

ADULT SUPPORT AND PROTECTION (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT – AN OVERVIEW

Part 2

Adults With Incapacity

Section 58 – Accounts and funds

Purposes and application of Part

95. This section replaces Part 3 of the 2000 Act (sections 25-35) and inserts new sections 24A-33.
96. New section 24A(1) and (2) sets out afresh the provision of a statutory scheme under which the Public Guardian may grant authority to access and use (intromit with) the funds of an adult and 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.
97. New section 24B(1) provides that an application can only be made where an adult is incapable in relation to decisions about the funds concerned. Section 24B(2) excludes adults whose funds are covered by a guardianship, a power of attorney or an intervention order.

Authority to take preliminary steps

98. New section 24C(1)-(3) provides that the Public Guardian may, on application, issue a certificate of authority to a person who wishes to intromit with funds but cannot do so because of a lack of information about the adult's accounts. This was not possible under the original scheme. Section 24(4) provides that the certificate will authorise a bank or other financial institution to provide information about an adult's account or accounts, required for the purpose of making an application for authority to intromit with funds.
99. New section 24D (1)-(3) provides that the Public Guardian may, on application, issue a certificate authorising the opening of an account in the adult's name for the purpose of intromitting with funds. This was not possible under the original scheme. Section 24D(4) allows the Public Guardian to specify the kind of account that can be opened. Section 24D(5) provides that the certificate will authorise the fundholder to open the account but if the certificate specifies a type of account, the fundholder may only open this type of account (Section 24D(6)). Section 24D(7) provides that the applicant must notify the Public Guardian of the details of the account once it has been opened.

Authority to intromit

100. Sections 25(1) and (2) provide that the persons who are permitted to apply for authority to intromit with funds are individuals, joint individuals or bodies (other than managers of authorised establishments under Part 4 of the 2000 Act). The original scheme only provided for individuals. Section 25(3) provides that where an application under section 25(1) is submitted with an application under 24D(5) to open an account, it will only be granted once the account is opened and its particulars notified to and registered by the Public Guardian. Section 25(4) provides that where the Public Guardian grants the application, she must enter the particulars on the register and issue a 'withdrawal certificate'. Section 25(5) prevents an application being made if a person is already authorised to intromit. Section 25(6) provides that the person who is issued with a 'withdrawal certificate' is called a 'withdrawer'.
101. New section 26(1) sets out what is required in an application to intromit. Subsection (2) introduces the possibility of identifying another account (the second account), either a pre-existing account or one to be opened under section 24D, which the applicant wishes to use for the purpose of intromitting with the adult's funds.

Withdrawal certificates

102. New section 26A(1) sets the parameters of what can be authorised in a withdrawal certificate. The withdrawal certificate can set limits on the amounts transferred, allow standing orders or direct debits to be set up on the current account for specified purposes (for example, the payment of regular utility bills), and authorise withdrawal of funds from the designated account for specified purposes. Section 26A(2) provides that the certificate cannot authorise any of the accounts to be overdrawn.

Joint and reserve withdrawers

103. New section 26B provides that the Public Guardian may on application issue a certificate appointing an additional withdrawer to be authorised to act alongside one or more existing withdrawers. Previously there could only be one withdrawer on an incapable adults account. This new provision will ensure continuity for the adult. The joint withdrawer's application must be signed by the original withdrawer and the Public Guardian will enter the particulars into the Register. The certificate is valid until the withdrawal certificate held by the original withdrawer ceases to be valid.
104. New section 26C defines the extent of joint withdrawers' liability. It provides for consultation among joint withdrawers before the exercise of their functions and for an application to the Public Guardian for directions in the event of a disagreement between joint withdrawers. There is an appeal to the sheriff and provision is made for third parties transacting with joint withdrawers in good faith.
105. New section 26D provides for an application to the Public Guardian for the appointment of a reserve withdrawer either at the time of the original application or at some later date on application by the main withdrawer. This was not possible under the original scheme and will help ensure continuity for the adult. The reserve withdrawers application must be signed by the original withdrawer and the Public Guardian will enter the particulars into the Register.
106. New section 26E (1)-(3) provides for a reserve withdrawer's authority to act coming into effect, either by notice to the Public Guardian by the main withdrawer, or in cases where the main withdrawer is unable to do so, by the reserve withdrawer and for the issue of a certificate by the Public Guardian. Section 26E(4) provides for the duration of the validity of the certificate and section 26E(5) sets out the limits of liability of both withdrawers for the reserve withdrawer's actings.

Variation of withdrawer's authority

107. New section 26F provides for applications to be made to the Public Guardian for variation of a withdrawal certificate, other than for the period of validity (which is covered by section 31) and the issue by the Public Guardian of a varied withdrawal certificate.

Authority to transfer funds

108. New section 26G provides for an application by a withdrawer or a person who has applied to become a withdrawer to the Public Guardian and for the issue of a certificate for a one-off transfer of funds from an adult's account to the designated account or to the adult's current or second account. It also provides that it will also be possible to apply for authority to close the original account and terminate standing orders and direct debits on it.

Applications: general

109. New section 27 covers those aspects of the application procedure which apply to all applications under this Part.
110. New section 27A(1) sets out the new countersigning requirements for applications for authority to obtain information (24C), open an account (24D), intromit (25) and for a joint withdrawer (26B). The countersignatory must have known the applicant for at least a year (this was previously two years), must not fall into one of the excluded categories, and must confirm that s/he believes the information in the application to be true and that the applicant is a fit and proper person to intromit. Section 27A(2) makes provision for the countersigning of reserve withdrawers' applications. Section 27A(3) sets out that applications by organisations do not require to be counter-signed.
111. New section 27B provides for a medical certificate to accompany applications for authority to provide information (24C), to open an account (24D) and to intromit (25). Medical certificates under this section will refer to the adult's ability to manage funds.
112. New section 27C requires all applications to be intimated in the same way as previously: to the adult; the adult's nearest relative; the adult's primary carer; the adult's named person and to any other person the Public Guardian considers has an interest. In cases where the applicant is both the adult's nearest relative and carer or a body other than a local authority, it must also be intimated to the Chief Social Work Officer of the local authority.
113. New section 27D requires the Public Guardian to be satisfied that an applicant, or a proposed reserve withdrawer, is a fit and proper person to intromit with an adult's funds before granting an application under sections 24C, 24D, 25, 26B or 26D. The Public Guardian has a broad discretion in this regard but must take account of any guidance issued by Scottish Ministers.
114. New section 27E provides a requirement that objectors should be heard in relation to all applications and refusals of applications under this Part. Representations may be made orally or in writing.
115. New section 27F provides power for the Public Guardian to refer an application under this Part to the sheriff to be determined. The sheriff's decision is final.
116. New section 27G(1) provides that where there has been an application for authority to obtain information (24C), open an account (24D) or intromit (25) and where that person makes a further application in relation to the adult, the Public Guardian has the power to dispense with the need for the same information to be provided more than once, or for the application to be countersigned or a medical certificate produced when this has already been done in respect of a previous application in respect of the same adult. Section 27G(2) allows for the issuing of a combined certificate.

Fundholders

117. New section 28 sets out that the fundholder of the relevant account is authorised to act on the instructions of a withdrawer to the extent of the authority in the withdrawal certificate and must not allow any operations on the account other than those authorised by the withdrawal certificate. Section 28(3) allows fundholders to release statements and other information on the adult's current and second accounts to the withdrawer whilst the withdrawal certificate is valid.
118. Section 28A allows fundholders of an account from which funds are to be transferred in accordance with a certificate issued under section 24G to act to the extent authorised by the certificate.
119. New section 29 sets out that fundholders will be liable for funds taken out of the adult's account at any time when they were aware that the withdrawer's authority had been terminated or suspended. Having met the liability, a fundholder can then recover from the withdrawer.

Withdrawers

120. New section 30 clarifies 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.
121. New section 30A requires the withdrawer to inform the Public Guardian of a change in his or her permanent address or that of the adult within 7 days.
122. New section 30B requires a withdrawer to keep records of the exercise of his or her powers and permits the Public Guardian to make inquiries into the exercise of the withdrawer's functions.

Duration etc. of authority

123. New section 31(1) provides that unless otherwise stated a withdrawal certificate is valid for 3 years. Section 31(2) allows this period to be reduced or extended by the Public Guardian. Section 31(4) provides that a withdrawer's authority will terminate if there is a guardianship or intervention order made, or continuing attorney appointed, with powers in relation to the funds in question.
124. New section 31A provides for the suspension and termination of authority. To take account of the amendments to the scheme which provide for intromission with more than one account in the adult's name and for separate certificates authorising one-off transfers, the duty to intimate suspensions and terminations is extended to include such other persons as the Public Guardian thinks fit. On terminating the authority, the Public Guardian must enter prescribed particulars in the register and may issue an interim withdrawal certificate for up to four weeks to the withdrawer.
125. New section 31B provides for applications to renew authority where the person applying holds an existing authority to intromit or where the reserve withdrawer wants to take the place of the main withdrawer where the latter has died, become incapable or has his or her authority terminated. This section will allow the Public Guardian, if she sees fit, to dispense with certain of the application requirements in order to make the renewal process faster and less onerous.
126. New section 31C allows the Public Guardian to specify a time limit on the validity of the certificates of authority to provide information about funds, open a bank account and to transfer specified sums. S/he can also cancel these certificates. It also sets out to whom cancellation must be notified.

Appeals

127. New section 31D brings together, in a single section, the appeal provisions. Decisions relating to applications under sections 24C, 24D, 25, 26D, 26E, 26F and 26G are appealable.
128. New section 31E provides for transition from guardianship to intromission with funds and extends to transitions from guardianship where applications are made by a person other than the guardian. It provides for situations where financial guardianship is no longer necessary (e.g. because there has been a simplification of the adult's financial affairs) but the adult remains incapable of managing his or her finances and intromission with funds would be more appropriate. There is no requirement for countersigning where the application is made by the adult's guardian. The Public Guardian may also disapply the requirement for a medical certificate. The Public Guardian must recall the guardianship before granting the application. The withdrawal certificate will specify the period of authority. This provision is not available where there is a recognised guardian under the law of another country.

Miscellaneous

129. New section 32 enables joint accounts to continue to be operated on by a joint account holder where the other joint account holder no longer has capacity to operate it.

Interpretation

130. [Section 33](#) defines certain expressions used in Part 3 of the 2000 Act.