

# **ADULT SUPPORT AND PROTECTION (SCOTLAND) ACT 2007**

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## **EXPLANATORY NOTES**

### **THE ACT – AN OVERVIEW**

#### **Part 2**

#### **Adults With Incapacity**

##### ***Section 54 – Preliminary***

87. This explains that references in Part 2 to “the 2000 Act” are references to the Adults with Incapacity (Scotland) Act 2000.

##### ***Section 55 - Applications and proceedings: sheriff to consider adult’s wishes and feelings***

88. **Section 55** inserts new subsections (5A) and (5B) into section 3 of the 2000 Act. Subsection (5A) provides that sheriffs must take into account any views expressed on behalf of an incapable adult by a person providing independent advocacy services in all types of applications and proceedings under the 2000 Act. Subsection 3(5B) provides that “independent advocacy services” has the same meaning as it has in section 259(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

##### ***Section 56 – Orders about incapable adults’ nearest relatives***

89. This section amends section 4 of the 2000 Act. Section 4 previously allowed an adult to apply to the sheriff to have the person who would otherwise be treated as the adult’s nearest relative displaced, for the purposes of the Act. This amendment provides that any person claiming an interest in the adult’s property, financial affairs or personal welfare may apply to have the nearest relative displaced. It also provides that a court may make an order different to the one applied for, e.g. naming a different person from the person specified in the application.

##### ***Section 57 – Powers of attorney***

90. This section amends sections 15, 16, 19, 20, 22 and 23 of the 2000 Act.
91. Subsections (1) and (2) amend section 15 (creation of continuing power of attorney) and section 16 (creation and exercise of welfare power of attorney) respectively. They provide that where the person does not have sufficient knowledge of the granter it is sufficient that the person consults one person who does have knowledge of the granter to ascertain that the granter understood the nature and extent of the power of attorney. Previously in these situations it was necessary to consult more than one person. These amendments also provide that all welfare powers of attorney and those continuing powers of attorney which will start on incapacity must contain a statement to the effect that the granter has considered how incapacity should be determined. They further

provide, to put beyond doubt, that a solicitor for the purpose of providing a certificate in sections 15 and 16 of the 2000 Act is a 'practising solicitor' and provide a definition of that expression. Subsection (1) also contains a declaratory provision that a continuing power of attorney ceases to have effect if the granter or attorney becomes bankrupt.

92. Subsection (3) inserts a new section 16A to provide that where a power of attorney contains both welfare and financial powers in a single document only one certificate is required.
93. Subsections (4), (5), (6) and (8) contain a number of minor changes relating to notification of welfare powers of attorney.
94. Subsection (7) introduces a new section 22A dealing with revocation of continuing and welfare powers of attorney. There was no express provision in the 2000 Act dealing with revocation of powers of attorney and the common law governed the position. This new statutory provision provides that revocation by the granter of a power of attorney (or any of the powers in it) must be done by giving notice in writing to the Public Guardian and must incorporate a certificate by a practising solicitor or a member of a prescribed class stating that s/he interviewed the granter immediately before the document was signed, that the granter understands the effect of the revocation and was not under undue influence. The revocation will be registered by the Public Guardian which is the point at which revocation takes effect. The Public Guardian will notify the attorney of the revocation and, in addition, where it is a welfare power of attorney, the Mental Welfare Commission and the local authority.

### **Section 58 – Accounts and funds**

#### **Purposes and application of Part**

95. This section replaces Part 3 of the 2000 Act (sections 25-35) and inserts new sections 24A-33.
96. New section 24A(1) and (2) sets out afresh the provision of a statutory scheme under which the Public Guardian may grant authority to access and use (intromit with) the funds of an adult and the types of expenditure that may be authorised by the Public Guardian under this Part of the Act. These include day to day household and living expenses and care costs, such as payments for home help services or for residential care. The Public Guardian's fee for processing the application may be met from the adult's funds but not the applicant's legal fees or any other expenses incurred in relation to the application.
97. New section 24B(1) provides that an application can only be made where an adult is incapable in relation to decisions about the funds concerned. Section 24B(2) excludes adults whose funds are covered by a guardianship, a power of attorney or an intervention order.

#### **Authority to take preliminary steps**

98. New section 24C(1)-(3) provides that the Public Guardian may, on application, issue a certificate of authority to a person who wishes to intromit with funds but cannot do so because of a lack of information about the adult's accounts. This was not possible under the original scheme. Section 24(4) provides that the certificate will authorise a bank or other financial institution to provide information about an adult's account or accounts, required for the purpose of making an application for authority to intromit with funds.
99. New section 24D (1)-(3) provides that the Public Guardian may, on application, issue a certificate authorising the opening of an account in the adult's name for the purpose of intromitting with funds. This was not possible under the original scheme. Section 24D(4) allows the Public Guardian to specify the kind of account that can be opened. Section 24D(5) provides that the certificate will authorise the fundholder to open the

account but if the certificate specifies a type of account, the fundholder may only open this type of account (Section 24D(6)). Section 24D(7) provides that the applicant must notify the Public Guardian of the details of the account once it has been opened.

### **Authority to intromit**

100. Sections 25(1) and (2) provide that the persons who are permitted to apply for authority to intromit with funds are individuals, joint individuals or bodies (other than managers of authorised establishments under Part 4 of the 2000 Act). The original scheme only provided for individuals. Section 25(3) provides that where an application under section 25(1) is submitted with an application under 24D(5) to open an account, it will only be granted once the account is opened and its particulars notified to and registered by the Public Guardian. Section 25(4) provides that where the Public Guardian grants the application, she must enter the particulars on the register and issue a 'withdrawal certificate'. Section 25(5) prevents an application being made if a person is already authorised to intromit. Section 25(6) provides that the person who is issued with a 'withdrawal certificate' is called a 'withdrawer'.
101. New section 26(1) sets out what is required in an application to intromit. Subsection (2) introduces the possibility of identifying another account (the second account), either a pre-existing account or one to be opened under section 24D, which the applicant wishes to use for the purpose of intromitting with the adult's funds.

### **Withdrawal certificates**

102. New section 26A(1) sets the parameters of what can be authorised in a withdrawal certificate. The withdrawal certificate can set limits on the amounts transferred, allow standing orders or direct debits to be set up on the current account for specified purposes (for example, the payment of regular utility bills), and authorise withdrawal of funds from the designated account for specified purposes. Section 26A(2) provides that the certificate cannot authorise any of the accounts to be overdrawn.

### **Joint and reserve withdrawers**

103. New section 26B provides that the Public Guardian may on application issue a certificate appointing an additional withdrawer to be authorised to act alongside one or more existing withdrawers. Previously there could only be one withdrawer on an incapable adults account. This new provision will ensure continuity for the adult. The joint withdrawer's application must be signed by the original withdrawer and the Public Guardian will enter the particulars into the Register. The certificate is valid until the withdrawal certificate held by the original withdrawer ceases to be valid.
104. New section 26C defines the extent of joint withdrawers' liability. It provides for consultation among joint withdrawers before the exercise of their functions and for an application to the Public Guardian for directions in the event of a disagreement between joint withdrawers. There is an appeal to the sheriff and provision is made for third parties transacting with joint withdrawers in good faith.
105. New section 26D provides for an application to the Public Guardian for the appointment of a reserve withdrawer either at the time of the original application or at some later date on application by the main withdrawer. This was not possible under the original scheme and will help ensure continuity for the adult. The reserve withdrawers application must be signed by the original withdrawer and the Public Guardian will enter the particulars into the Register.
106. New section 26E (1)-(3) provides for a reserve withdrawer's authority to act coming into effect, either by notice to the Public Guardian by the main withdrawer, or in cases where the main withdrawer is unable to do so, by the reserve withdrawer and for the issue of a certificate by the Public Guardian. Section 26E(4) provides for the duration

of the validity of the certificate and section 26E(5) sets out the limits of liability of both withdrawers for the reserve withdrawer's actings.

### **Variation of withdrawer's authority**

107. New section 26F provides for applications to be made to the Public Guardian for variation of a withdrawal certificate, other than for the period of validity (which is covered by section 31) and the issue by the Public Guardian of a varied withdrawal certificate.

### **Authority to transfer funds**

108. New section 26G provides for an application by a withdrawer or a person who has applied to become a withdrawer to the Public Guardian and for the issue of a certificate for a one-off transfer of funds from an adult's account to the designated account or to the adult's current or second account. It also provides that it will also be possible to apply for authority to close the original account and terminate standing orders and direct debits on it.

### **Applications: general**

109. New section 27 covers those aspects of the application procedure which apply to all applications under this Part.
110. New section 27A(1) sets out the new countersigning requirements for applications for authority to obtain information (24C), open an account (24D), intromit (25) and for a joint withdrawer (26B). The countersignatory must have known the applicant for at least a year (this was previously two years), must not fall into one of the excluded categories, and must confirm that s/he believes the information in the application to be true and that the applicant is a fit and proper person to intromit. Section 27A(2) makes provision for the countersigning of reserve withdrawers' applications. Section 27A(3) sets out that applications by organisations do not require to be counter-signed.
111. New section 27B provides for a medical certificate to accompany applications for authority to provide information (24C), to open an account (24D) and to intromit (25). Medical certificates under this section will refer to the adult's ability to manage funds.
112. New section 27C requires all applications to be intimated in the same way as previously: to the adult; the adult's nearest relative; the adult's primary carer; the adult's named person and to any other person the Public Guardian considers has an interest. In cases where the applicant is both the adult's nearest relative and carer or a body other than a local authority, it must also be intimated to the Chief Social Work Officer of the local authority.
113. New section 27D requires the Public Guardian to be satisfied that an applicant, or a proposed reserve withdrawer, is a fit and proper person to intromit with an adult's funds before granting an application under sections 24C, 24D, 25, 26B or 26D. The Public Guardian has a broad discretion in this regard but must take account of any guidance issued by Scottish Ministers.
114. New section 27E provides a requirement that objectors should be heard in relation to all applications and refusals of applications under this Part. Representations may be made orally or in writing.
115. New section 27F provides power for the Public Guardian to refer an application under this Part to the sheriff to be determined. The sheriff's decision is final.
116. New section 27G(1) provides that where there has been an application for authority to obtain information (24C), open an account (24D) or intromit (25) and where that person makes a further application in relation to the adult, the Public Guardian has the power to dispense with the need for the same information to be provided more than

once, or for the application to be countersigned or a medical certificate produced when this has already been done in respect of a previous application in respect of the same adult. Section 27G(2) allows for the issuing of a combined certificate.

### **Fundholders**

117. New section 28 sets out that the fundholder of the relevant account is authorised to act on the instructions of a withdrawer to the extent of the authority in the withdrawal certificate and must not allow any operations on the account other than those authorised by the withdrawal certificate. Section 28(3) allows fundholders to release statements and other information on the adult's current and second accounts to the withdrawer whilst the withdrawal certificate is valid.
118. Section 28A allows fundholders of an account from which funds are to be transferred in accordance with a certificate issued under section 24G to act to the extent authorised by the certificate.
119. New section 29 sets out that fundholders will be liable for funds taken out of the adult's account at any time when they were aware that the withdrawer's authority had been terminated or suspended. Having met the liability, a fundholder can then recover from the withdrawer.

### **Withdrawers**

120. New section 30 clarifies that the adult's funds must be spent on the adult's own requirements, although they may be used for shared household expenses, for example, where the withdrawer is the adult's partner and lives in the same house.
121. New section 30A requires the withdrawer to inform the Public Guardian of a change in his or her permanent address or that of the adult within 7 days.
122. New section 30B requires a withdrawer to keep records of the exercise of his or her powers and permits the Public Guardian to make inquiries into the exercise of the withdrawer's functions.

### **Duration etc. of authority**

123. New section 31(1) provides that unless otherwise stated a withdrawal certificate is valid for 3 years. Section 31(2) allows this period to be reduced or extended by the Public Guardian. Section 31(4) provides that a withdrawer's authority will terminate if there is a guardianship or intervention order made, or continuing attorney appointed, with powers in relation to the funds in question.
124. New section 31A provides for the suspension and termination of authority. To take account of the amendments to the scheme which provide for intromission with more than one account in the adult's name and for separate certificates authorising one-off transfers, the duty to intimate suspensions and terminations is extended to include such other persons as the Public Guardian thinks fit. On terminating the authority, the Public Guardian must enter prescribed particulars in the register and may issue an interim withdrawal certificate for up to four weeks to the withdrawer.
125. New section 31B provides for applications to renew authority where the person applying holds an existing authority to intromit or where the reserve withdrawer wants to take the place of the main withdrawer where the latter has died, become incapable or has his or her authority terminated. This section will allow the Public Guardian, if she sees fit, to dispense with certain of the application requirements in order to make the renewal process faster and less onerous.
126. New section 31C allows the Public Guardian to specify a time limit on the validity of the certificates of authority to provide information about funds, open a bank account

and to transfer specified sums. S/he can also cancel these certificates. It also sets out to whom cancellation must be notified.

## **Appeals**

127. New section 31D brings together, in a single section, the appeal provisions. Decisions relating to applications under sections 24C, 24D, 25, 26D, 26E, 26F and 26G are appealable.
128. New section 31E provides for transition from guardianship to intromission with funds and extends to transitions from guardianship where applications are made by a person other than the guardian. It provides for situations where financial guardianship is no longer necessary (e.g. because there has been a simplification of the adult's financial affairs) but the adult remains incapable of managing his or her finances and intromission with funds would be more appropriate. There is no requirement for countersigning where the application is made by the adult's guardian. The Public Guardian may also disapply the requirement for a medical certificate. The Public Guardian must recall the guardianship before granting the application. The withdrawal certificate will specify the period of authority. This provision is not available where there is a recognised guardian under the law of another country.

## **Miscellaneous**

129. New section 32 enables joint accounts to continue to be operated on by a joint account holder where the other joint account holder no longer has capacity to operate it.

## **Interpretation**

130. **Section 33** defines certain expressions used in Part 3 of the 2000 Act.

## ***Sections 59 and 60 – Intervention orders and guardianship orders***

131. These sections amend provisions in Part 6 of the 2000 Act which makes provision for intervention orders and guardianship orders.
132. **Sections 59(1)(a)** and **60(1)** amend sections 53 and 57 of the 2000 Act respectively to provide that:-
  - (a) where a medical report is lodged in an application for an intervention order or a guardianship order it shall be valid even where the medical examination of the adult has been carried out more than 30 days previously, provided that the sheriff is satisfied that the adult's condition is unlikely to have improved since the examination was carried out;
  - (b) Scottish Ministers may prescribe in regulations, following consultation with the Mental Welfare Commission, persons (i.e. medical practitioners) who can complete reports to accompany applications for guardianship and intervention orders; and
  - (c) where an adult is not living in Scotland and is the subject of an application for an intervention order or guardianship order, he or she may be examined by a medical practitioner in the country where he or she lives provided that practitioner holds recognised qualifications, has special experience in relation to mental disorders and has consulted the Mental Welfare Commission about the report.
133. **Sections 59(1)(b)** and (c) and **60(2), (4), (5), (6), (9), (13)** and **(14)** amend sections 53 and 57 to dispense with the requirement for caution in intervention orders and guardianship orders relating to property or financial affairs. Whether or not to impose caution in such circumstances is left instead to the sheriff's discretion. These sections provide that the sheriff may permit the Public Guardian to accept other forms of security instead of caution.

134. **Section 59(2)** amends sections 53 to provide for notification to the Public Guardian by the person authorised under the intervention order of a change in his or her or the adult's address within 7 days of such a change. Provision for such notification by guardians is already made in section 64(4) of the 2000 Act.
135. **Sections 59(3)** and **60(15)** insert new sections 56A and 75A which provide for notification to the Public Guardian of the death of a person authorised to intervene or death of a guardian by his or her personal representatives.
136. **Section 60(3)** inserts new subsections (3) and (3A) into section 60 to provide a simplified procedure for renewal which can be dealt with by the sheriff on the basis of an application form. Section 60(3)(a) provides that the application must be supported by a medical report completed not more than 30 days before the application. Section 60(3)(b) provides for one other report to support the application either from a mental health officer, or the chief social work officer where the adult is unable to communicate, where the application relates to the adult's welfare or from the Public Guardian if it relates to the adult's property or financial affairs. Section 60(3A) provides, as for guardianship applications, that where the reason for incapacity is mental disorder, the medical report, or one of them, must be carried out by a relevant medical practitioner.
137. **Section 60(1)(d)** amends section 57 to provide that sheriffs may grant interim guardianships for 3 months (as previously) or for a longer period up to a maximum of 6 months.
138. **Section 60(8)** amends section 70 (non-compliance with decisions of guardian with welfare powers) to remove the unintended effect that a warrant may be issued for the adult's removal from his or her place of residence where a third party has refused to comply with the guardian's decision. It also inserts a new subsection to provide that the sheriff may, on cause shown, disapply the intimation requirement and the corresponding right to object within a prescribed period. The reason for this is that in urgent cases a delay of the prescribed period of 21 days can prove detrimental to the welfare of the adult concerned.
139. **Section 60(10)** amends section 72(1) to provide that where the guardianship order has expired the Public Guardian may grant a discharge to a financial guardian in respect of the former guardian's actings and intromissions with the estate of the adult.
140. **Section 60(11)** inserts a new subsection (3A) in section 73 to provide that the Mental Welfare Commission may recall guardianships relating to personal welfare only in those cases where incapacity relates to a mental disorder and not, as at present, all guardianships relating to personal welfare. Section 60(12) inserts new section 73A which allows local authorities to recall welfare guardianships where the Chief Social Work Officer is the guardian. Under section 73A(2) the proposed recall must be intimated to the Public Guardian and the Mental Welfare Commission in addition to the adult and other persons who have an interest. If any objections are received, the local authority may not recall the guardianship and must remit the matter to the sheriff for a decision.
141. **Section 60(16)** inserts a new section 79A which allows a guardianship order to be applied for in the three month period prior to an individual's sixteenth birthday and for that order to come into effect on the individual's sixteenth birthday. The new provision is to provide continuing protection for young adults who lack capacity. Previously an application could not be made for an individual until s/he reached sixteen. These guardianship orders will be subject to the other provisions which currently apply to guardianship orders.
142. **Section 60(17)** inserts new sub-paragraph (3A) into paragraph 6 of schedule 4 to provide for the reconsideration under the 2000 Act of the appointments of all welfare and financial guardians who became such by virtue of being curators bonis, tutors dative or tutors at law prior to the coming into effect of Part 6 of the 2000 Act and of the

appointment of joint guardians to these transitional guardians. The amendment provides that these guardianships will cease unless there is an application for renewal within two years of the commencement of this subsection (or, where the guardian was previously curator bonis to a person under 16 years, within 2 years of the person becoming sixteen, if that is a longer period). Subsection (12) also inserts the new sub-paragraph (3B) to provide that new sub-paragraph (3A) does not prevent early termination of guardianship under the terms of the Act, e.g. where guardianship is recalled. New sub-paragraph (3C) provides for additional guardians to be subject to the requirements of the new sub-paragraph (3A). New sub-paragraphs (3D) and (3E) provide that the Public Guardian or the local authority must take reasonable steps to notify transitional guardians of the requirement to renew their guardianships, if appropriate.

### ***Section 61- Power to obtain records***

143. **Section 61** inserts new section 81A which strengthens the Public Guardians's powers to obtain information when carrying out investigations into the exercise of authority by proxies under the 2000 Act. Section 81A(1) provides that proxies can be required by the Public Guardian to provide her with their records and other relevant information. In addition, banks and other financial institutions can be required by the Public Guardian to provide him/her with records and other relevant information about the accounts of the adult concerned. Section 81A(2) provides that proxies comprise attorneys, withdrawers, persons authorised under intervention orders and guardians and include former proxies. Section 81A(3) provides for fees to be charged by fundholders for providing information.