficient to enable the adult's interests in his property, financial affairs or personal welfare to be safeguarded or promoted,he may grant the application.
- (2) In considering an application under section 57, the sheriff shall have regard to any intervention order or guardianship order which may have been previously made in relation to the adult, and to any order varying, or ancillary to, such an order.
- (3) Where the sheriff is satisfied that an intervention order would be sufficient as mentioned in subsection (1), he may treat the application under this section as an application for an intervention order under section 53 and may make such order as appears to him to be appropriate.
- (4) Where the sheriff grants the application under section 57 he shall make an order (in this Act referred to as a “guardianship order”) appointing the individual or office holder nominated in the application to be the guardian of the adult for a period of 3 years or such other period (including an indefinite period) as, on cause shown, he may determine.
- (5) Where more than one individual or office holder is nominated in the application, a guardianship order may, without prejudice to the power under section 62(1) to appoint joint guardians, appoint two or more guardians to exercise different powers in relation to the adult.
- (6) In making a guardianship order relating to the property or financial affairs of the adult the sheriff shall, except where—
  - (a) the individual is unable to find caution; but
  - (b) the sheriff is satisfied that nevertheless he is suitable to be appointed guardian, require an individual appointed as guardian to find caution.

- (7) Where the sheriff makes a guardianship order the sheriff clerk shall forthwith send a copy of the interlocutor containing the order to the Public Guardian who shall—
- (a) enter prescribed particulars of the appointment in the register maintained by him under section 6(2)(b)(iv);
  - (b) when satisfied that the guardian has found caution if so required, issue a certificate of appointment to the guardian;
  - (c) notify the adult of the appointment of the guardian; and
  - (d) notify the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission of the terms of the interlocutor.

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

- (1) The sheriff may appoint as guardian—
- (a) any individual whom he considers to be suitable for appointment and who has consented to being appointed;
  - (b) where the guardianship order is to relate only to the personal welfare of the adult, the chief social work officer of the local authority.
- (2) Where the guardianship order is to relate to the property and financial affairs and to the personal welfare of the adult and joint guardians are to be appointed, the chief social work officer of the local authority may be appointed guardian in relation only to the personal welfare of the adult.
- (3) The sheriff shall not appoint an individual as guardian to an adult unless he is satisfied that the individual is aware of—
- (a) the adult's circumstances and condition and of the needs arising from such circumstances and condition; and
  - (b) the functions of a guardian.
- (4) In determining if an individual is suitable for appointment as guardian, the sheriff shall have regard to—
- (a) the accessibility of the individual to the adult and to his primary carer;
  - (b) the ability of the individual to carry out the functions of guardian;
  - (c) any likely conflict of interest between the adult and the individual;
  - (d) any undue concentration of power which is likely to arise in the individual over the adult;
  - (e) any adverse effects which the appointment of the individual would have on the interests of the adult;
  - (f) such other matters as appear to him to be appropriate.
- (5) Paragraphs (c) and (d) of subsection (4) shall not be regarded as applying to an individual by reason only of his being a close relative of, or person residing with, the adult.

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

- (1) At any time before the end of a period in respect of which a guardianship order has been made or renewed, an application may be made to the sheriff under this section by

the guardian for the renewal of such order, and where such an application is so made, the order shall continue to have effect until the application is determined.

- (2) Where it appears to the local authority that an application for renewal of a guardianship order under subsection (1) is necessary but that no such application has been made or is likely to be made, they shall apply under subsection (1) for the renewal of such an order and, where such an application is so made, the order shall continue to have effect until the application is determined.
- (3) Section 57(3) shall apply for the purposes of an application made under this section as it applies for the purposes of an application made under that section; and for the purposes of so applying that subsection references to the appointment of a guardian (however expressed) shall be construed as references to the continuation of appointment.
- (4) Section 58 shall apply to an application under this section as it applies to an application under section 57; and for the purposes of so applying that section—
  - (a) references to the making of a guardianship order and the appointment of a guardian (however expressed) shall be construed as references to, respectively, the renewal of the order and the continuation of appointment;
  - (b) for subsection (4) there shall be substituted—

“(4) Where the sheriff grants an application under section 60, he may continue the guardianship order for a period of 5 years or for such other period (including an indefinite period) as, on cause shown, he may determine.”.
- (5) Where the sheriff refuses an application under this section, the sheriff clerk shall forthwith send a copy of the interlocutor containing the refusal to the Public Guardian who shall—
  - (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv); and
  - (b) notify the adult and the local authority and (in a case where the adult’s incapacity is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult’s personal welfare or factors which include it) the Mental Welfare Commission.

## **61 Registration of guardianship order relating to heritable property**

- (1) This section applies where the sheriff makes a guardianship order which vests in the guardian any right of the adult to deal with, convey or manage any interest in heritable property which is recorded or is capable of being recorded in the General Register of Sasines or is registered or is capable of being registered in the Land Register of Scotland.
- (2) In making such an order the sheriff shall specify each property affected by the order, in such terms as enable it to be identified in the Register of Sasines or, as the case may be, the Land Register of Scotland.
- (3) The guardian shall, after finding caution if so required, forthwith apply to the Keeper of the Registers of Scotland for recording of the interlocutor containing the order in the General Register of Sasines or, as the case may be, registering of it in the Land Register of Scotland.
- (4) An application under subsection (3) shall contain—

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- (a) the name and address of the guardian;
  - (b) a statement that the guardian has powers relating to each property specified in the order;
  - (c) a copy of the interlocutor.
- (5) Where the interlocutor is to be recorded in the General Register of Sasines, the Keeper shall—
  - (a) record the interlocutor in the Register; and
  - (b) endorse the interlocutor to the effect that it has been so recorded.
- (6) Where the interlocutor is to be registered in the Land Register of Scotland, the Keeper shall update the title sheet of the property to show the interlocutor.
- (7) The guardian shall send the endorsed interlocutor or, as the case may be, the updated Land Certificate or an office copy thereof to the Public Guardian who shall enter prescribed particulars of it in the register maintained by him under section 6(2)(b)(iv).

#### *Joint and substitute guardians*

### **62 Joint guardians**

- (1) An application may be made to the sheriff—
  - (a) by two or more individuals seeking appointment, for their appointment as joint guardians to an adult; or
  - (b) by an individual seeking appointment, for his appointment as an additional guardian to an adult jointly with one or more existing guardians.
- (2) Joint guardians shall not be appointed to an adult unless—
  - (a) the individuals so appointed are parents, siblings or children of the adult; or
  - (b) the sheriff is satisfied that, in the circumstances, it is appropriate to appoint as joint guardians individuals who are not related to the adult as mentioned in paragraph (a).
- (3) Where an application is made under subsection (1)(a), sections 58 and 59 shall apply for the purposes of the disposal of that application as they apply for the disposal of an application under section 57.
- (4) In deciding if an individual is suitable for appointment as additional guardian under subsection (1)(b), the sheriff shall have regard to the matters set out in section 59(3) to (5).
- (5) Where the sheriff appoints an additional guardian under this section, the sheriff clerk shall send a copy of the order appointing him to the Public Guardian who shall—
  - (a) enter prescribed particulars in the register maintained by him under section 6(2) (b)(iv) of this Act;
  - (b) when satisfied that the additional guardian has found caution if so required, issue a certificate of appointment to the additional guardian and a new certificate of appointment to the existing guardian;
  - (c) notify the adult and the local authority and (in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission.



- (6) Joint guardians may, subject to subsection (7), exercise their functions individually, and each guardian shall be liable for any loss or injury caused to the adult arising out of—
  - (a) his own acts or omissions; or
  - (b) his failure to take reasonable steps to ensure that a joint guardian does not breach any duty of care or fiduciary duty owed to the adult,and where more than one such guardian is so liable they shall be liable jointly and severally.
- (7) A joint guardian shall, before exercising any functions conferred on him, consult the other joint guardians, unless—
  - (a) consultation would be impracticable in the circumstances; or
  - (b) the joint guardians agree that consultation is not necessary.
- (8) Where joint guardians disagree as to the exercise of their functions, either or both of them may apply to the sheriff for directions under section 3.
- (9) Where there are joint guardians, a third party in good faith is entitled to rely on the authority to act of any one or more of them.

## **63      Substitute guardian**

- (1) In any case where an individual is appointed as guardian under section 58 the sheriff may, on an application, appoint to act as guardian in the event of the guardian so appointed becoming unable to act any individual or office holder who could competently be appointed by virtue of section 59.
- (2) In this Act an individual appointed under section 58 and an individual or office holder appointed under this section are referred to respectively as an “original guardian” and a “substitute guardian”.
- (3) The appointment of a substitute guardian shall be for the same period as the appointment of the original guardian under section 58(4).
- (4) An application for appointment as a substitute guardian may be made at the time of the application for the appointment of the original guardian or at any time thereafter.
- (5) In making an order appointing an individual as substitute guardian with powers relating to the property or financial affairs of the adult the sheriff shall, except where—
  - (a) the individual is unable to find caution; but
  - (b) the sheriff is satisfied that nevertheless he is suitable to be appointed substitute guardian,require an individual appointed as substitute guardian to find caution.
- (6) Subsection (1) shall apply to an individual who, having been appointed as a substitute guardian subsequently, by virtue of this section, becomes the guardian as it applies to an individual appointed under section 58 and, for this purpose, any reference in this section to the “original guardian” shall be construed accordingly.
- (7) Where the sheriff appoints a substitute guardian (other than a substitute guardian appointed in the same order as an original guardian) under subsection (1), the sheriff clerk shall send a copy of the interlocutor containing the order appointing the substitute guardian to the Public Guardian who shall—

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- (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv); and
  - (b) notify the adult, the original guardian and the local authority and (in a case where the adult's incapacity is by reason of, or by reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission.
- (8) On the death or incapacity of the original guardian, the substitute guardian shall, without undue delay, notify the Public Guardian—
  - (a) of the death or incapacity (and where the original guardian has died, provide the Public Guardian with documentary evidence of the death); and
  - (b) whether or not he is prepared to act as guardian.
- (9) The Public Guardian on being notified under subsection (8) shall, if the substitute guardian is prepared to act—
  - (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);
  - (b) when satisfied that the substitute guardian has found caution if so required, issue the substitute guardian with a certificate of appointment;
  - (c) notify the adult, the original guardian, the local authority and (in a case where the adult's incapacity is by reason of, or by reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission that the substitute guardian is acting.
- (10) Unless otherwise specified in the order appointing him, the substitute guardian shall have the same functions and powers as those exercisable by the original guardian immediately before the event mentioned in subsection (1).

#### *Functions etc. of guardian*

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

- (1) Subject to the provisions of this section, an order appointing a guardian may confer on him—
  - (a) power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the order;
  - (b) power to deal with all aspects of the personal welfare of the adult, or with such aspects as may be specified in the order;
  - (c) power to pursue or defend an action of declarator of nullity of marriage, or of divorce or separation in the name of the adult;
  - (d) power to manage the property or financial affairs of the adult, or such parts of them as may be specified in the order;
  - (e) power to authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.
- (2) A guardian may not—
  - (a) place the adult in a hospital for the treatment of mental disorder against his will; or
  - (b) consent on behalf of the adult to any form of treatment mentioned in section 48(1) or (2).

- (3) A guardian shall (unless prohibited by an order of the sheriff and subject to any conditions or restrictions specified in such an order) have power by virtue of his appointment to act as the adult's legal representative in relation to any matter within the scope of the power conferred by the guardianship order.
- (4) The guardian shall not later than 7 days after any change of his own or the adult's address notify the Public Guardian who shall—
  - (a) notify the adult (in a case where it is the guardian's address which has changed), the local authority and (in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission of the change; and
  - (b) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv).
- (5) A guardian having powers relating to the property or financial affairs of the adult shall, subject to—
  - (a) such restrictions as may be imposed by the court;
  - (b) any management plan prepared under paragraph 1 of schedule 2; or
  - (c) paragraph 6 of that schedule,be entitled to use the capital and income of the adult's estate for the purpose of purchasing assets, services or accommodation so as to enhance the adult's quality of life.
- (6) The guardian may arrange for some or all of his functions to be exercised by one or more persons acting on his behalf but shall not be entitled to surrender or transfer any part of them to another person.
- (7) The guardian shall comply with any order or demand made by the Public Guardian in relation to the property or financial affairs of the adult in so far as so complying would be within the scope of his authority; and where the guardian fails to do so the sheriff may, on the application of the Public Guardian, make an order to the like effect as the order or demand made by the Public Guardian, and the sheriff's decision shall be final.
- (8) An interim guardian appointed under section 57(5) having powers relating to—
  - (a) the property or financial affairs of an adult shall report to the Public Guardian;
  - (b) the personal welfare of an adult shall report to the chief social work officer of the local authority,every month as to his exercise of those powers.
- (9) Where the chief social work officer of the local authority has been appointed guardian he shall, not later than 7 working days after his appointment, notify any person who received notification under section 58(7) of the appointment of the name of the officer responsible at any time for carrying out the functions and duties of guardian.
- (10) If, in relation to the appointment of the chief social work officer as guardian, the sheriff has directed that that intimation or notification of any application or other proceedings should not be given to the adult, the chief social work officer shall not notify the adult under subsection (9).
- (11) The Scottish Ministers may by regulations define the scope of the powers which may be conferred on a guardian under subsection (1) and the conditions under which they shall be exercised.

- (12) Schedule 2 (which makes provision as to the guardian's management of the estate of an adult) has effect.

**65      Records: guardians**

A guardian shall keep records of the exercise of his powers.

**66      Gifts**

- (1) A guardian having powers relating to the property or financial affairs of an adult may make a gift out of the adult's estate only if authorised to do so by the Public Guardian.
- (2) Authorisation by the Public Guardian under subsection (1) may be given generally, or in respect of a particular gift.
- (3) On receipt of an application in the prescribed form for an authorisation to make a gift, the Public Guardian shall, subject to subsection (4), intimate the application to the adult, his nearest relative, his primary carer and any other person who the Public Guardian considers has an interest in the application and advise them of the prescribed period within which they may object to the granting of the application; and he shall not grant the application without affording to any objector an opportunity of being heard.
- (4) Where the Public Guardian is of the opinion that the value of the gift is such that intimation is not necessary, he may dispense with intimation.
- (5) Having heard any objections as mentioned in subsection (3), the Public Guardian may grant the application.
- (6) Where the Public Guardian proposes to refuse the application he shall intimate his decision to the guardian and advise him of the prescribed period within which he may object to the refusal; and he shall not refuse the application without affording to the guardian, if he objects, an opportunity of being heard.
- (7) The Public Guardian may at his own instance or at the instance of the guardian or of any person who objects to the granting of the application remit the application for determination by the sheriff, whose decision shall be final.
- (8) A decision of the Public Guardian—
  - (a) to grant an application under subsection (5) or to refuse an application; or
  - (b) to refuse to remit an application to the sheriff under subsection (7),
 may be appealed to the sheriff, whose decision shall be final.

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

- (1) The adult shall have no capacity to enter into any transaction in relation to any matter which is within the scope of the authority conferred on the guardian except in a case where he has been authorised by the guardian under section 64(1)(e); but nothing in this subsection shall be taken to affect the capacity of the adult in relation to any other matter.
- (2) Where the guardian has powers relating to the property or financial affairs of the adult, the certificate of appointment issued to him by the Public Guardian shall, subject to the terms of the order appointing him, have the effect of—

- (a) authorising the guardian to take possession of, manage and deal with any moveable or immoveable estate (wherever situated) of the adult;
  - (b) requiring any payment due to the adult to be made to the guardian,in so far as the estate, payment or matter falls within the scope of the guardian's authority.
- (3) A guardian having powers relating to the personal welfare of an adult may exercise these powers in relation to the adult whether or not the adult is in Scotland at the time of the exercise of the powers.
- (4) The guardian shall be personally liable under any transaction entered into by him—
  - (a) without disclosing that he is acting as guardian of the adult; or
  - (b) which falls outwith the scope of his authority,but where a guardian has acted as mentioned in paragraph (a) and is not otherwise in breach of any requirement of this Act relating to such guardians, he shall be entitled to be reimbursed from the estate of the adult in respect of any loss suffered by him in consequence of a claim made upon him personally by virtue of this subsection.
- (5) Where a third party with whom the adult entered into a transaction was aware at the date of entering into the transaction that authority had been granted by the guardian under section 64(1)(e), the transaction shall not be void only on the ground that the adult lacked capacity.
- (6) A transaction for value between the guardian purporting to act as such and a third party acting in good faith shall not be invalid on the ground only that—
  - (a) the guardian acted outwith the scope of his authority; or
  - (b) the guardian failed to observe any requirement, whether substantive or procedural, imposed by or under this Act, or by the sheriff or by the Public Guardian; or
  - (c) there was any irregularity whether substantive or procedural in the appointment of the guardian.
- (7) In subsections (3) and (4) any reference to a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland.

## **68 Reimbursement and remuneration of guardian**

- (1) A guardian shall be entitled to be reimbursed out of the estate of the adult for any outlays reasonably incurred by him in the exercise of his functions.
- (2) In subsection (1), “outlays”, in relation to a guardian—
  - (a) who is someone other than the chief social work officer of a local authority, includes payment for items and services other than those items and services which the guardian is expected to provide as part of his functions;
  - (b) who is the chief social work officer of a local authority, includes payment for items and services only if they would not normally be provided free of charge by the local authority to a person who is in similar circumstances but who does not have a guardian.

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- (3) The local authority shall, in relation to the cost of any application by them for appointment of their chief social work officer as guardian or of any subsequent application by that officer while acting as guardian—
- (a) where the application relates to the personal welfare of the adult, meet such cost;
  - (b) where the application relates to the property or financial affairs of the adult, be entitled to recover such cost from the estate of the adult,
- and where the application relates to the personal welfare and to the property or financial affairs of the adult the sheriff shall, in determining the application, apportion the cost as he thinks fit.
- (4) Remuneration shall be payable out of the adult's estate—
- (a) in respect of the exercise of functions relating to the personal welfare of the adult, only in a case where special cause is shown;
  - (b) in respect of the exercise of functions relating to the property or financial affairs of the adult, unless the sheriff directs otherwise in the order appointing the guardian,
- but shall not be payable to a local authority in respect of the exercise by their chief social work officer of functions relating to the personal welfare of the adult.
- (5) In determining whether or not to make a direction under subsection (4)(b), the sheriff shall take into account the value of the estate and the likely difficulty of managing it.
- (6) Any remuneration payable to the guardian and the amount of outlays to be allowed under subsection (1) shall be fixed by the Public Guardian—
- (a) in a case where the guardian is required to submit accounts, when the guardian's accounts for that period are audited;
  - (b) in any other case, on an application by the guardian,
- and in fixing the remuneration to be paid to the guardian the Public Guardian shall take into account the value of the estate.
- (7) The Public Guardian may allow payments to account to be made by way of remuneration during the accounting period if it would be unreasonable to expect the guardian to wait for payment until the end of an accounting period.
- (8) A decision by the Public Guardian—
- (a) under subsection (6) as to the remuneration payable and the outlays allowable to the guardian;
  - (b) under subsection (7) as to payments to account to the guardian
- may be appealed to the sheriff, whose decision shall be final.

## **69 Forfeiture of guardian's remuneration**

Where a guardian is in breach of any duty of care, fiduciary duty or obligation imposed by this Act the sheriff may, on an application being made to him by any person claiming an interest in the property, financial affairs or personal welfare of the adult, order the forfeiture (in whole or in part) of any remuneration due to the guardian.

## **70 Non-compliance with decisions of guardian with welfare powers**

- (1) Where any decision of a guardian with powers relating to the personal welfare of the adult is not complied with by the adult or by any other person, and the adult or other person might reasonably be expected to comply with the decision, the sheriff may, on an application by the guardian—
  - (a) make an order ordaining the adult or any person named in the order to implement the decision of the guardian;
  - (b) where the non-compliance relates to a decision of the guardian as to the place of residence of the adult, grant a warrant authorising a constable—
    - (i) to enter any premises where the adult is, or is reasonably supposed to be;
    - (ii) to apprehend the adult and to remove him to such place as the guardian may direct.
- (2) Where any decision of a guardian with powers relating to the personal welfare of the adult is not complied with by any person other than the adult, and that person might reasonably be expected to comply with the decision, the sheriff may, on an application by the guardian make an order ordaining the person named in the order to implement the decision of the guardian.
- (3) On receipt of an application in the prescribed form for an order or warrant under subsection (1) or for an order under subsection (2), the court shall intimate the application to the adult or, as the case may be, to the person named in the application as a person against whom the order or warrant is sought and shall advise them of the prescribed period within which they may object to the granting of the application; and the sheriff shall not grant the order or warrant without affording to any objector an opportunity of being heard.
- (4) Having heard any objections as mentioned in subsection (3), the sheriff may grant the application.
- (5) A constable executing a warrant under subsection (1)(b) may use such force as is reasonable in the circumstances and shall be accompanied by the guardian or such person as the guardian may authorise in writing.
- (6) In this section any reference to a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland.

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

## **71 Replacement or removal of guardian or recall of guardianship by sheriff**

- (1) The sheriff, on an application made to him by an adult subject to guardianship or by any other person claiming an interest in the adult's property, financial affairs or personal welfare, may—
  - (a) replace a guardian by an individual or office holder nominated in the application if he is satisfied, in relation to an individual, that he is suitable for appointment having regard to the matters set out in section 59(3) to (5);
  - (b) remove a guardian from office if he is satisfied—

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- (i) that there is a substitute guardian who is prepared to act as guardian; or
    - (ii) in a case where there are joint guardians, that the remaining guardian is or remaining guardians are prepared to continue to act; or
  - (c) recall a guardianship order or otherwise terminate a guardianship if he is satisfied—
    - (i) that the grounds for appointment of a guardian are no longer fulfilled; or
    - (ii) that the interests of the adult in his property, financial affairs or personal welfare can be satisfactorily safeguarded or promoted otherwise than by guardianship,

and where an application under this subsection is granted, the sheriff clerk shall send a copy of the interlocutor to the Public Guardian.
- (2) In making an order replacing a guardian by an individual with powers relating to the property or financial affairs of the adult or removing a guardian from office where there is a substitute guardian with such powers prepared to act as guardian, the sheriff shall, except where—
  - (a) the individual or substitute guardian is unable to find caution; but
  - (b) the sheriff is satisfied that nevertheless he is suitable to be appointed guardian or substitute guardian, as the case may be,

require an individual appointed as guardian or the substitute guardian to find caution.
- (3) The Public Guardian on receiving a copy of the interlocutor under subsection (1) shall—
  - (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);
  - (b) where the sheriff—
    - (i) replaces the guardian by the individual or office holder nominated in the application, when satisfied that, in the case of an individual, the individual has found caution if so required, issue him with a certificate of appointment;
    - (ii) removes a guardian from office and a substitute guardian is prepared to act, when satisfied that the substitute guardian has found caution if so required, issue the substitute guardian with a certificate of appointment;
    - (iii) removes a joint guardian from office and there is a joint guardian who is prepared to continue to act, issue a remaining joint guardian with a new certificate of appointment;
  - (c) notify the adult and the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors including it) the Mental Welfare Commission.
- (4) Where the sheriff recalls the guardianship order he may at the same time make an intervention order.
- (5) In this section any reference to a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland; and “guardianship order” shall be construed accordingly.



## **72 Discharge of guardian with financial powers**

- (1) At any time after—
- (a) the recall of a guardianship order appointing a guardian with powers relating to the property or financial affairs of an adult;
  - (b) the resignation, removal or replacement of such a guardian; or
  - (c) the death of the adult,
- the Public Guardian may, on an application by the former guardian or, if the former guardian has died, his representative, grant a discharge in respect of the former guardian's actings and intromissions with the estate of the adult.
- (2) On receipt of an application in the prescribed form, the Public Guardian shall intimate the application to the adult, his nearest relative, his primary carer and any other person who the Public Guardian considers has an interest in the application and advise them of the prescribed period within which they may object to the granting of the application; and he shall not grant the application without affording to any objector an opportunity of being heard.
- (3) Having heard any objections as mentioned in subsection (2) the Public Guardian may grant the application.
- (4) Where the Public Guardian proposes to refuse the application he shall intimate his decision to the applicant and advise him of the prescribed period within which he may object to the refusal; and he shall not refuse the application without affording to the applicant, if he objects, an opportunity of being heard.
- (5) The Public Guardian may at his own instance or at the instance of the applicant or of any person who objects to the granting of the application remit the application for determination by the sheriff, whose decision shall be final.
- (6) A decision of the Public Guardian—
- (a) to grant a discharge under subsection (1) or to refuse a discharge;
  - (b) to grant an application under subsection (3) or to refuse an application;
  - (c) to refuse to remit an application to the sheriff under subsection (5)
- may be appealed to the sheriff, whose decision shall be final.

## **73 Recall of powers of guardian**

- (1) The Public Guardian, at his own instance or on an application by any person (including the adult himself) claiming an interest in the property and financial affairs of an adult in respect of whom a guardian has been appointed, may recall the powers of a guardian relating to the property or financial affairs of the adult if it appears to him that—
- (a) the grounds for appointment of a guardian with such powers are no longer fulfilled; or
  - (b) the interests of the adult in his property and financial affairs can be satisfactorily safeguarded or promoted otherwise than by guardianship.
- (2) Where the Public Guardian recalls the powers of a guardian under subsection (1) he shall—
- (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);
  - (b) notify the adult, the guardian and the local authority.

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*Status: This is the original version (as it was originally enacted).*

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- (3) The Mental Welfare Commission or the local authority in whose area an adult in respect of whom a guardian has been appointed habitually resides (other than a local authority whose chief social work officer has been appointed guardian), at their own instance or on an application by any person (including the adult himself) claiming an interest in the personal welfare of the adult, may recall the powers of a guardian relating to the personal welfare of the adult if it appears to them that—
  - (a) the grounds for appointment of a guardian with such powers are no longer fulfilled; or
  - (b) the interests of the adult in his personal welfare can be satisfactorily safeguarded or promoted otherwise than by guardianship.
- (4) Where the Mental Welfare Commission or the local authority recall the powers of a guardian under subsection (3) they shall notify the other and the Public Guardian who shall—
  - (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);
  - (b) notify the adult and the guardian.
- (5) The Public Guardian, Mental Welfare Commission or local authority, as the case may be, shall—
  - (a) where acting on an application, on receipt of the application in the prescribed form intimate it;
  - (b) where acting at his or their own instance, intimate the intention to recall the powers of a guardian,

to the adult, his nearest relative, his primary carer and any person who he or they consider has an interest in the recall of the powers and advise them of the prescribed period within which they may object to such recall; and he or they shall not recall the powers without affording to any objector an opportunity of being heard.
- (6) Having heard any objections as mentioned in subsection (5) the Public Guardian, Mental Welfare Commission or local authority may recall the powers of a guardian.
- (7) Where the Public Guardian, Mental Welfare Commission or local authority proposes or propose to refuse the application he or they shall intimate the decision to the applicant and the adult and advise them of the prescribed period within which they may object to the refusal; and he or they shall not refuse the application without affording to the applicant or the adult, if he objects, an opportunity of being heard.
- (8) The Public Guardian, Mental Welfare Commission or local authority may at his or their own instance or at the instance of an applicant or of any person who objects to the recall of the powers of the guardian remit the matter for determination by the sheriff whose decision shall be final.
- (9) A decision of—
  - (a) the Public Guardian, Mental Welfare Commission or local authority to recall the powers of a guardian under subsection (6);
  - (b) the Public Guardian, Mental Welfare Commission or local authority to remit or not to remit the matter to the sheriff under subsection (8),

may be appealed to the sheriff, whose decision shall be final, and the decision of the Public Guardian, Mental Welfare Commission or local authority as to the recall of the powers of a guardian shall remain in force pending the final determination of the appeal.

- (10) The Scottish Ministers may prescribe the forms and procedure for the purposes of any recall of guardianship powers by the Mental Welfare Commission or the local authority.

#### **74 Variation of guardianship order**

- (1) The sheriff, on an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of the adult, may vary the powers conferred by the guardianship order and may vary any existing ancillary order.
- (2) In varying powers relating to the property or financial affairs of the adult conferred by the guardianship order or in varying any ancillary order in relation to such powers the sheriff shall, except where—
- (a) the guardian is unable to find caution; but
  - (b) the sheriff is satisfied that nevertheless it is appropriate to vary the powers conferred by the guardianship order or to vary the ancillary order,
- require the guardian to find caution.
- (3) In considering an application under subsection (1), the sheriff shall have regard to any intervention order or guardianship order which may have been previously made in relation to the adult or any other order varying such an order, and to any order ancillary to such an order.
- (4) Notwithstanding subsection (1), an application which seeks to vary the powers conferred by a guardianship order or to vary an ancillary order so that—
- (a) a guardian, appointed only in relation to the personal welfare of an adult, shall be appointed also or instead in relation to the property or financial affairs of the adult; or
  - (b) a guardian, appointed only in relation to the property or financial affairs of an adult, shall be appointed also or instead in relation to the personal welfare of the adult;
- shall be made under section 57.
- (5) Where the sheriff varies the powers conferred by a guardianship order or varies an ancillary order under this section, the sheriff clerk shall send a copy of the interlocutor containing the order to the Public Guardian who shall—
- (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);
  - (b) notify the adult and the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors including it) the Mental Welfare Commission; and
  - (c) if he is satisfied that the guardian has caution, if so required, which covers the varied order, issue a new certificate of appointment where necessary.

#### **75 Resignation of guardian**

- (1) A joint guardian, or a guardian in respect of whom a substitute guardian has been appointed, may resign by giving notice in writing of his intention to do so to the Public Guardian and the local authority and (in a case where the incapacity of the adult is by

reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors including it) the Mental Welfare Commission.

- (2) The resignation of a guardian as mentioned in subsection (1)—
  - (a) shall not take effect unless—
    - (i) the remaining joint guardian is willing to continue to act; or
    - (ii) the substitute guardian is willing to act;
  - (b) shall take effect on the receipt by the Public Guardian of notice in writing under subsection (1) together with evidence as to the matters contained in paragraph (a)(i) or (ii).
- (3) On receiving notice in writing and evidence as mentioned in subsection (2)(b), the Public Guardian shall—
  - (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);
  - (b) if satisfied that the substitute guardian has found caution if so required, issue him with a new certificate of appointment;
  - (c) issue a remaining joint guardian with a new certificate of appointment;
  - (d) notify the adult.
- (4) A substitute guardian who has not subsequently become guardian by virtue of section 63 may resign by giving notice in writing to the Public Guardian and the local authority and (in the case mentioned in subsection (1)) the Mental Welfare Commission and the resignation shall take effect on the date of receipt of the notice by the Public Guardian; and on its becoming effective, the Public Guardian shall—
  - (a) notify the guardian and the adult; and
  - (b) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv).
- (5) A guardian—
  - (a) who has no joint guardian; or
  - (b) in respect of whom no substitute guardian has been appointed; or
  - (c) being a joint guardian or guardian in respect of whom a substitute has been appointed who cannot effectively resign by reason of subsection (2)(a)(i) or (ii),
 shall not resign until a replacement guardian has been appointed under section 71.

## 76 **Change of habitual residence**

- (1) Where the guardian is the chief social work officer of the local authority and the adult changes his place of habitual residence to the area of another local authority, the chief social work officer of the first mentioned local authority shall notify the chief social work officer of the second mentioned local authority (the "receiving authority") who shall become guardian on receipt of the notification and shall within 7 days of that receipt notify the Public Guardian and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission.
- (2) The Public Guardian shall—

- (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv) and issue a certificate of appointment to the new guardian; and
  - (b) subject to subsection (4), notify the adult within 7 days of receipt of the notification from the receiving authority.
- (3) Subject to subsection (4), the chief social work officer of the receiving authority shall, within 7 working days of receipt of the notification, notify any person who received notification under section 58(7) of the appointment of the name of the officer responsible at any time for carrying out the functions and duties of guardian.
- (4) If, in relation to the original application for a guardianship order, the sheriff has directed that intimation or notification of any application or other proceedings should not be given to the adult, the Public Guardian and the chief social work officer shall not notify the adult under subsection (2)(b) or (3) as the case may be.

*Termination of authority to intervene and guardianship on death of adult*

**77 Termination of authority to intervene and guardianship on death of adult**

- (1) An intervention order or a guardianship order in respect of an adult under this Part shall cease to have effect on his death.
- (2) A person authorised under an intervention order or a guardian having powers relating to the property or financial affairs of the adult shall, until he becomes aware of the death of the adult or of any other event which has the effect of terminating his authority, be entitled to act under those powers if he acts in good faith.
- (3) Where the authority of a person authorised under an intervention order or of a guardian (including a joint guardian) is terminated or otherwise comes to an end, a third party in good faith is entitled to rely on the authority of the person or guardian if he is unaware of the termination or ending of that authority.
- (4) No title to any interest in heritable property acquired by a third party in good faith and for value from a person authorised under an intervention order or from a guardian having powers relating to the property or financial affairs of the adult shall be challengeable on the grounds only of the termination or coming to an end of the authority of the person or of the guardian.
- (5) In this section any reference to a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland.

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

- (1) The Public Guardian shall—
  - (a) where under section 71(3)(a), 73(2)(a), 74(5)(a) or 75(3)(a) he enters in the register maintained by him under section 6(2)(b)(iv) prescribed particulars relating to a guardianship order in respect of which the appointment of the guardian was recorded or registered under section 61; or

- (b) where an adult in respect of whom there was such a guardianship order has died,

apply forthwith to the Keeper of the Registers of Scotland for the recording of the interlocutor or other document vouching the event giving rise to the entry or, as the case may be, the certificate of the death or, as the case may be, the registering of the event or the death in the Land Register of Scotland.

- (2) On an application under subsection (1), the Keeper shall, as appropriate—
  - (a) record the interlocutor or other document or certificate in the Register of Sasines and endorse it that it has been so recorded;
  - (b) update the title sheet of the heritable property accordingly.

## **79 Protection of third parties: guardianship**

Where a third party has acquired, in good faith and for value, title to any interest in heritable property from a guardian that title shall not be challengeable on the ground only—

- (a) of any irregularity of procedure in making the guardianship order; or
- (b) that the guardian has acted outwith the scope of his authority.