Adults with Incapacity (Scotland) Act 2000

2000 asp 4

PART 6 S

INTERVENTION ORDERS AND GUARDIANSHIP ORDERS

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

71 Replacement or removal of guardian or recall of guardianship by sheriff S

(1) The sheriff, on an application made to him by an adult subject to guardianship or by any other person claiming an interest in the adult's property, financial affairs or personal welfare, may—

(a) replace a guardian by an individual or office holder nominated in the application if he is satisfied, in relation to an individual, that he is suitable for appointment having regard to the matters set out in section 59(3) to (5);

(b) remove a guardian from office if he is satisfied—

(i) that there is a substitute guardian who is prepared to act as guardian; or

(ii) in a case where there are joint guardians, that the remaining guardian is or remaining guardians are prepared to continue to act; or

(c) recall a guardianship order or otherwise terminate a guardianship if he is satisfied—

(i) that the grounds for appointment of a guardian are no longer fulfilled; or

(ii) that the interests of the adult in his property, financial affairs or personal welfare can be satisfactorily safeguarded or promoted otherwise than by guardianship,

and where an application under this subsection is granted, the sheriff clerk shall send a copy of the interlocutor to the Public Guardian.

(2) In making an order replacing a guardian by an individual with powers relating to the property or financial affairs of the adult or removing a guardian from office where there is a substitute guardian with such powers prepared to act as guardian, the sheriff

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[[F1]may**]** require an individual appointed as guardian or the substitute guardian to find caution **[**[F2]or to give such other security as the sheriff thinks fit**]**.

(3) The Public Guardian on receiving a copy of the interlocutor under subsection (1) shall—

(a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);

(b) where the sheriff—

(i) replaces the guardian by the individual or office holder nominated in the application, when satisfied that, in the case of an individual, the individual has found caution **[**[F3]or given other security**]** if so required, issue him with a certificate of appointment;

(ii) removes a guardian from office and a substitute guardian is prepared to act, when satisfied that the substitute guardian has found caution **[**[F4]or given other security**]** if so required, issue the substitute guardian with a certificate of appointment;

(iii) removes a joint guardian from office and there is a joint guardian who is prepared to continue to act, issue a remaining joint guardian with a new certificate of appointment;

(c) notify the adult and the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors including it) the Mental Welfare Commission.

(4) Where the sheriff recalls the guardianship order he may at the same time make an intervention order.

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

Textual Amendments

F1 Words in s. 71(2) substituted (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(9)(a)(i)**, 79(3); S.S.I. 2008/49, art. 2(1)

F2 Words in s. 71(2) inserted (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(9)(a)(ii)**, 79(3); S.S.I. 2008/49, art. 2(1)

F3 Words in s. 71(3)(b)(i) inserted (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(9)(b)(i)**, 79(3); S.S.I. 2008/49, art. 2(1)

F4 Words in s. 71(3)(b)(ii) inserted (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(9)(b)(ii)**, 79(3); S.S.I. 2008/49, art. 2(1)

72 Discharge of guardian with financial powers S

(1) At any time after—

(a) the recall of a guardianship order appointing a guardian with powers relating to the property or financial affairs of an adult;

[[F5](aa) the expiry of such a guardianship order;**]**

(b) the resignation, removal or replacement of such a guardian; or

(c) the death of the adult,

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the Public Guardian may, on an application by the former guardian or, if the former guardian has died, his representative, grant a discharge in respect of the former guardian's actings and intromissions with the estate of the adult.

(2) On receipt of an application in the prescribed form, the Public Guardian shall intimate the application to the adult, his nearest relative, his primary carer, **[**[F6]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.

(3) Having heard any objections as mentioned in subsection (2) the Public Guardian may grant the application.

(4) Where the Public Guardian proposes to refuse the application he shall intimate his decision to the applicant and advise him of the prescribed period within which he may object to the refusal; and he shall not refuse the application without affording to the applicant, if he objects, an opportunity of being heard.

(5) The Public Guardian may at his own instance or at the instance of the applicant or of any person who objects to the granting of the application remit the application for determination by the sheriff, whose decision shall be final.

(6) A decision of the Public Guardian—
   (a) to grant a discharge under subsection (1) or to refuse a discharge;
   (b) to grant an application under subsection (3) or to refuse an application;
   (c) to refuse to remit an application to the sheriff under subsection (5)

may be appealed to the sheriff, whose decision shall be final.

Textual Amendments

F5 S. 72(1)(aa) inserted (5.10.2007) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(10)**, 79; S.S.I. 2007/334, **art. 2(b)**, Sch. 2 (with savings in arts. 4-6)

F6 Words in s. 72(2) 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(7)**

73 Recall of powers of guardian S

(1) The Public Guardian, at his own instance or on an application by any person (including the adult himself) claiming an interest in the property and financial affairs of an adult in respect of whom a guardian has been appointed, may recall the powers of a guardian relating to the property or financial affairs of the adult if it appears to him that—
   (a) the grounds for appointment of a guardian with such powers are no longer fulfilled; or
   (b) the interests of the adult in his property and financial affairs can be satisfactorily safeguarded or promoted otherwise than by guardianship.

(2) Where the Public Guardian recalls the powers of a guardian under subsection (1) he shall—
   (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);
   (b) notify the adult, the guardian and the local authority.

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(3) The Mental Welfare Commission or the local authority in whose area an adult in respect of whom a guardian has been appointed habitually resides [F7]..., at their own instance or on an application by any person (including the adult himself) claiming an interest in the personal welfare of the adult, may recall the powers of a guardian relating to the personal welfare of the adult if it appears to them that—

(a) the grounds for appointment of a guardian with such powers are no longer fulfilled; or

(b) the interests of the adult in his personal welfare can be satisfactorily safeguarded or promoted otherwise than by guardianship.

[[F8](3A) The Mental Welfare Commission may recall the powers of a guardian under subsection (3) only if those powers were granted in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder.**]**

(4) Where the Mental Welfare Commission or the local authority recall the powers of a guardian under subsection (3) they shall notify the other and the Public Guardian who shall—

(a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);

(b) notify the adult and the guardian.

(5) The Public Guardian, Mental Welfare Commission or local authority, as the case may be, shall—

(a) where acting on an application, on receipt of the application in the prescribed form intimate it;

(b) where acting at his or their own instance, intimate the intention to recall the powers of a guardian,

to the adult, his nearest relative, his primary carer**[**[F9], his named person**]** and any person who he or they consider has an interest in the recall of the powers and advise them of the prescribed period within which they may object to such recall; and he or they shall not recall the powers without affording to any objector an opportunity of being heard.

(6) Having heard any objections as mentioned in subsection (5) the Public Guardian, Mental Welfare Commission or local authority may recall the powers of a guardian.

(7) Where the Public Guardian, Mental Welfare Commission or local authority proposes or propose to refuse the application he or they shall intimate the decision to the applicant and the adult and advise them of the prescribed period within which they may object to the refusal; and he or they shall not refuse the application without affording to the applicant or the adult, if he objects, an opportunity of being heard.

(8) The Public Guardian, Mental Welfare Commission or local authority may at his or their own instance or at the instance of an applicant or of any person who objects to the recall of the powers of the guardian remit the matter for determination by the sheriff whose decision shall be final.

(9) A decision of—

(a) the Public Guardian, Mental Welfare Commission or local authority to recall the powers of a guardian under subsection (6);

(b) the Public Guardian, Mental Welfare Commission or local authority to remit or not to remit the matter to the sheriff under subsection (8),

may be appealed to the sheriff, whose decision shall be final, and the decision of the Public Guardian, Mental Welfare Commission or local authority as to the recall of

the powers of a guardian shall remain in force pending the final determination of the appeal.

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

[[F10](11) Section 73A modifies the application of this section in relation to the recall by a local authority of guardianship powers held by their chief social work officer.**]**

Textual Amendments

F7 Words in s. 73(3) repealed (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(11)(a)**, 79(3); S.S.I. 2008/49, art. 2(1)

F8 S. 73(3A) inserted (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(11)(b)**, 79(3); S.S.I. 2008/49, art. 2(1)

F9 Words in s. 73(5) 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(8)**

F10 S. 73(11) inserted (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(11)(c)**, 79(3); S.S.I. 2008/49, art. 2(1)

[[F11]**73A Recall of chief social work officer's guardianship powers** S

(1) This section applies where—

(a) a local authority's chief social work officer is appointed as a guardian; and

(b) either—

(i) the local authority wish to recall their chief social work officer's guardianship powers at their own instance; or

(ii) another person (including the adult himself) applies to the local authority for such a recall.

(2) Where this section applies—

(a) the local authority shall, for the purposes of section 73(5), treat the Public Guardian and the Mental Welfare Commission as persons whom they consider to have an interest in the recall of the guardian's powers; and

(b) if the Public Guardian, the Mental Welfare Commission or any other person to whom intimation is given under section 73(5) objects to the recall of the guardian's powers, the local authority—

(i) shall not recall the guardian's powers; but

(ii) shall instead remit the matter for determination by the sheriff under section 73(8).**]**

Textual Amendments

F11 S. 73A inserted (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(12)**, 79(3); S.S.I. 2008/49, art. 2(1)

Changes to legislation: *There are currently no known outstanding effects for the Adults with Incapacity (Scotland) Act 2000, Cross Heading: Termination and variation of guardianship and replacement, removal or resignation of guardian. (See end of Document for details)*

74 Variation of guardianship order S

(1) The sheriff, on an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of the adult, may vary the powers conferred by the guardianship order and may vary any existing ancillary order.

(2) In varying powers relating to the property or financial affairs of the adult conferred by the guardianship order or in varying any ancillary order in relation to such powers the sheriff **[**[F12]may**]** require the guardian to find caution **[**[F13]or to give such other security as the sheriff thinks fit**]**.

(3) In considering an application under subsection (1), the sheriff shall have regard to any intervention order or guardianship order which may have been previously made in relation to the adult or any other order varying such an order, and to any order ancillary to such an order.

(4) Notwithstanding subsection (1), an application which seeks to vary the powers conferred by a guardianship order or to vary an ancillary order so that—

(a) a guardian, appointed only in relation to the personal welfare of an adult, shall be appointed also or instead in relation to the property or financial affairs of the adult; or

(b) a guardian, appointed only in relation to the property or financial affairs of an adult, shall be appointed also or instead in relation to the personal welfare of the adult;

shall be made under section 57.

(5) Where the sheriff varies the powers conferred by a guardianship order or varies an ancillary order under this section, the sheriff clerk shall send a copy of the interlocutor containing the order to the Public Guardian who shall—

(a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);

(b) notify the adult and the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors including it) the Mental Welfare Commission; and

(c) if he is satisfied that the guardian has caution **[**[F14]or other security**]**, if so required, which covers the varied order, issue a new certificate of appointment where necessary.

Textual Amendments

F12 Words in s. 74(2) substituted (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(13)(a)(i)**, 79(3); S.S.I. 2008/49, art. 2(1)

F13 Words in s. 74(2) inserted (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(13)(a)(ii)**, 79(3); S.S.I. 2008/49, art. 2(1)

F14 Words in s. 74(5)(c) inserted (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(13)(b)**, 79(3); S.S.I. 2008/49, art. 2(1)

75 Resignation of guardian S

(1) A joint guardian, or a guardian in respect of whom a substitute guardian has been appointed, may resign by giving notice in writing of his intention to do so to the Public

Guardian and the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors including it) the Mental Welfare Commission.

(2) The resignation of a guardian as mentioned in subsection (1)—

(a) shall not take effect unless—

(i) the remaining joint guardian is willing to continue to act; or

(ii) the substitute guardian is willing to act;

(b) shall take effect on the receipt by the Public Guardian of notice in writing under subsection (1) together with evidence as to the matters contained in paragraph (a)(i) or (ii).

(3) On receiving notice in writing and evidence as mentioned in subsection (2)(b), the Public Guardian shall—

(a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);

(b) if satisfied that the substitute guardian has found caution **[**[F15]or given other security**]** if so required, issue him with a new certificate of appointment;

(c) issue a remaining joint guardian with a new certificate of appointment;

(d) notify the adult.

(4) A substitute guardian who has not subsequently become guardian by virtue of section 63 may resign by giving notice in writing to the Public Guardian and the local authority and (in the case mentioned in subsection (1)) the Mental Welfare Commission and the resignation shall take effect on the date of receipt of the notice by the Public Guardian; and on its becoming effective, the Public Guardian shall—

(a) notify the guardian and the adult; and

(b) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv).

(5) A guardian—

(a) who has no joint guardian; or

(b) in respect of whom no substitute guardian has been appointed; or

(c) being a joint guardian or guardian in respect of whom a substitute has been appointed who cannot effectively resign by reason of subsection (2)(a)(i) or (ii),

shall not resign until a replacement guardian has been appointed under section 71.

Textual Amendments

F15 Words in s. 75(3)(b) inserted (1.4.2008) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(14)**, 79(3); S.S.I. 2008/49, art. 2(1)

[[F16]75A Death of guardian S

The personal representatives of a guardian who dies shall, if aware of the existence of the guardianship, notify the Public Guardian who shall—

(a) notify—

(i) the adult;

(ii) the local authority; and

(iii) 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 including it, the Mental Welfare Commission;

(b) enter prescribed particulars in the register maintained under section 6(2)(b)(iv); and

(c) issue a new certificate of appointment—

(i) to any surviving joint guardian;

(ii) where the Public Guardian is satisfied that any substitute guardian appointed in respect of the dead guardian is willing to act and has found caution or given other security if so required, to the substitute guardian.**]**

Textual Amendments

F16 S. 75A inserted (5.10.2007) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 60(15)**, 79; S.S.I. 2007/334, **art. 2(b)**, Sch. 2 (with savings in arts. 4-6)

76 Change of habitual residence S

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

(2) The Public Guardian shall—

(a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv) and issue a certificate of appointment to the new guardian; and

(b) subject to subsection (4), notify the adult within 7 days of receipt of the notification from the receiving authority.

(3) Subject to subsection (4), the chief social work officer of the receiving authority shall, within 7 working days of receipt of the notification, notify any person who received notification under section 58(7) of the appointment of the name of the officer responsible at any time for carrying out the functions and duties of guardian.

(4) If, in relation to the original application for a guardianship order, the sheriff has directed that intimation or notification of any application or other proceedings should not be given to the adult, the Public Guardian and the chief social work officer shall not notify the adult under subsection (2)(b) or (3) as the case may be.

Changes to legislation:
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