



# Adults with Incapacity (Scotland) Act 2000

2000 asp 4

## PART 6 S

### INTERVENTION ORDERS AND GUARDIANSHIP ORDERS

#### *Functions etc. of guardian*

#### 64 Functions and duties of guardian S

- (1) Subject to the provisions of this section, an order appointing a guardian may confer on him—
- power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the order;
  - power to deal with all aspects of the personal welfare of the adult, or with such aspects as may be specified in the order;
  - power to pursue or defend an action of declarator of nullity of marriage, or of divorce or separation in the name of the adult;
  - power to manage the property or financial affairs of the adult, or such parts of them as may be specified in the order;
  - power to authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.
- (2) A guardian may not—
- place the adult in a hospital for the treatment of mental disorder against his will; <sup>F1</sup> ...
  - consent on behalf of the adult to any form of treatment [<sup>F2</sup>in relation to which the authority conferred by section 47(2) does not apply by virtue of regulations made under section 48(2)] [<sup>F3</sup>;
  - make, on behalf of the adult, a request under section 4(1) of the Anatomy Act 1984 (c. 14);
  - give, on behalf of the adult, an authorisation under, or by virtue of, section 6(1), [<sup>F4</sup>16F(1)(a),] 17, 29(1) or 42(1) of the Human Tissue(Scotland) Act 2006 (asp 4);

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- [<sup>F5</sup>(da) withdraw an authorisation, on behalf of the adult, by virtue of section 6A(1) of that Act;
- (db) make, on behalf of the adult, an opt-out declaration by virtue of section 6B(1) of that Act;
- (dc) withdraw an opt-out declaration, on behalf of the adult, by virtue of section 6C(1) of that Act;] or
- (e) make, on behalf of the adult, a nomination under section 30(1) of that Act]
- (3) A guardian shall (unless prohibited by an order of the sheriff and subject to any conditions or restrictions specified in such an order) have power by virtue of his appointment to act as the adult's legal representative in relation to any matter within the scope of the power conferred by the guardianship order.
- (4) The guardian shall not later than 7 days after any change of his own or the adult's address notify the Public Guardian who shall—
- (a) notify the adult (in a case where it is the guardian's address which has changed), the local authority and (in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission of the change; and
- (b) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv).
- (5) A guardian having powers relating to the property or financial affairs of the adult shall, subject to—
- (a) such restrictions as may be imposed by the court;
- (b) any management plan prepared under paragraph 1 of schedule 2; or
- (c) paragraph 6 of that schedule,
- be entitled to use the capital and income of the adult's estate for the purpose of purchasing assets, services or accommodation so as to enhance the adult's quality of life.
- (6) The guardian may arrange for some or all of his functions to be exercised by one or more persons acting on his behalf but shall not be entitled to surrender or transfer any part of them to another person.
- (7) The guardian shall comply with any order or demand made by the Public Guardian in relation to the property or financial affairs of the adult in so far as so complying would be within the scope of his authority; and where the guardian fails to do so the sheriff may, on the application of the Public Guardian, make an order to the like effect as the order or demand made by the Public Guardian, and the sheriff's decision shall be final.
- (8) An interim guardian appointed under section 57(5) having powers relating to—
- (a) the property or financial affairs of an adult shall report to the Public Guardian;
- (b) the personal welfare of an adult shall report to the chief social work officer of the local authority,
- every month as to his exercise of those powers.
- (9) Where the chief social work officer of the local authority has been appointed guardian he shall, not later than 7 working days after his appointment, notify any person who received notification under section 58(7) of the appointment of the name of the officer responsible at any time for carrying out the functions and duties of guardian.

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- (10) If, in relation to the appointment of the chief social work officer as guardian, the sheriff has directed that that intimation or notification of any application or other proceedings should not be given to the adult, the chief social work officer shall not notify the adult under subsection (9).
- (11) The Scottish Ministers may by regulations define the scope of the powers which may be conferred on a guardian under subsection (1) and the conditions under which they shall be exercised.
- (12) Schedule 2 (which makes provision as to the guardian's management of the estate of an adult) has effect.

#### Textual Amendments

- F1** Word in s. 64(2)(a) repealed (1.9.2006) by [Human Tissue \(Scotland\) Act 2006 \(asp 4\)](#), [ss. 57\(3\)\(a\)](#), 62; [S.S.I. 2006/251](#), [art. 3](#)
- F2** Words in s. 64(2)(b) substituted (5.10.2007) by [Adult Support and Protection \(Scotland\) Act 2007 \(asp 10\)](#), [ss. 60\(7\)](#), 79; [S.S.I. 2007/334](#), [art. 2\(b\)](#), Sch. 2 (with savings in arts. 4-6)
- F3** S. 64(2)(c)-(e) inserted (1.9.2006) by [Human Tissue \(Scotland\) Act 2006 \(asp 4\)](#), [ss. 57\(3\)\(b\)](#), 62; [S.S.I. 2006/251](#), [art. 3](#)
- F4** S. 64(2)(da)-(dc) inserted (26.3.2021) by [Human Tissue \(Authorisation\) \(Scotland\) Act 2019 \(asp 11\)](#), [ss. 28\(2\)\(b\)\(ii\)](#), 29(2); [S.S.I. 2021/108](#), reg. 2
- F5** Word in s. 64(2)(d) inserted (26.3.2021) by [Human Tissue \(Authorisation\) \(Scotland\) Act 2019 \(asp 11\)](#), [ss. 28\(2\)\(b\)\(i\)](#), 29(2); [S.S.I. 2021/108](#), reg. 2

## 65 Records: guardians **S**

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

## 66 Gifts **S**

- (1) A guardian having powers relating to the property or financial affairs of an adult may make a gift out of the adult's estate only if authorised to do so by the Public Guardian.
- (2) Authorisation by the Public Guardian under subsection (1) may be given generally, or in respect of a particular gift.
- (3) On receipt of an application in the prescribed form for an authorisation to make a gift, the Public Guardian shall, subject to subsection (4), intimate the application to the adult, his nearest relative, his primary carer [<sup>F6</sup>, his named person] and any other person who the Public Guardian considers has an interest in the application and advise them of the prescribed period within which they may object to the granting of the application; and he shall not grant the application without affording to any objector an opportunity of being heard.
- (4) Where the Public Guardian is of the opinion that the value of the gift is such that intimation is not necessary, he may dispense with intimation.
- (5) Having heard any objections as mentioned in subsection (3), the Public Guardian may grant the application.
- (6) Where the Public Guardian proposes to refuse the application he shall intimate his decision to the guardian and advise him of the prescribed period within which he may

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object to the refusal; and he shall not refuse the application without affording to the guardian, if he objects, an opportunity of being heard.

- (7) The Public Guardian may at his own instance or at the instance of the guardian or of any person who objects to the granting of the application remit the application for determination by the sheriff, whose decision shall be final.
- (8) A decision of the Public Guardian—
- (a) to grant an application under subsection (5) or to refuse an application; or
  - (b) to refuse to remit an application to the sheriff under subsection (7),
- may be appealed to the sheriff, whose decision shall be final.

#### Textual Amendments

**F6** Words in s. 66(3) inserted (27.9.2005) by [The Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 \(Modification of Enactments\) Order 2005 \(S.S.I. 2005/465\)](#), art. 2, [Sch. 1 para. 28\(6\)](#)

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

- (1) The adult shall have no capacity to enter into any transaction in relation to any matter which is within the scope of the authority conferred on the guardian except in a case where he has been authorised by the guardian under section 64(1)(e); but nothing in this subsection shall be taken to affect the capacity of the adult in relation to any other matter.
- (2) Where the guardian has powers relating to the property or financial affairs of the adult, the certificate of appointment issued to him by the Public Guardian shall, subject to the terms of the order appointing him, have the effect of—
- (a) authorising the guardian to take possession of, manage and deal with any moveable or immoveable estate (wherever situated) of the adult;
  - (b) requiring any payment due to the adult to be made to the guardian,
- in so far as the estate, payment or matter falls within the scope of the guardian's authority.
- (3) A guardian having powers relating to the personal welfare of an adult may exercise these powers in relation to the adult whether or not the adult is in Scotland at the time of the exercise of the powers.
- (4) The guardian shall be personally liable under any transaction entered into by him—
- (a) without disclosing that he is acting as guardian of the adult; or
  - (b) which falls outwith the scope of his authority,
- but where a guardian has acted as mentioned in paragraph (a) and is not otherwise in breach of any requirement of this Act relating to such guardians, he shall be entitled to be reimbursed from the estate of the adult in respect of any loss suffered by him in consequence of a claim made upon him personally by virtue of this subsection.
- (5) Where a third party with whom the adult entered into a transaction was aware at the date of entering into the transaction that authority had been granted by the guardian under section 64(1)(e), the transaction shall not be void only on the ground that the adult lacked capacity.

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- (6) A transaction for value between the guardian purporting to act as such and a third party acting in good faith shall not be invalid on the ground only that—
- (a) the guardian acted outwith the scope of his authority; or
  - (b) the guardian failed to observe any requirement, whether substantive or procedural, imposed by or under this Act, or by the sheriff or by the Public Guardian; or
  - (c) there was any irregularity whether substantive or procedural in the appointment of the guardian.
- (7) In subsections (3) and (4) any reference to a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland.

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

- (1) A guardian shall be entitled to be reimbursed out of the estate of the adult for any outlays reasonably incurred by him in the exercise of his functions.
- (2) In subsection (1), “outlays”, in relation to a guardian—
- (a) who is someone other than the chief social work officer of a local authority, includes payment for items and services other than those items and services which the guardian is expected to provide as part of his functions;
  - (b) who is the chief social work officer of a local authority, includes payment for items and services only if they would not normally be provided free of charge by the local authority to a person who is in similar circumstances but who does not have a guardian.
- (3) The local authority shall, in relation to the cost of any application by them for appointment of their chief social work officer as guardian or of any subsequent application by that officer while acting as guardian—
- (a) where the application relates to the personal welfare of the adult, meet such cost;
  - (b) where the application relates to the property or financial affairs of the adult, be entitled to recover such cost from the estate of the adult,
- and where the application relates to the personal welfare and to the property or financial affairs of the adult the sheriff shall, in determining the application, apportion the cost as he thinks fit.
- (4) Remuneration shall be payable out of the adult’s estate—
- (a) in respect of the exercise of functions relating to the personal welfare of the adult, only in a case where special cause is shown;
  - (b) in respect of the exercise of functions relating to the property or financial affairs of the adult, unless the sheriff directs otherwise in the order appointing the guardian,
- but shall not be payable to a local authority in respect of the exercise by their chief social work officer of functions relating to the personal welfare of the adult.
- (5) In determining whether or not to make a direction under subsection (4)(b), the sheriff shall take into account the value of the estate and the likely difficulty of managing it.

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- (6) Any remuneration payable to the guardian and the amount of outlays to be allowed under subsection (1) shall be fixed by the Public Guardian—
  - (a) in a case where the guardian is required to submit accounts, when the guardian's accounts for that period are audited;
  - (b) in any other case, on an application by the guardian,
 and in fixing the remuneration to be paid to the guardian the Public Guardian shall take into account the value of the estate.
- (7) The Public Guardian may allow payments to account to be made by way of remuneration during the accounting period if it would be unreasonable to expect the guardian to wait for payment until the end of an accounting period.
- (8) A decision by the Public Guardian—
  - (a) under subsection (6) as to the remuneration payable and the outlays allowable to the guardian;
  - (b) under subsection (7) as to payments to account to the guardian
 may be appealed to the sheriff, whose decision shall be final.

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

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

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

- (1) Where any decision of a guardian with powers relating to the personal welfare of the adult is not complied with by the adult <sup>F7</sup>. . . , and the adult <sup>F8</sup>. . . might reasonably be expected to comply with the decision, the sheriff may, on an application by the guardian—
  - (a) make an order ordaining the adult <sup>F9</sup>. . . to implement the decision of the guardian;
  - (b) where the non-compliance relates to a decision of the guardian as to the place of residence of the adult, grant a warrant authorising a constable—
    - (i) to enter any premises where the adult is, or is reasonably supposed to be;
    - (ii) to apprehend the adult and to remove him to such place as the guardian may direct.
- (2) Where any decision of a guardian with powers relating to the personal welfare of the adult is not complied with by any person other than the adult, and that person might reasonably be expected to comply with the decision, the sheriff may, on an application by the guardian make an order ordaining the person named in the order to implement the decision of the guardian.
- (3) On receipt of an application in the prescribed form for an order or warrant under subsection (1) or for an order under subsection (2), the court shall intimate the application to the adult or, as the case may be, to the person named in the application as a person against whom the order or warrant is sought and shall advise them of the prescribed period within which they may object to the granting of the application; and

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the sheriff shall not grant the order or warrant without affording to any objector an opportunity of being heard.

(4) Having heard any objections as mentioned in subsection (3), the sheriff may grant the application.

[<sup>F10</sup>(4A) The sheriff may, on cause shown, disapply or modify the application of—

(a) subsection (3); and

(b) subsection (4) in so far as it requires the sheriff to hear objections.]

(5) A constable executing a warrant under subsection (1)(b) may use such force as is reasonable in the circumstances and shall be accompanied by the guardian or such person as the guardian may authorise in writing.

(6) In this section any reference to a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland.

#### Textual Amendments

**F7** Words in s. 70(1) repealed (5.10.2007) by [Adult Support and Protection \(Scotland\) Act 2007 \(asp 10\)](#), [ss. 60\(8\)\(a\)](#), 79; [S.S.I. 2007/334](#), [art. 2\(b\)](#), [Sch. 2](#) (with savings in arts. 4-6)

**F8** Words in s. 70(1) repealed (5.10.2007) by [Adult Support and Protection \(Scotland\) Act 2007 \(asp 10\)](#), [ss. 60\(8\)\(a\)](#), 79; [S.S.I. 2007/334](#), [art. 2\(b\)](#), [Sch. 2](#) (with savings in arts. 4-6)

**F9** Words in s. 70(1) repealed (5.10.2007) by [Adult Support and Protection \(Scotland\) Act 2007 \(asp 10\)](#), [ss. 60\(8\)\(a\)](#), 79; [S.S.I. 2007/334](#), [art. 2\(b\)](#), [Sch. 2](#) (with savings in arts. 4-6)

**F10** S. 70(4A) inserted (5.10.2007) by [Adult Support and Protection \(Scotland\) Act 2007 \(asp 10\)](#), [ss. 60\(8\)\(b\)](#), 79; [S.S.I. 2007/334](#), [art. 2\(b\)](#), [Sch. 2](#) (with savings in arts. 4-6)

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