

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

EXPLANATORY NOTES

THE ACT

Part 6: Intervention Orders and Guardianship Orders

Intervention orders

Section 53: Intervention orders

207. This section gives the sheriff the power to make one-off intervention orders, which govern a specific action or decision which an adult lacks the capacity to make. An order can be made relating to the adult's property, financial affairs or personal welfare. It is envisaged that intervention orders will be used for a wide variety of matters, including giving consent on behalf of an adult to a transaction, or signing a document. It is intended that an intervention order would be sufficient to overcome particular problems without having to impose continuous management on an adult with incapacity, and that more than one intervention order can be granted at any one time. The sheriff will also be able to make interim orders under section 3(2).
208. Subsection (1) establishes that anyone claiming an interest, including the adult, can apply for an intervention order.
209. Subsection (2) ensures that a sheriff shall consider any other orders relating to the adult made under Part 6 of the Act when considering an application for an intervention order. This will avoid conflicting orders being made and inform the sheriff about measures that have been taken in the past.
210. Subsection (3) places a duty upon the local authority to apply for an intervention order relating to a particular decision, under circumstances where it appears that an order is necessary but nobody else is applying for one. This means that where an intervention order exists, for example, to sell the adult's house, the local authority could still apply for an order relating to a welfare decision where they felt that nobody else was going to apply. However, if another party was in the process of applying for an order concerning this welfare decision, the local authority should not apply.
211. Subsection (4) provides that the court should have the same reports before it when considering applications for intervention orders as it does when considering guardianship orders.
212. Subsection (6) requires the Public Guardian to consent to the price before accommodation for the adult is bought or sold, under an intervention order. This is the same provision in respect of the actual price as for disposing or buying accommodation under a guardianship order under schedule 2, paragraph 6. In this case, the sheriff has already consented when granting the intervention order to the sale or purchase taking place, so the Public Guardian's consent in principle is not required.

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213. Subsection (7) provides for the sheriff, when making or varying an intervention order, to order the person authorised under the order to provide caution or insurance against liability. This is to protect the adult from any mishandling of their affairs, ensuring that recourse to compensation is possible. The sheriff will order that caution must be found by anyone acting under an order about property or financial matters, unless the person authorised proves unable to find caution, in which case, if the sheriff is satisfied that the person is still suitable to be authorised under the order, the requirement can be waived.
214. Subsection (8) provides that an intervention order can be altered or revoked by the sheriff. The person authorised under the intervention order, the adult, or any interested party can apply to the sheriff.
215. Subsection (10) provides that it is the duty of the court to notify the Public Guardian of all intervention orders. The Public Guardian will enter the details of the order in the public register, and inform the adult concerned, the local authority, and where the intervention order concerns welfare matters, the Mental Welfare Commission.
216. Subsection (11) provides protection for third parties who enter into a transaction with a person authorised under an intervention order, providing that these transactions should not be invalidated by problems in the person's authority under an intervention order. Transactions of this kind will not be invalid due to the person acting outwith the scope of their authority, not observing requirements of the Act, or because of an irregularity in their appointment. Without this protection, third parties might be reluctant to deal with those acting under intervention orders.
217. Subsection (12) allows for the outlays made in carrying out the directions or duties of an intervention order to be recovered from the adult's estate. For example, this means that the outlays involved in selling the adult's house, as directed by an intervention order, could be recovered.
218. Subsection (13) provides protection for third parties who acquire heritable property from a person authorised under an intervention order, preventing their title to the property being challenged by an irregularity in the person's appointment, or because they acted outwith their authority. It ensures that there is no greater risk or disincentive for a third party in acquiring heritable property from a person authorised under an intervention order than from any other person.
219. Subsection (14) provides for sections 64(2) and 67(3) and (4) to apply to intervention orders. Therefore an intervention order may not direct the detention of an adult in a hospital for the treatment of mental disorder, or consent to any of the excepted treatments provided under section 48. An intervention order relating to the adult's personal welfare can be exercised whether or not the adult is in Scotland at the relevant time, and the personal liability of a person authorised under an intervention order is limited in the same way as a guardian's personal liability.

Section 54: Records: intervention orders

220. This section requires a person authorised under an intervention order to keep a record of their actions. The code of practice for persons authorised under intervention orders will include information on record-keeping.

Section 55: Notification of change of address

221. This section provides for the Public Guardian to be notified by the person granted the intervention order of any change of their address or that of the adult, and for the appropriate statutory authorities to be notified by the Public Guardian.

Section 56: Registration of intervention order relating to heritable property

222. This section applies when an intervention order is made concerning an adult's heritable property, that is property which is or could be recorded or registered in the General

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Register of Sasines or Land Register of Scotland respectively. This would include an adult's house and any land or second home that they owned. The provisions are required so that any conveyancing search of the Registers would reveal the existence of the intervention order for the purposes of transactions with the property.

223. The Register of Sasines, established in 1617, is a register of title deeds to land. The Land Register of Scotland, a map-based and computerised register, established in 1979, is progressively replacing the Register of Sasines. When property changes hands, these registers are examined to ensure that the purchaser obtains a valid title. They provide the same check on who has the title to a particular property. The Land Register is being extended across Scotland in stages. A property whose title was previously recorded in the Register of Sasines will fall to be registered in the Land Register on the first occasion it changes hands after the county in which it is situated becomes operational in the Land Register. If the Keeper of the Registers is satisfied with the state of the title when the property is registered, then he will issue a fully indemnified Land Certificate.
224. Subsection (2) states that an order including powers over heritable property must specify the property in detail.
225. Subsection (3) provides that persons authorised under intervention orders including any rights to deal with, sell or manage an interest in heritable property must record their appointment in the Register of Sasines or Land Register of Scotland, as appropriate.
226. Subsection (4) sets out the information required in the application, including critical details of the powers conferred by the court, for example, the power to sell the property.
227. Subsection (5) states the procedure for recording the intervention order in the Register of Sasines.
228. Subsection (6) states the procedure for recording the intervention order in the Land Register of Scotland. The title sheet of each property over which the person authorised under an intervention order has been granted powers will be amended to show the authority conferred by the court.
229. Subsection (7) provides for the person authorised under an intervention order to send to the Public Guardian the proof of his registration in relation to the heritable property concerned, either the endorsed interlocutor if recorded in the Register of Sasines, or the Land Certificate if registered in the Land Register of Scotland. The Public Guardian will record these particulars in the public register.

Guardianship orders

Section 57: Application for guardianship order

230. This section sets out how applications can be made for guardianship orders, who may apply for an order and what documents must accompany applications.
231. Subsection (1) establishes that an application to the sheriff for a guardianship order can be made by anyone with an interest, including the adult. The application can be made about any or all aspects of the property, financial affairs or personal welfare of the adult concerned.
232. Subsection (2) places a duty upon the local authority to apply for a guardianship order under certain circumstances, where it appears that an order is necessary but nobody else is applying for one. In assessing whether the order is required, there must be no other lesser measure that could safeguard the adult's interests sufficiently. A guardianship order would only be appropriate where no other measures were possible or sufficient, for example, an intervention order.

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233. Subsection (3) establishes the evidence which must accompany an application for guardianship. Evidence is required in relation to the incapacity of the adult, the need for a guardianship order and the suitability of the person nominated in the order.
234. Subsection (3)(a) requires assessment of the adult concerned to be by two medical practitioners. Their examinations must have been within the 30 days prior to making the application, which ensures recent and specific assessments.
235. Where mental disorder is being assessed, one of the medical practitioners must be approved under section 20 of the Mental Health (Scotland) Act. Section 20 doctors are approved by Health Boards as having special experience in the diagnosis or treatment of mental disorder. They are mainly psychiatrists but may include other medical practitioners who have the necessary special experience.
236. Where the guardianship application covers any aspect of the personal welfare of the adult, subsection (3)(b) requires a report from the mental health officer of the relevant local authority on the appropriateness of the order sought. Where the incapacity of the adult is due only to an inability to communicate, the report is the responsibility of the chief social work officer. Again the report must be based on a recent assessment. The opinion of the mental health officer or chief social work officer is also sought on the suitability of the nominated guardian.
237. Subsection (3)(c) provides for a similar report to (3)(b) where a guardian with powers covering only property or financial affairs is sought. The report must be from somebody with sufficient knowledge of the adult and the applicant. This may be a social worker, but might also be a relative, carer or professional involved with the adult. They will assess whether guardianship is an appropriate order to make, and the nominated guardian is suitable, by interviewing the adult concerned. Again the assessment must be carried out in the 30 days prior to lodging the application.
238. Subsection (4) requires an individual when applying for a guardianship order covering welfare matters, to inform the chief social work officer of his intention. The chief social work officer or mental health officer, as the case may be, will then be obliged to make their report within 21 days, ensuring that the report will be available for the application to proceed.
239. Subsection (5) establishes that the sheriff may, in the period between receiving an application for a guardianship order, and deciding whether to grant the order, appoint an interim guardian. This measure might be required if the property or financial affairs of the adult required urgent administration, or the adult needed someone to take welfare decisions on their behalf before an order could be granted.
240. Subsection (6) limits the period of the appointment of an interim guardian to until a guardian has been appointed, or three months from the date of appointment, or any earlier date on which the sheriff recalls it. This ensures that interim guardians do not have authority for extended periods, as they would not have been subject to the full scrutiny required to protect adults on the appointment of a guardian.

Section 58: Disposal of application

241. This section sets out how the sheriff will deal with an application for a guardianship order and the process of notification of such an order.
242. Subsection (1)(a) requires the sheriff to ascertain that the adult's incapacity relates to the powers proposed for the guardian, and that the incapacity is likely to continue. Subsection (1)(b) ensures that the principle of least intervention is adhered to and a guardian is only appointed where no other available measure would sufficiently safeguard or promote the adult's interests.
243. Subsection (2) ensures that a sheriff shall consider any previous orders relating to the adult made under Part 6 of the Act when considering an application for a guardianship

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order. This will avoid conflicting orders being made and inform the sheriff about measures that have been taken in the past.

244. Subsection (3) allows the sheriff to decide that an intervention order would be more appropriate than guardianship and to treat the original application as an application for an intervention order. This will avoid the delay of having to reapply for an intervention order, and the sheriff having to consider the case twice.
245. Subsection (4) provides that the sheriff will normally appoint a guardian for 3 years, but has discretion to vary this, including making the appointment indefinite.
246. Subsection (5) provides that two or more guardians may be appointed jointly with separate powers, for example, one for welfare matters and one for financial matters. This is different to the provision at section 62 for guardians to be appointed to exercise the same powers jointly.
247. Subsection (6) provides that the sheriff shall order a person granted a guardianship order relating to property or financial affairs to provide caution or insurance against liability. This is to protect the adult from any mishandling of their affairs, ensuring that recourse to compensation is possible. The sheriff will require caution to be found unless the person appointed as guardian proves unable to find caution, in which case, if the sheriff is satisfied that the person is still suitable to be appointed as guardian, the sheriff can waive the requirement.
248. Subsection (7) states that it is the court's duty to inform the Public Guardian of a guardianship order. It also sets out the duties of the Public Guardian on receiving notification of the guardianship order. The details must be entered in the public register, and when satisfied that the guardian has found insurance against liability, if the sheriff has required it, the Public Guardian will issue a certificate to the guardian, giving him authority to act.
249. Subsections (7)(c) and (d) provide for the Public Guardian to notify the appointment of a guardian to the adult and the appropriate statutory bodies. The terms of the interlocutor, that is to say, the details of the appointment, must be notified to the statutory bodies.

Section 59: Who may be appointed as guardian

250. This section sets out who the sheriff may appoint as a guardian to an adult and factors they should consider in making an appointment.
251. Subsection (1) establishes the categories of people suitable for appointment as guardians. The chief social work officer of the local authority can be appointed as an adult's guardian only with respect to their welfare. Otherwise, any individual whom the sheriff considers to be suitable and is willing can be appointed.
252. The chief social work officer of the local authority can be appointed as an adult's guardian only with respect to the adult's welfare. Subsection (2) clarifies that where a guardianship order is to relate to property, financial affairs and welfare, the chief social work officer may be appointed as a joint guardian with powers relating only to the adult's welfare.
253. Subsection (3) provides for the sheriff to ensure that an individual understands the adult's requirements, and a guardian's duties before appointing them.
254. Subsection (4) sets out the points that the sheriff should consider to assess the suitability of an individual to be appointed guardian. It is important that the guardian is easily and regularly accessible to the adult. Subsections (4)(c), (d) and (e) are important to prevent an appointment that fails to benefit the adult. These provisions are not intended to prevent close relatives or a person residing with an adult being appointed their guardian, as stated in subsection (5). Subsection (4)(f) allows the sheriff to take into account any other matter if appropriate.

Section 60: Renewal of guardianship order by sheriff

255. Subsection (1) provides that at any point before a guardianship order expires, a renewal application can be made, and that this will have the effect of continuing the period of guardianship until the renewal has been decided. For example, if a renewal was requested a week before the guardianship order expired and it took six weeks for the sheriff to make a decision, the guardianship would continue uninterrupted until that decision was made.
256. Subsection (2) provides that it is the duty of the local authority to apply for the renewal of a guardianship order where nobody else does, and that in such a case the guardianship order will continue until the application has been determined. This protects the adult against a lapse in their protection.
257. Subsection (3) provides that an application to renew a guardianship order should require the same reports on the incapacity of the adult as the original order required, as set out in section 57. This means that a sheriff will be fully informed as to the current state of the adult's incapacity, and whether a guardianship order is still appropriate, and, where an individual is the guardian, whether they are still a suitable person to act.
258. Subsection (4) provides for sheriffs to follow the same procedure for disposing of renewal applications as other applications, as described in section 58.
259. Subsection (4)(b) provides for the renewal of a guardianship application to normally be for 5 years, as opposed to the 3 years suggested for an initial appointment. The sheriff may, however, set another period where appropriate – this could be short if the adult's condition was subject to change, or indefinite where no improvement was expected.
260. Subsection (5) applies to cases where the sheriff refuses to renew the guardianship order. In this case it is the duty of the court to inform the Public Guardian, who must record this in the public register, and notify the adult and the appropriate statutory bodies.

Section 61: Registration of guardianship order relating to heritable property

261. This section makes the same provision for registering a guardianship order relating to heritable property with the Keeper of the Registers of Scotland, as for intervention orders under section 56. The provision ensures that any conveyancing search of the Registers would reveal the existence of the guardian for the purposes of transactions with the property. See section 56 for further explanatory notes.

Joint and substitute guardians

Section 62: Joint guardians

262. This section allows for two or more individuals to be appointed as joint guardians to an adult.
263. Subsection (1) sets out the two manners in which joint guardians might be appointed – either by an initial application by more than one individual, or by adding a further individual to act jointly with the existing guardian or guardians.
264. Subsection (2) states that normally joint guardians will only be appointed where they are close relatives of the adult, namely parents, siblings or children. Only where the sheriff is satisfied that there is a particular need, would individuals who are not relatives of the adult be appointed as joint guardians.
265. Subsection (3) provides that the appointment of joint guardians will follow the same steps as appointing a single guardian. The sheriff will have the same options to dispose of applications as are detailed in section 58 and will use the same criteria to decide whether to appoint the applicants, as described in section 59.

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266. Subsection (4) provides for the application of an individual to be an additional guardian to act alongside the existing guardian. The sheriff must be satisfied, using the criteria described at section 59(2) to (4), that the individual is suitable to be appointed as guardian of the adult concerned.
267. Subsection (5) provides the procedure for notification of the appointment of an additional guardian. The sheriff court will inform the Public Guardian of the appointment, who will enter the details in his register, and, when the new appointee has obtained insurance against liability if required, will issue a certificate of appointment. The existing guardian will be issued with a new certificate of appointment, which will indicate the joint guardianship.
268. Subsection (6) states that joint guardians can, subject to the requirements of subsection (7), act individually. Joint guardians are however liable for damage due to their acts or omissions, as a single guardian would be, and also for that caused by their fellow joint guardian, where they have failed to take reasonable steps to prevent it. In the case where two or more joint guardians are liable for loss or injury caused to the adult concerned, their liability is joint and several. For example, if one of the joint guardians, entered into a financial arrangement on behalf of the adult, all of the joint guardians could be liable if the arrangement turned out to have been incompetent.
269. Subsection (7) places a duty on joint guardians to consult each other before acting. This consultation can be waived if it is impractical. For example, one of the joint guardians could freely act if the other was abroad and out of ready communication. It can also be waived by agreement of the joint guardians. For example, two joint guardians might agree that only one would be involved in the adult's everyday finances.
270. Subsection (8) provides for recourse to the sheriff court if joint guardians cannot agree.
271. Subsection (9) establishes that third parties when dealing with a joint guardian can, unless they know anything to the contrary, rely on the authority of one of the guardians as they would on a single guardian, without seeking further confirmation.

Section 63: Substitute guardian

272. This section provides for the appointment of a substitute guardian who will replace the original guardian if they die, or have to stop acting. For example, this might be particularly relevant where a guardian is elderly: the guardian may themselves lose capacity.
273. Subsection (1) states that the sheriff can, on application, appoint a substitute guardian who meets the same criteria that govern the appointment of the original guardian, that is to say, those in section 59.
274. Subsection (3) provides that a substitute guardian's appointment expires at the same time as the appointment of the original guardian. At that point, the need for guardianship will be reviewed by the court and renewed provision for a substitute guardian can be made in any resulting guardianship order.
275. Subsection (4) establishes that an application for the appointment of a substitute guardian can be made at the same time as the appointment of the original guardian or later. This allows a substitute to be appointed when the circumstances of the original guardian alter. Alternatively, a suitable individual who was not eligible at the time of the original application may apply, for example, if a child of the adult concerned reaches adulthood.
276. Subsection (5) requires a person appointed as substitute guardian to find caution or insurance against liability. Where the substitute guardian's powers will relate to property or financial affairs, caution will be required by the sheriff unless the substitute guardian is unable to get such insurance, in which case, if the sheriff is still satisfied that the person is appropriate for appointment, the requirement can be waived.

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277. Subsection (6) establishes that when a substitute guardian replaces an original guardian, they should be referred to as the “original guardian” for the purposes of this section, to allow for the appointment of a replacement substitute guardian.
278. Subsection (7) states that when a substitute guardian is appointed, other than in the original guardianship order, it is the duty of the court to notify the Public Guardian. The Public Guardian must notify those listed in subsection (7)(b), and record the appointment of the substitute guardian in the public register.
279. Subsection (8) states the duties of a substitute guardian on the death or incapacity of the original guardian. They must notify the Public Guardian, providing a death certificate where the original guardian has died. The substitute guardian must also state at this stage whether they will accept the appointment as guardian. This means that even if the substitute guardian does not wish to accept the appointment, it is still their duty to inform the Public Guardian if the original guardian can no longer act by reason of incapacity or death.
280. Subsection (9) provides for the Public Guardian to authorise the substitute guardian to act in the place of the original guardian, after notification under subsection (8) has occurred. The new guardian’s details will be entered in the public register, a certificate will be issued and the adult and the appropriate statutory bodies will be notified.
281. Subsection (10) establishes that the scope of a substitute guardian’s powers is the same as those of the original guardian, unless the sheriff has specified otherwise.

Functions etc. of guardian

Section 64: Functions and duties of guardian

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

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means that the guardian remains responsible for all areas covered by the order, until their appointment is terminated.

289. Subsection (7) gives the Public Guardian the general function of supervising and directing financial guardians. This would, for example, allow the Public Guardian to require a guardian to desist from using the adult's funds in a particular way. The Public Guardian may apply to the sheriff for an order where the guardian has not complied with an order issued by him.
290. Subsection (8) safeguards an adult who has an interim guardian with welfare or financial powers. Monthly reports must be made by the interim guardian to allow extra supervision of the exercise of interim guardianship powers since they were appointed without the safeguards required when a permanent guardian is appointed. These reports will be made to the local authority in the case of welfare powers and the Public Guardian in the case of financial powers.
291. Subsection (9) applies where the chief social work officer has been appointed as an adult's guardian. It is likely that another official will actually exercise the day to day responsibilities of the guardian, and this provision ensures that those who would be informed about guardianship are informed quickly of who the nominated official is at any particular point.
292. Subsection (11) provides for the scope and conditions of a guardian's powers to be prescribed in Regulations.
293. Subsection (12) provides for schedule 2, which gives detailed conditions for guardians managing aspects of the estate of an adult, to take effect.

Section 65: Records: guardians

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

Section 66: Gifts

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

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301. Subsection (8) provides for decisions of the Public Guardian to be appealed to the sheriff. There is no further appeal against decisions of the sheriff.

Section 67: Effect of appointment and transactions of guardian

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

Section 68: Reimbursement and remuneration of guardian

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

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was also the adult's solicitor, this allows them to continue to be paid by the adult for services provided that are not included in the appointment as a guardian.

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

Section 69: Forfeiture of guardian's remuneration

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

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

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

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

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Act 2000 (asp 4) which received Royal Assent on 9 May 2000*

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 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.
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.
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.

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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.
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).