



# Adults with Incapacity (Scotland) Act 2000

2000 asp 4

## PART 7

### MISCELLANEOUS

#### **80 Future appointment of curator bonis etc. incompetent**

In any proceedings begun after the commencement of this Act it shall not be competent to appoint a curator bonis, tutor-dative or tutor-at-law to a person who has attained the age of 16 years.

#### **81 Repayment of funds**

(1) Where—

- (a) a continuing attorney;
- (b) a welfare attorney;
- (c) a withdrawer;
- (d) a guardian;
- (e) a person authorised under an intervention order; or
- (f) the managers of an authorised establishment within the meaning of Part 4,

uses or use any funds of an adult in breach of their fiduciary duty or outwith their authority or power to intervene in the affairs of the adult or after having received intimation of the termination or suspension of their authority or power to intervene, they shall be liable to repay the funds so used, with interest thereon at the rate fixed by Act of Sederunt as applicable to a decree of the sheriff, to the account of the adult.

(2) Subsection (1) shall be without prejudice to sections 69 and 82.

#### **82 Limitation of liability**

(1) No liability shall be incurred by a guardian, a continuing attorney, a welfare attorney, a person authorised under an intervention order, a withdrawer or the managers of an

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establishment for any breach of any duty of care or fiduciary duty owed to the adult if he has or they have—

- (a) acted reasonably and in good faith and in accordance with the general principles set out in section 1; or
- (b) failed to act and the failure was reasonable and in good faith and in accordance with the said general principles.

(2) In this section 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; and
- (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.

### **83 Offence of ill-treatment and wilful neglect**

- (1) It shall be an offence for any person exercising powers under this Act relating to the personal welfare of an adult to ill-treat or wilfully neglect that adult.
- (2) A person guilty of an offence under subsection (1) shall be liable—
  - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine, or both.

### **84 Application to guardians appointed under Criminal Procedure (Scotland) Act 1995**

- (1) Parts 1, 5, 6 and 7 shall apply to a guardian appointed under section 57(2)(c) or section 58(1) of the Criminal Procedure (Scotland) Act 1995 (c. 46) (“the 1995 Act”) as they apply to a guardian with powers relating to the personal welfare of an adult appointed under Part 6; and accordingly the 1995 Act shall be amended as follows.
- (2) After section 58 there shall be inserted—

#### **“58A Application of Adults with Incapacity (Scotland) Act 2000**

- (1) Subject to the provisions of this section, the provisions of Parts 1, 5, 6 and 7 of the Adults with Incapacity (Scotland) Act 2000 (asp 4) (“the 2000 Act”) apply—
  - (a) to a guardian appointed by an order of the court under section 57(2)(c), 58(1) or 58(1A) of this Act (in this section referred to as a “guardianship order”) whether appointed before or after the coming into force of these provisions, as they apply to a guardian with powers

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- relating to the personal welfare of an adult appointed under section 58 of that Act;
- (b) to a person authorised under an intervention order under section 60A of this Act as they apply to a person so authorised under section 53 of that Act.
- (2) In making a guardianship order the court shall have regard to any regulations made by the Scottish Ministers under section 64(11) of the 2000 Act and—
- (a) shall confer powers, which it shall specify in the order, relating only to the personal welfare of the person;
- (b) may appoint a joint guardian;
- (c) may appoint a substitute guardian;
- (d) may make such consequential or ancillary order, provision or direction as it considers appropriate.
- (3) Without prejudice to the generality of subsection (2), or to any other powers conferred by this Act, the court may—
- (a) make any order granted by it subject to such conditions and restrictions as appear to it to be appropriate;
- (b) order that any reports relating to the person who will be the subject of the order 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 it to be appropriate;
- (d) make such interim order as appears to it to be appropriate pending the disposal of the proceedings.
- (4) Where the court makes a guardianship order it shall forthwith send a copy of the interlocutor containing the order to the Public Guardian who shall—
- (a) enter prescribed particulars of the appointment in the register maintained by him under section 6(2)(b)(iv) of the 2000 Act;
- (b) unless he considers that the notification would be likely to pose a serious risk to the person's health notify the person of the appointment of the guardian; and
- (c) notify the local authority and the Mental Welfare Commission of the terms of the interlocutor.
- (5) A guardianship order shall continue in force for a period of 3 years or such other period (including an indefinite period) as, on cause shown, the court may determine.
- (6) Where any proceedings for the appointment of a guardian under section 57(2) (c) or 58(1) of this Act have been commenced and not determined before the date of coming into force of section 84 of, and paragraph 26 of schedule 5 to, the Adults with Incapacity (Scotland) Act 2000 (asp 4) they shall be determined in accordance with this Act as it was immediately in force before that date.”.

**85 Jurisdiction and private international law**

Schedule 3 shall have effect for the purposes of defining the jurisdiction, in respect of adults who are incapable within the meaning of this Act, of the Scottish judicial and administrative authorities and for making provision as to the private international law of Scotland in that respect.

**86 Regulations**

- (1) Any power of the Scottish Ministers to make regulations under this Act shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (2) Any such power may be exercised to make different provision for different cases or classes of case and includes power to make such incidental, supplemental, consequential or transitional provision or savings as appear to the Scottish Ministers to be appropriate.

**87 Interpretation**

- (1) In this Act, unless the context otherwise requires—
  - “adult” shall be construed in accordance with section 1;
  - “continuing attorney” shall be construed in accordance with section 15;
  - “guardianship order” shall be construed in accordance with section 58;
  - “incapable” and “incapacity” shall be construed in accordance with section 1;
  - “intervention order” shall be construed in accordance with section 53;
  - “local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39), and references to a local authority shall be construed as references to the local authority for the area in which the adult resides;
  - “managers of an establishment” shall be construed in accordance with schedule 1;
  - “mental disorder” means mental illness (including personality disorder) or mental handicap however caused or manifested; but an adult shall not be treated as suffering from mental disorder by reason only of promiscuity or other immoral conduct, sexual deviancy, dependence on alcohol or drugs, or acting as no prudent person would act;
  - “Mental Welfare Commission” means the Mental Welfare Commission for Scotland continued in being by section 2 of the 1984 Act;
  - “nearest relative” means, subject to subsection (2), the person who would be, or would be exercising the functions of, the adult’s nearest relative under sections 53 to 57 of the 1984 Act if the adult were a patient within the meaning of that Act and notwithstanding that the person neither is nor was caring for the adult for the purposes of section 53(3) of that Act;
  - “office holder”, in relation to a guardian, means the chief social work officer of the local authority;
  - “person claiming an interest” includes the local authority, the Mental Welfare Commission and the Public Guardian;
  - “power of attorney” includes a factory and commission;

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“prescribe”, except for the purposes of anything which may be or is to be prescribed by the Public Guardian, means prescribe by regulations; and “prescribed” shall be construed accordingly;

“primary carer” in relation to an adult, means the person or organisation primarily engaged in caring for him;

“Public Guardian” shall be construed in accordance with section 6;

“State hospital” shall be construed in accordance with section 102 of the National Health Service (Scotland) Act 1978 (c. 29);

“substitute guardian” shall be construed in accordance with section 63;

“welfare attorney” shall be construed in accordance with section 16;

“withdrawer” shall be construed in accordance with section 26;

“the 1984 Act” means the Mental Health (Scotland) Act 1984 (c. 36).

(2) Where—

(a) an adult has no spouse or has a spouse but subsection (3) applies; and

(b) a person of the same sex as the adult—

(i) is and has been, for a period of not less than 6 months, living with the adult in a relationship which has the characteristics, other than that the persons are of the opposite sex, of the relationship between husband and wife; or

(ii) if the adult is for the time being an in-patient in a hospital, had so lived with the adult until the adult was admitted;

then that person shall be treated as the nearest relative.

(3) This subsection applies where the adult’s spouse is permanently separated from the adult, either by agreement or under an order of a court, or has deserted, or been deserted by, the adult for a period and the desertion persists.

(4) For the purposes of this Act, a person is bankrupt if his estate has been sequestrated for insolvency or he has granted a trust deed which has become a protected trust deed under Schedule 5 to the Bankruptcy (Scotland) Act 1985 (c. 66), or he has been adjudged bankrupt in England and Wales, or he has become bankrupt (however expressed) under the law of any other country.

## **88 Continuation of existing powers, minor and consequential amendments and repeals**

(1) Schedule 4, which contains provisions relating to the continuation of existing powers, shall have effect.

(2) Schedule 5, which contains minor amendments and amendments consequential on the provisions of this Act, shall have effect.

(3) The enactments mentioned in schedule 6 are hereby repealed to the extent specified in the second column of that schedule.

## **89 Citation and commencement**

(1) This Act may be cited as the Adults with Incapacity (Scotland) Act 2000.

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- (2) This Act shall come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint and different days may be appointed for different purposes.
- (3) Without prejudice to the provisions of schedule 4, an order under subsection (2) may make such transitional provisions and savings as appear to the Scottish Ministers necessary or expedient in connection with any provision brought into force by the order; and where it does so, the statutory instrument under which it is made shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.