

# **ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### **Part 3: Accounts and Funds**

##### ***Section 25: Authority to intromit with funds***

102. This section provides for a new statutory scheme under which the Public Guardian may grant authority for individuals to have access to and use (intromit with) the funds of an adult with incapacity who cannot look after those funds properly. Those who apply are expected to be family members or carers. Staff of social work departments or other statutory bodies cannot be given authority. The scheme applies to funds held by any individual or organisation in an account where the adult is the sole holder of the account. It is envisaged that the scheme will apply mainly to bank and building society accounts, although it would extend to any similar organisation.
103. Subsection (2) requires the adult's account to be specified clearly and clarifies that only one authority to have access to the adult's funds can be granted at any one time. It would not, therefore, be possible for two people to have access to the adult's funds for different purposes.

##### ***Section 26: Application for authority to intromit***

104. Subsection (1) sets out the information required for applying for authority to use the adult's funds. Subsection (1)(a) requires the application form to detail what the funds will be used for and how much is required for each item, for example, gas, electricity, Council Tax, food. It will be necessary to include information about the extent to which funds are to be used for shared household expenses.
105. Subsection (1)(c) provides that an application must be countersigned. The Scottish Ministers are to have the power to make regulations prescribing who is entitled to countersign. It is envisaged that the class of persons concerned will be similar to those entitled to authenticate passport photographs, for example, teachers, ministers, doctors. Subsection (1)(c) sets out further requirements of the person countersigning the application who must know both the adult and the applicant and must not have a personal interest in the application.
106. Subsection (1)(f) requires the application to be accompanied by a medical certificate, in a form to be prescribed in Regulations, confirming that the adult lacks the capacity to look after the funds concerned
107. Subsection (1)(g) requires details to be given of the new account set up by the applicant, the "designated account", into which the approved amounts are to be transferred from the adult's account. It is envisaged that this account will be clearly identified as the adult's account, although it will be operated by the person authorised to use the adult's funds.

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108. Subsection (3) requires the Public Guardian to inform the adult and others who might be expected to have an interest, that an application has been made and that they have a right to make comments on it. The Public Guardian is obliged to take these into account before reaching a decision on whether to grant authority for access to the funds.
109. Subsection (4) provides for the Public Guardian to issue a statutory certificate confirming that an application has been granted. Details are to be entered in the register. The certificate is required by the person or organisation holding the adult's funds (the fundholder) to allow transactions on the account to take place. Otherwise, it is generally the practice to freeze the account of an adult who loses the capacity to operate it. The certificate will include details of the adult's account, the designated account to which funds are to be transferred and the period for which the Public Guardian's authority is to last.
110. Subsection (5) says that the certificate will require that neither the adult's account nor the designated account is to be overdrawn.
111. Subsection (6) clarifies that the certificate of authority will have the effect that only the authorised withdrawals are to be made from the adult's account and no other transactions on the account are to be permitted. Existing direct debit and standing order arrangements will be cancelled, and any cheque books and cards will be withdrawn.
112. Subsection (7) requires the Public Guardian to give the applicant a chance to make representations if it is proposed to refuse the application.
113. Subsection (8) allows for an application to be referred to the sheriff to be determined. The Public Guardian may decide to refer the matter to the sheriff, or may do so at the request of the applicant or anyone who objects to the application.
114. Subsection (10) defines a withdrawer as a person who is authorised in this Part of the Act to intromit with the adult's funds.

***Section 27: Notification of change of address***

115. This section requires the withdrawer to inform the Public Guardian of a change in their permanent address or that of the adult, so that the Public Guardian can update the register of authorisations under this Part of the Act.

***Section 28: Purposes of intromissions with funds***

116. Subsection (1) sets out 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.
117. Subsection (2) allows the Public Guardian to authorise payments for items not included in subsection (1), at his discretion, for example, payments for small gifts to family members. Any such discretionary payments would have to fall within the general scope of the scheme for access to funds.
118. Subsections (3) and (4) clarify 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.

***Section 29: Withdrawal and use of funds***

119. Subsection (1) allows the fundholder of the adult's account to release to the designated account the amounts authorised by the Public Guardian's certificate of authority.

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120. Subsection (2) confirms that the fundholder of the adult's account is liable to repay to the adult any amounts it has released from the adult's account after the Public Guardian's authority has been withdrawn. Although the fundholder is liable to make repayments to the adult, they may subsequently attempt to recover the sums concerned from the withdrawer.
121. Subsection (3) allows the Public Guardian to authorise other payments from the adult's account, for example a one-off payment to a supplier for goods or services
122. Subsection (4) allows an appeal to the sheriff against a decision of the Public Guardian not to allow access to the adult's funds, either for one of the specified purposes on a regular basis, or for an exceptional payment. The sheriff's decision will be final.

***Section 30: Records and enquiries***

123. Subsection (1) provides for regulations to be made by the Scottish Ministers requiring those with access to the adult's funds to keep records of how they have used the funds. regulations may also be made enabling the Public Guardian to require such records to be released for inspection on demand.
124. Subsection (2) allows the Public Guardian to make checks on how the adult's funds are being used. This includes asking for documentation, including receipts and notebook records that have been kept by the withdrawer.
125. Subsection (3) clarifies that the Public Guardian may make enquiries to the relevant fundholder about transactions on either the adult's or the designated account. The fundholders must release their records to the Public Guardian on request, for the purposes of investigation or spot check. This provision is required, because such information is normally released by the fundholder only to the account-holder.
126. Subsection (4) allows a fundholder who releases records to make a charge for this and to recover it from the adult's or the designated account as appropriate.

***Section 31: Duration and termination of registration***

127. Subsection (1) provides that authority for regular payments from the adult's account should normally last for 3 years, at which point a fresh application to the Public Guardian in the same form as the original application would be required. Subsection (2) allows the Public Guardian to vary the period of the authority and to allow any other period, including an indefinite period, as he thinks fit.
128. Subsection (3) allows the Public Guardian at his sole discretion to suspend or terminate an authority to have access to funds. The suspension or termination would have to be notified to the withdrawer and, through a formal certificate, to the fundholder.
129. Where the Public Guardian terminates the authority to withdraw, he may under subsection (4) grant an interim authority for a period of up to 4 weeks, provided the adult still lacks capacity to operate their account. The interim authority would allow payments specified by the Public Guardian to be made from the adult's account, in order to prevent hardship of the adult, and of the withdrawer where the relevant expenses are shared. An interim certificate of authority is to be in the same format as a normal certificate and particulars are to be entered in the register.
130. Subsection (6) allows an appeal to the sheriff against a decision of the Public Guardian to suspend or terminate an authority. Suspension or termination of the authority is to remain in effect notwithstanding any appeal to the sheriff until it is reversed on appeal.
131. Subsection (7) clarifies that the authority to have access to the adult's funds automatically terminates where a guardian with the relevant powers is appointed, or an intervention order is granted, or an attorney acquires authority to act. If someone

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continues to act under the Public Guardian's authority in good faith, however, they will not have to repay to the adult the amounts they have spent.

132. Subsection (8) clarifies that access to funds shall be terminated by the appointment of either a foreign guardian recognised under the law of Scotland or a foreign attorney, with relevant powers.

***Section 32: Joint accounts***

133. This section applies to "either/or survivor" joint accounts, in other words those enabling any account holder to operate the account without a signature being required from the other holder(s). It does not apply to joint accounts where all the joint account holders have to sign every cheque or withdrawal document. The purpose of the provision is to ensure that one holder of such an account can continue to operate the account if the other holder becomes incapable of doing so, unless the account holders have specifically agreed to opt out of this provision. The purpose is to ensure that fundholders do not freeze a joint account on becoming aware of the incapacity of one of the account holders, thus preventing any withdrawals from the account and requiring the appointment of a guardian to gain access to the funds held.
134. The continued authority to operate will not apply if the joint account holders have previously agreed to opt out of the scheme by confirming with the fundholder that the incapacity of one of them should terminate the authority of the other account holder(s) to operate the account. Nor will the provision apply where the account holder(s) with capacity is/are prevented by a court order from operating the account.

***Section 33: Transfer of funds***

135. This section allows the Public Guardian to approve the transfer of the adult's funds to a different account. This might be convenient, for example, if the adult or person with access to their funds moved to a different address. The Public Guardian might also authorise movement of the account to allow funds to be lodged in an appropriate high interest account, from which payments under the scheme could be made directly.

***Section 34: Disapplication of Part 3***

136. This section confirms that authority to have access to the adult's funds will not be granted where there is a guardian with powers over the account, or a continuing attorney or person appointed under an intervention order with relevant powers. This provision applies to both the Public Guardian's authority and to the continued authority to operate a joint account.
137. Subsection (2) clarifies that subsection (1) applies to foreign guardians and attorneys if their powers are recognised in Scotland.