



# Adults with Incapacity (Scotland) Act 2000

2000 asp 4

## PART 1

### GENERAL

#### *General*

#### **1 General principles and fundamental definitions**

- (1) The principles set out in subsections (2) to (4) shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act, including any order made in or for the purpose of any proceedings under this Act for or in connection with an adult.
- (2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.
- (3) Where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.
- (4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of—
  - (a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult;
  - (b) the views of the nearest relative and the primary carer of the adult, in so far as it is reasonable and practicable to do so;
  - (c) the views of—
    - (i) any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and
    - (ii) any person whom the sheriff has directed to be consulted,

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- in so far as it is reasonable and practicable to do so; and
- (d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so.
- (5) Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act or under any order of the sheriff in relation to an adult shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills.
- (6) For the purposes of this Act, and unless the context otherwise requires—  
“adult” means a person who has attained the age of 16 years;  
“incapable” means incapable of—  
(a) acting; or  
(b) making decisions; or  
(c) communicating decisions; or  
(d) understanding decisions; or  
(e) retaining the memory of decisions,  
as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and  
“incapacity” shall be construed accordingly.
- (7) In subsection (4)(c)(i) any reference to—  
(a) 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;  
(b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter’s property or financial affairs and having continuing effect notwithstanding the granter’s incapacity;  
(c) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter’s personal welfare and having effect during the granter’s incapacity.

### *Judicial proceedings*

## 2 **Applications and other proceedings and appeals**

- (1) This section shall apply for the purposes of any application which may be made to and any other proceedings before the sheriff under this Act.
- (2) An application to the sheriff under this Act shall be made by summary application.

- (3) Unless otherwise expressly provided for, any decision of the sheriff at first instance in any application to, or in any other proceedings before, him under this Act may be appealed to the sheriff principal, and the decision upon such appeal of the sheriff principal may be appealed, with the leave of the sheriff principal, to the Court of Session.
- (4) Rules made under section 32 of the Sheriff Courts (Scotland) Act 1971 (c. 58) may make provision as to the evidence which the sheriff shall take into account when deciding whether to give a direction under section 11(1).

### **3 Powers of sheriff**

- (1) In an application or any other proceedings under this Act, the sheriff may make such consequential or ancillary order, provision or direction as he considers appropriate.
- (2) Without prejudice to the generality of subsection (1) or to any other powers conferred by this Act, the sheriff may—
  - (a) make any order granted by him subject to such conditions and restrictions as appear to him to be appropriate;
  - (b) order that any reports relating to the person who is the subject of the application or proceedings be lodged with the court or that the person be assessed or interviewed and that a report of such assessment or interview be lodged;
  - (c) make such further inquiry or call for such further information as appears to him to be appropriate;
  - (d) make such interim order as appears to him to be appropriate pending the disposal of the application or proceedings.
- (3) On an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult, the sheriff may give such directions to any person exercising—
  - (a) functions conferred by this Act; or
  - (b) functions of a like nature conferred by the law of any country,as to the exercise of those functions and the taking of decisions or action in relation to the adult as appear to him to be appropriate.
- (4) In an application or any other proceedings under this Act, the sheriff—
  - (a) shall consider whether it is necessary to appoint a person for the purpose of safeguarding the interests of the person who is the subject of the application or proceedings; and
  - (b) without prejudice to any existing power to appoint a person to represent the interests of the person who is the subject of the application or proceedings may, if he thinks fit, appoint a person to act for the purpose specified in paragraph (a).
- (5) Safeguarding the interests of a person shall, for the purposes of subsection (4), include conveying his views so far as they are ascertainable to the sheriff; but if the sheriff considers that it is inappropriate that a person appointed to safeguard the interests of another under this section should also convey that other's views to the sheriff, the sheriff may appoint another person for that latter purpose only.
- (6) The sheriff may, on an application by—

- (a) the person authorised under the order;
  - (b) the adult; or
  - (c) any person entitled to apply for the order,
- make an order varying the terms of an order granted under subsection (2)(a).

#### **4 Power of Court of Session or sheriff with regard to nearest relative**

- (1) On an application by an adult, the court may, having regard to section 1 and being satisfied that to do so will benefit the adult, make an order that—
- (a) certain information shall not be disclosed, or intimation of certain applications shall not be given, to the nearest relative of the adult;
  - (b) the functions of the nearest relative of the adult shall, during the continuance in force of the order, be exercised by a person, specified in the application, who is not the nearest relative of the adult but who—
    - (i) is a person who would otherwise be entitled to be the nearest relative in terms of this Act;
    - (ii) in the opinion of the court is a proper person to act as the nearest relative; and
    - (iii) is willing to so act; or
  - (c) no person shall, during the continuance in force of the order, exercise the functions of the nearest relative.
- (2) An order made under subsection (1) shall apply only to the exercise of the functions under this Act of the nearest relative.
- (3) The court may, on an application by an adult, make an order varying the terms of an order granted under subsection (1).
- (4) No application shall be made under this section by an adult who is not incapable within the meaning of this Act at the time of making the application.

#### **5 Safeguarding of interests in Court of Session appeals or proceedings**

- (1) In determining any appeal or in any other proceedings under this Act the Court of Session—
- (a) shall consider whether it is necessary to appoint a person for the purpose of safeguarding the interests of the person who is the subject of the appeal or other proceedings; and
  - (b) without prejudice to any existing power to appoint a person to represent the interests of the second mentioned person, may if it thinks fit appoint a person to act for the purpose specified in paragraph (a).
- (2) Safeguarding the interests of a person shall, for the purposes of subsection (1), include conveying his views so far as they are ascertainable to the court; but if the court considers that it is inappropriate that a person appointed to safeguard the interests of another under this section should also convey that other's views to the court, the court may appoint another person for that latter purpose only.

## *The Public Guardian*

### **6 The Public Guardian and his functions**

- (1) The Accountant of Court shall be the Public Guardian.
- (2) The Public Guardian shall have the following general functions under this Act—
  - (a) to supervise any guardian or any person who is authorised under an intervention order in the exercise of his functions relating to the property or financial affairs of the adult;
  - (b) to establish, maintain and make available during normal office hours for inspection by members of the public on payment of the prescribed fee, separate registers of—
    - (i) all documents relating to continuing powers of attorney governed by the law of Scotland;
    - (ii) all documents relating to welfare powers of attorney governed by the law of Scotland;
    - (iii) all authorisations to intromit with funds under Part 3;
    - (iv) all documents relating to guardianship orders under Part 6;
    - (v) all documents relating to intervention orders under Part 6,in which he shall enter any matter which he is required to enter under this Act and any other matter of which he becomes aware relating to the existence or scope of the power, authorisation or order as the case may be;
  - (c) to receive and investigate any complaints regarding the exercise of functions relating to the property or financial affairs of an adult made—
    - (i) in relation to continuing attorneys;
    - (ii) concerning intromissions with funds under Part 3;
    - (iii) in relation to guardians or persons authorised under intervention orders;
  - (d) to investigate any circumstances made known to him in which the property or financial affairs of an adult seem to him to be at risk;
  - (e) to provide, when requested to do so, a guardian, a continuing attorney, a withdrawer or a person authorised under an intervention order with information and advice about the performance of functions relating to property or financial affairs under this Act;
  - (f) to consult the Mental Welfare Commission and any local authority on cases or matters relating to the exercise of functions under this Act in which there is, or appears to be, a common interest.
- (3) In subsection (2)(c) any reference to—
  - (a) 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;
  - (b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity.

## 7 The Public Guardian: further provision

- (1) The Scottish Ministers may prescribe—
  - (a) the form and content of the registers to be established and maintained under section 6(2)(b) and the manner and medium in which they are to be established and maintained;
  - (b) the form and content of any certificate which the Public Guardian is empowered to issue under this Act;
  - (c) the forms and procedure for the purposes of any application required or permitted to be made under this Act to the Public Guardian in relation to any matter;
  - (d) the evidence which the Public Guardian shall take into account when deciding under section 11(2) whether to dispense with intimation or notification to the adult.
- (2) The Public Guardian may charge the prescribed fee for anything done by him in connection with any of his functions under this Act and he shall not be obliged to act until such fee is paid.
- (3) Any certificate which the Public Guardian issues under this Act shall, for the purposes of any proceedings, be conclusive evidence of the matters contained in it.

### *Expenses in court proceedings*

## 8 Expenses in court proceedings

- (1) Where in any court proceedings (other than, in the case of a local authority, an application under section 68(3)) the Public Guardian, Mental Welfare Commission or local authority is a party for the purpose of protecting the interests of an adult, the court may make an award of expenses against the adult or against any person whose actings have resulted in the proceedings.
- (2) Where in any court proceedings (other than, in the case of a local authority, an application under section 68(3)) the Public Guardian, Mental Welfare Commission or local authority is a party for the purpose of representing the public interest, the court may make an award of expenses against any person whose actings have resulted in the proceedings or on whose part there has been unreasonable conduct in relation to the proceedings.

### *The Mental Welfare Commission*

## 9 Functions of the Mental Welfare Commission

- (1) Without prejudice to their functions under the 1984 Act, the Mental Welfare Commission shall have the following general functions under this Act in relation to any adult to whom this Act applies by reason of, or by reasons which include, mental disorder—
  - (a) to exercise protective functions in respect of the adult if the adult is the subject of an intervention or guardianship order, in so far as the order relates to the personal welfare of the adult;
  - (b) to visit the adult as often as they think appropriate and bring to the attention of the Health Board for the area in which the adult resides, or the local authority,

- or any other body any matter relating to the personal welfare of the adult which they consider ought to be brought to their attention;
- (c) to consult the Public Guardian and any local authority on cases or matters relating to the exercise of functions under this Act in which there is, or appears to be, a common interest;
  - (d) where they are not satisfied with any investigation made by a local authority into a complaint made under section 10(1)(c), or where the local authority have failed to investigate the complaint, to receive and investigate any complaints relating to the exercise of functions relating to the personal welfare of the adult made—
    - (i) in relation to welfare attorneys;
    - (ii) in relation to guardians or persons authorised under intervention orders;
  - (e) to investigate any circumstances made known to them in which the personal welfare of the adult seems to them to be at risk;
  - (f) to investigate any circumstances made known to them in which the property of the adult may, by reason of the mental disorder of the adult, be exposed to a risk of loss or damage;
  - (g) to provide a guardian, welfare attorney or person authorised under an intervention order, when requested to do so, with information and advice in connection with the performance of his functions in relation to personal welfare under this Act.
- (2) A guardian or welfare attorney of such an adult or a person authorised under an intervention order in relation to such an adult or the local authority shall afford the Mental Welfare Commission all facilities necessary to enable them to carry out their functions in respect of the adult.
- (3) In subsection (1)(d) any reference to—
- (a) 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;
  - (b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.

### *Local authorities*

## **10 Functions of local authorities**

- (1) A local authority shall have the following general functions under this Act—
- (a) to supervise a guardian appointed with functions relating to the personal welfare of an adult in the exercise of those functions;
  - (b) to consult the Public Guardian and the Mental Welfare Commission on cases or matters relating to the exercise of functions under this Act in which there is, or appears to be, a common interest;
  - (c) to receive and investigate any complaints relating to the exercise of functions relating to the personal welfare of an adult made—
    - (i) in relation to welfare attorneys;

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- (ii) in relation to guardians or persons authorised under intervention orders;
  - (d) to investigate any circumstances made known to them in which the personal welfare of an adult seems to them to be at risk;
  - (e) to provide a guardian, welfare attorney or person authorised under an intervention order, when requested to do so, with information and advice in connection with the performance of his functions in relation to personal welfare under this Act.
- (2) For the purposes of subsection (1)(d), “local authority” includes a local authority for an area in which the adult is present.
- (3) The Scottish Ministers may make provision by regulations as regards the supervision by local authorities of the performance of their functions—
- (a) by guardians, in relation to the personal welfare of adults under this Act;
  - (b) where the supervision has been ordered by the sheriff—
    - (i) by persons authorised under intervention orders;
    - (ii) by welfare attorneys.
- (4) In subsection (1)(c) any reference to—
- (a) 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;
  - (b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter’s personal welfare and having effect during the granter’s incapacity.

### *Intimation*

## **11 Intimation not required in certain circumstances**

- (1) Where, apart from this subsection, intimation of any application or other proceedings under this Act, or notification of any interlocutor relating to such application or other proceedings, would be given to an adult and the court considers that the intimation or notification would be likely to pose a serious risk to the health of the adult the court may direct that such intimation or notification shall not be given.
- (2) Where, apart from this subsection and subsection (1), any intimation or notification to him under this Act would be given by the Public Guardian to an adult and the Public Guardian considers that the intimation or notification would be likely to pose a serious risk to the health of the adult the Public Guardian shall not give the intimation or notification.

### *Investigations*

## **12 Investigations**

- (1) In consequence of any investigation carried out under—
- (a) section 6(2)(c) or (d) by the Public Guardian;



- (b) section 9(1)(d) or (e) by the Mental Welfare Commission; or
- (c) section 10(1)(c) or (d) by a local authority,

the Public Guardian, Mental Welfare Commission or local authority, as the case may be, may take such steps, including the making of an application to the sheriff, as seem to him or them to be necessary to safeguard the property, financial affairs or personal welfare, as the case may be, of the adult.

- (2) For the purposes of any investigation mentioned in subsection (1), the Public Guardian, Mental Welfare Commission and local authority shall provide each other with such information and assistance as may be necessary to facilitate the investigation.

### *Codes of practice*

## **13 Codes of practice**

- (1) The Scottish Ministers shall prepare, or cause to be prepared for their approval, and from time to time revise, or cause to be revised for their approval, codes of practice containing guidance as to the exercise by—
  - (a) local authorities and their chief social work officers and mental health officers;
  - (b) continuing and welfare attorneys;
  - (c) persons authorised under intervention orders;
  - (d) guardians;
  - (e) withdrawers;
  - (f) managers of authorised establishments;
  - (g) supervisory bodies;
  - (h) persons authorised to carry out medical treatment or research under Part 5,of their functions under this Act and as to such other matters arising out of or connected with this Act as the Scottish Ministers consider appropriate.
- (2) Before preparing or approving any code of practice under this Act or making or approving any alteration in it the Scottish Ministers shall consult such bodies as appear to them to be concerned.
- (3) The Scottish Ministers shall lay copies of any such code and of any alteration in it before the Parliament.
- (4) The Scottish Ministers shall publish every code of practice made under this Act as for the time being in force.

### *Appeal against decision as to incapacity*

## **14 Appeal against decision as to incapacity**

A decision taken for the purposes of this Act, other than by the sheriff, as to the incapacity of an adult may be appealed by—

- (a) the adult; or
- (b) any person claiming an interest in the adult's property, financial affairs or personal welfare relating to the purpose for which the decision was taken,

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to the sheriff or, where the decision was taken by the sheriff, to the sheriff principal and thence, with the leave of the sheriff principal, to the Court of Session.