



Adult Support and Protection (Scotland) Act 2007

2007 asp 10

PART 2

ADULTS WITH INCAPACITY

54 Preliminary

References in this Part to “the 2000 Act” are references to the Adults with Incapacity (Scotland) Act [2000 \(asp 4\)](#).

55 Applications and proceedings: sheriff to consider adult’s wishes and feelings

After section 3(5) of the 2000 Act insert—

“(5A) In determining an application or any other proceedings under this Act, the sheriff shall, without prejudice to the generality of section 1(4)(a), take account of the wishes and feelings of the adult who is the subject of the application or proceedings so far as they are expressed by a person providing independent advocacy services.

(5B) In subsection (5A), “independent advocacy services” has the same meaning as it has in section 259(1) of the Mental Health (Care and Treatment) (Scotland) Act [2003 \(asp 13\)](#).”.

56 Orders about incapable adults' nearest relatives

(1) Section 4 (orders about functions of nearest relative etc.) of the 2000 Act is amended as follows.

(2) In subsection (1)—

- (a) the words “On an application by an adult,” are repealed,
- (b) for “the adult”, where first occurring, substitute “an adult with incapacity”,
- (c) in paragraph (b), for “application” substitute “order”.

(3) In subsection (3), the words “, on an application by an adult,” are repealed.

(4) After subsection (3) insert—

“(3A) The court may make an order under subsection (1) or (3) only on the application of—

- (a) the adult to whom the application relates; or
- (b) any person claiming an interest in that adult’s property, financial affairs or personal welfare.

(3B) The court may dispose of an application for an order under subsection (1) or (3) by making—

- (a) the order applied for; or
- (b) such other order under this section as it thinks fit.”.

(5) Subsection (4) is repealed.

57 Powers of attorney

(1) Section 15 (continuing powers of attorney) of the 2000 Act is amended as follows—

- (a) after paragraph (b) of subsection (3) insert—
 - “(ba) where the continuing power of attorney is exercisable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates, states that the granter has considered how such a determination may be made;”,
- (b) in subsection (3)(c)—
 - (i) leave out “a solicitor” and insert “a practising solicitor”,
 - (ii) in sub-paragraph (ii), for “other persons” substitute “another person”,
 - (iii) in sub-paragraph (ii), for “have” substitute “has”,
- (c) in subsection (4), for “A solicitor” substitute “A practising solicitor”,
- (d) after subsection (4) insert—

“(5) It is declared that the rule of law which provides that an agent’s authority ends in the event of the bankruptcy of the principal or the agent applies, and has applied since subsection (1) came into force, in relation to continuing powers of attorney.”.

(2) Section 16 (welfare powers of attorney) of the 2000 Act is amended as follows—

- (a) after paragraph (b) of subsection (3) insert—
 - “(ba) states that the granter has considered how a determination as to whether he is incapable in relation to decisions about the matter to which the welfare power of attorney relates may be made for the purposes of subsection (5)(b);”,
- (b) in subsection (3)(c)—
 - (i) leave out “a solicitor” and insert “a practising solicitor”,
 - (ii) in sub-paragraph (ii), for “other persons” substitute “another person”,
 - (iii) in sub-paragraph (ii), for “have” substitute “has”,
- (c) in subsection (4), for “A solicitor” substitute “A practising solicitor”,
- (d) in subsection (6)(b), for “mentioned in section 48(1) or (2)” substitute “in relation to which the authority conferred by section 47(2) does not apply by virtue of regulations made under section 48(2)”.

(3) After section 16 of the 2000 Act insert—

“16A Continuing and welfare power of attorney: accompanying certificate

Where a document confers both—

- (a) a continuing power of attorney; and
- (b) a welfare power of attorney,

the validity requirements imposed by sections 15(3)(c) and 16(3)(c) may be satisfied by incorporating a single certificate which certifies the matters set out in those provisions.”.

(4) Section 19 (registration of powers of attorney) of the 2000 Act is amended as follows—

- (a) in subsection (2)(c), for “send a copy of it to” substitute “give notice of the registration of the document to both the local authority and”,
- (b) in subsection (5)—
 - (i) the word “and” which appears immediately after paragraph (a) is repealed,
 - (ii) after paragraph (b) insert—
 - “(c) where the document confers a welfare power of attorney and the local authority requests a copy of it, send such a copy to the local authority; and
 - (d) where the document confers a welfare power of attorney and the Mental Welfare Commission requests a copy of it, send such a copy to the Mental Welfare Commission.”.

(5) In section 20(3)(b)(iii) (notice of order: supervision etc) of the 2000 Act, the words from “(in” to “disorder)” are repealed.

(6) In section 22 (notice of changes) of the 2000 Act, the words “(in a case where the incapacity of the granter is by reason of, or reasons which include, mental disorder)”, where they occur in subsections (1) and (2), are repealed.

(7) After section 22 of the 2000 Act insert—

“22A Revocation of continuing or welfare power of attorney

- (1) The granter of a continuing or welfare power of attorney may revoke the power of attorney (or any of the powers granted by it) after the document conferring the power of attorney has been registered under section 19 by giving a revocation notice to the Public Guardian.
- (2) A revocation notice shall be valid only if it is expressed in a written document which—
 - (a) is subscribed by the granter; and
 - (b) incorporates a certificate in the prescribed form by a practising solicitor or by a member of another prescribed class that—
 - (i) he has interviewed the granter immediately before the granter subscribed the document;

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- (ii) he is satisfied, either because of his own knowledge of the granter or because he has consulted another person (whom he names in the certificate) who has knowledge of the granter, that at the time the revocation is made the granter understands its effect;
 - (iii) he has no reason to believe that the granter is acting under undue influence or that any other factor vitiates the revocation of the power.
- (3) The Public Guardian, on receiving a revocation notice, shall—
- (a) enter the prescribed particulars of it in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be; and
 - (b) notify—
 - (i) the continuing or welfare attorney; and
 - (ii) where it is the welfare attorney who is notified, the local authority and the Mental Welfare Commission.
- (4) A revocation has effect when the revocation notice is registered under this section.
- (5) No liability shall be incurred by any person who acts in good faith in ignorance of the revocation of a power of attorney under this section. Nor shall any title to heritable property acquired by such a person be challengeable on that ground alone.”.
- (8) In section 23(3) (notice of resignation) of the 2000 Act, the words from “(in” to “disorder)” are repealed.
- (9) In section 87(1) (interpretation) of the 2000 Act, after the definition of “power of attorney” insert—
- ““practising solicitor” means a solicitor holding a practising certificate issued in accordance with Part 2 of the Solicitors (Scotland) Act 1980 (c. 46);”.

58 Accounts and funds

For Part 3 of the 2000 Act substitute—

“PART 3

ACCOUNTS AND FUNDS

Purposes and application of Part

24A Intromissions with funds

- (1) This Part makes provision for the authorisation of persons by the Public Guardian to intromit with the funds of an adult for the purposes mentioned in subsection (2).
- (2) Those purposes are—

- (a) the payment of central and local government taxes for which the adult is responsible;
- (b) the provisions of sustenance, accommodation, fuel, clothing and related goods and services for the adult;
- (c) the provision of other services provided for the purposes of looking after or caring for the adult;
- (d) the settlement of debts owed by or incurred in respect of the adult, including any prescribed fees charged by the Public Guardian in connection with an application under this Part;
- (e) the payment for the provision of items other than those mentioned in paragraphs (a) to (d) such as the Public Guardian may, in any case, authorise.

24B Adults in respect of whom applications may be made

- (1) An application to the Public Guardian under this Part may be made only in relation to an adult who is incapable in relation to decisions about, or of safeguarding the adult's interests in, the funds to which the application relates.
- (2) But an application may not be made in the case of an adult in relation to whom—
 - (a) there is a guardian of the type mentioned in section 33(1)(a) with powers relating to the funds in question;
 - (b) there is a continuing attorney with powers relating to the funds in question; or
 - (c) an intervention order relating to the funds in question has been granted.

Authority to take preliminary steps

24C Authority to provide information about funds

- (1) This section applies where a person—
 - (a) believes that an adult holds funds in an account in the adult's sole name; but
 - (b) cannot make an application under section 25 or section 26G because the person does not know—
 - (i) where the account is held;
 - (ii) the account details;
 - (iii) how much is held in the account; or
 - (iv) any other information needed to complete the application.
- (2) Where this section applies, the person may apply to the Public Guardian for a certificate authorising any fundholder to provide the person with such information as the person may reasonably require in order to make an application under section 25 or 26G.
- (3) Where the Public Guardian grants an application under subsection (2), the Public Guardian must issue the certificate to the applicant.
- (4) A fundholder presented with a certificate issued under subsection (3) is not prevented by—
 - (a) any obligation as to secrecy; or

(b) any other restriction on disclosure of information, from providing the person who presents the certificate to it with such information as the person may reasonably require in order to make an application under section 25 or 26G about funds held by it on behalf of the adult.

24D Authority to open account in adult's name

- (1) This section applies where—
 - (a) a person believes that—
 - (i) an adult holds funds;
 - (ii) an adult is entitled to income or other payments or is likely to become so entitled; or
 - (iii) a fundholder holds funds on behalf of an adult; but
 - (b) the adult does not have a suitable account in the adult's sole name in which the funds, income or other payments can be placed for the purposes of intromitting with the adult's funds under this Part.
- (2) Where this section applies, the person may apply to the Public Guardian for a certificate authorising the opening of an account in the adult's name for the purpose of intromitting with the adult's funds.
- (3) Where the Public Guardian grants an application under subsection (2), the Public Guardian must issue the certificate to the applicant.
- (4) The certificate issued under subsection (3) may specify the kind of account which may be opened by a fundholder.
- (5) A fundholder presented with a certificate issued under subsection (3) may open an account in the adult's name.
- (6) But, if the certificate specifies a kind of account, the fundholder may open only an account of the type specified.
- (7) On an account being opened in pursuance of subsection (5), the applicant must notify prescribed particulars of the account to the Public Guardian.

Authority to intromit

25 Authority to intromit

- (1) A person mentioned in subsection (2) may apply to the Public Guardian for a certificate authorising the person to intromit with an adult's funds.
- (2) Those persons are—
 - (a) an individual (other than an individual acting in his capacity as an officer of a local authority or other body established by or under an enactment);
 - (b) two or more individuals who wish to act jointly; or
 - (c) a body (other than a manager of an authorised establishment within the meaning of section 35(2)).
- (3) An application under subsection (1) which is accompanied by an application under section 24D may only be granted if—

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- (a) an account is opened in pursuance of section 24D(5); and
 - (b) prescribed particulars of that account are notified to the Public Guardian in pursuance of section 24D(7).
- (4) Where the Public Guardian grants an application under subsection (1), the Public Guardian must—
- (a) enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii); and
 - (b) issue a certificate of authority (a “withdrawal certificate”) to the applicant.
- (5) No application may be made under subsection (1) if a person is already authorised to intromit with the funds of the adult to whom the application relates (unless the application is made by that person).
- (6) In this Act, an individual or a body who holds a valid withdrawal certificate issued under this Part is referred to as a “withdrawer”.

26 Authority to intromit: application

- (1) An application under section 25(1) must—
- (a) state the purposes of the proposed intromission with the adult’s funds, setting out the specific sums relating to each purpose;
 - (b) specify an account held by a fundholder in the adult’s sole name which the applicant wishes to use for the purpose of intromitting with the adult’s funds (or be accompanied by an application under section 24D to open an account for that purpose);
 - (c) contain an undertaking that the applicant will open an account (the “designated account”) solely for the purposes of—
 - (i) receiving funds transferred under the authority of any certificate granted; and
 - (ii) intromitting with those funds;
- (2) The application may also specify another account held by a fundholder in the adult’s sole name which the applicant also wishes to use for the purpose of intromitting with the adult’s funds (or be accompanied by an application under section 24D to open an account for that purpose).
- (3) In this Part—
- (a) the account specified or, as the case may be, opened for the purposes of subsection (1)(b) is referred to as the adult’s current account.
 - (b) the account specified or, as the case may be, opened for the purposes of subsection (2) is referred to as the adult’s second account.

Withdrawal certificates

26A Withdrawal certificates

- (1) A withdrawal certificate may—
- (a) authorise the transfer of funds—
 - (i) from the adult’s current account to the designated account;

- (ii) from the adult’s current account to the adult’s second account;
 - (iii) from the designated account to the adult’s second account;
 - (b) authorise the continuance or making of arrangements for the regular or occasional payment of funds from the adult’s current account for specified purposes (for example: by standing order or direct debit);
 - (c) authorise the withdrawal of funds from the designated account for specified purposes;
 - (d) place limits on the amount of funds that may be so transferred, paid or withdrawn.
- (2) But such a certificate does not authorise a transfer of funds or payment that would cause—
- (a) the adult’s current account;
 - (b) the adult’s second account; or
 - (c) the designated account,
- to become overdrawn.
- (3) If any of the accounts mentioned in paragraphs (a) to (c) of subsection (2) is overdrawn, the fundholder of that account has a right of relief against the withdrawer.
- (4) In subsection (1)(b), “specified” means specified in the certificate of appointment.

Joint and reserve withdrawers

26B Addition of joint withdrawer

- (1) This section applies where an individual has or individuals have been appointed as a withdrawer in relation to an adult.
- (2) Where this sections applies, another individual may apply to the Public Guardian for appointment as a joint withdrawer.
- (3) An application under subsection (1) must be signed by the existing withdrawer.
- (4) Where the Public Guardian grants an application under subsection (1), the Public Guardian must—
- (a) enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii); and
 - (b) issue a certificate of authority (a “withdrawal certificate”) to the existing withdrawer and the applicant.
- (5) Subject to sections 31(2) and 31A, a certificate issued under subsection (4)(b) is valid until the date on which the withdrawal certificate held by the existing withdrawer would cease to be valid under section 31(1) or 31E(6), as the case may be (regardless of any subsequent extension, reduction, termination or suspension of the existing withdrawer’s authority).
- (6) In this section, “the existing withdrawer” means the individual or individuals mentioned in subsection (1).

- (7) In this Part, where two or more individuals are appointed as withdrawers, each individual is referred to as a “joint withdrawer”.

26C Joint withdrawers: supplementary

- (1) Joint withdrawers may, subject to subsection (2), exercise their functions individually, and each joint withdrawer is liable for any loss incurred by the adult arising out of—
- (a) the joint withdrawer’s own acts or omissions; or
 - (b) the joint withdrawer’s failure to take reasonable steps to ensure that another joint withdrawer does not breach any duty of care or fiduciary duty owed to the adult.
- (2) Where more than one joint withdrawer is liable under subsection (1), they are liable jointly and severally.
- (3) A joint withdrawer must, before exercising any function conferred on the joint withdrawer, consult the other joint withdrawers, unless—
- (a) consultation would be impracticable in the circumstances; or
 - (b) the joint withdrawers agree that consultation is not necessary.
- (4) Where joint withdrawers disagree as to the exercise of their functions, one or more of them may apply to the Public Guardian for directions.
- (5) Directions given by the Public Guardian in pursuance of subsection (4) may be appealed to the sheriff, whose decision is final.
- (6) Where there are joint withdrawers—
- (a) a third party in good faith is entitled to rely on the authority to act of any one or more of them; and
 - (b) section 31A(5) (interim authority) only applies where the Public Guardian terminates the authority of all of the joint withdrawers.

26D Reserve withdrawers: applications

- (1) In any case where an individual is issued with a withdrawal certificate (“a main withdrawer”), the Public Guardian may, on an application by the main withdrawer, appoint another individual (“a reserve withdrawer”) to act as a withdrawer in the event of the main withdrawer temporarily becoming unable to act.
- (2) An application for appointment of a reserve withdrawer may be made at the time of the application under section 25 for a withdrawal certificate or at any later time.
- (3) The application for appointment as a reserve withdrawer must be signed by the proposed reserve withdrawer.
- (4) Where the Public Guardian grants the application, the Public Guardian must enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii).

26E Reserve withdrawers: authority to act

- (1) Where—
- (a) a reserve withdrawer has been appointed under section 26D; and
 - (b) the main withdrawer considers that the main withdrawer is or will be unable to carry out some or all of the main withdrawer’s functions under this Part,
- the main withdrawer may notify the Public Guardian that the main withdrawer wishes the Public Guardian to authorise the reserve withdrawer to intromit with the adult’s funds for a specified period.
- (2) Where a reserve withdrawer becomes aware that the main withdrawer is unable—
- (a) to carry out some or all of the main withdrawer’s functions in relation to intromitting with the funds concerned; and
 - (b) to notify the Public Guardian under subsection (1),
- the reserve withdrawer may apply to the Public Guardian for a certificate authorising the reserve withdrawer to intromit with the adult’s funds for a specified period.
- (3) The Public Guardian, on being notified under subsection (1), must or, on an application under subsection (2), may—
- (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iii);
 - (b) issue a certificate of authority (a “withdrawal certificate”) to the reserve withdrawer; and
 - (c) notify the adult and the main withdrawer.
- (4) The certificate issued under subsection (3)(b) is—
- (a) valid for the specified period, or such shorter period as the Public Guardian thinks fit, but does not extend beyond the date on which the validity of the withdrawal certificate issued to the main withdrawer would cease under section 31(1) or 31E(6), as the case may be;
 - (b) suspended during any period when the authority of the main withdrawer is suspended;
 - (c) terminated if the authority of the main withdrawer is terminated.
- (5) The main withdrawer and the reserve withdrawer are liable (jointly and severally) for any loss incurred by the adult arising out of the reserve withdrawer’s acts or omissions.
- (6) In this section, “specified” means specified in the notice or, as the case may be, application.

*Variation of withdrawer’s authority***26F Variation of withdrawal certificate**

- (1) The Public Guardian may—
- (a) on the application of a withdrawer, or

- (b) if notified under section 30A,
vary the withdrawal certificate (the “existing certificate”) issued to the withdrawer.
- (2) But a withdrawal certificate may not be varied under this section so as to alter the period of validity of the certificate.
- (3) Where the Public Guardian decides to vary the withdrawal certificate under subsection (1), the Public Guardian must—
 - (a) enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii); and
 - (b) issue a varied withdrawal certificate to the withdrawer.
- (4) The existing certificate ceases to be valid on the date the varied certificate is issued under subsection (3)(b).

Authority to transfer funds

26G Authority to transfer specified sums

- (1) A person mentioned in subsection (2) may apply to the Public Guardian for a certificate authorising the transfer of a specified sum from a specified account (“the original account”) in an adult’s sole name to—
 - (a) the designated account;
 - (b) the adult’s current account;
 - (c) the adult’s second account; or
 - (d) such other account as may be specified.
- (2) Those persons are—
 - (a) a withdrawer;
 - (b) a person who has applied for a withdrawal certificate under section 25;
- (3) An application under subsection (1) may also seek authority—
 - (a) to close the original account;
 - (b) to terminate an arrangement for the payment of funds from the original account to another account (for example: a standing order or direct debit).
- (4) Where the Public Guardian grants an application under subsection (1), the Public Guardian must—
 - (a) enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii); and
 - (b) issue the certificate to the applicant.
- (5) In this section, “specified” means specified in the application under subsection (1) or, as the case may be, in the certificate granted under subsection (4).

*Applications: general***27 Applications: general requirements**

An application under section 24C, 24D, 25, 26B, 26D, 26F or 26G must—

- (a) be signed by the applicant;
- (b) contain the name and addresses of the nearest relative, named person and primary carer of the adult, if known;
- (c) be submitted to the Public Guardian no later than 14 days after—
 - (i) where it is required to be countersigned under section 27A, the day the application is so countersigned, or
 - (ii) in any other case, the day the application is signed by the applicant as mentioned in paragraph (a).

27A Countersigning of applications

- (1) An application under section 24C, 24D, 25, or 26B must be countersigned by a person who must declare in the application that—
 - (a) the person knows the applicant and has known the applicant for at least one year prior to the date of the application;
 - (b) the person is not any of the following—
 - (i) a relative of or person residing with the applicant or the adult;
 - (ii) a director or employee of the fundholder;
 - (iii) a solicitor acting on behalf of the adult or any other person mentioned in this paragraph in relation to any matter under this Act;
 - (iv) the medical practitioner who has issued the certificate under section 27B in connection with the application;
 - (v) a guardian of the adult;
 - (vi) a welfare or continuing attorney of the adult;
 - (vii) a person who is authorised under an intervention order in relation to the adult;
 - (c) the person believes the information contained in the application to be true; and
 - (d) the person believes the applicant to be a fit and proper person to intromit with the adult’s funds.
- (2) An application under section 26D (reserve withdrawers) must be countersigned by a person who must declare in the application the matters set out in paragraphs (a) to (d) of subsection (1) but with references in those paragraphs to “applicant” read as references to the proposed reserve withdrawer.
- (3) This section does not apply to an application made by a body.

27B Medical certificates

An application under section 24C, 24D, or 25 must be accompanied by a certificate in prescribed form from a medical practitioner that the adult is—

- (a) incapable in relation to decisions about; or

(b) incapable of acting to safeguard or promote the adult's interests in, the adult's funds.

27C Intimation of applications

- (1) On receipt of a competent application under section 24C, 24D, 25, 26B, 26D, 26F or 26G, the Public Guardian must intimate the application to—
 - (a) the adult;
 - (b) the adult's nearest relative;
 - (c) the adult's primary carer;
 - (d) the adult's named person;
 - (e) where the applicant is—
 - (i) the individual mentioned in both paragraph (b) and (c); or
 - (ii) a body other than a local authority, the chief social work officer of the local authority; and
 - (f) any other person who the Public Guardian considers has an interest in the application.
- (2) A competent application is an application which complies with section 27 and, where appropriate, sections 27A and 27B.

27D Determination of applications: applicant to be fit and proper

- (1) The Public Guardian may grant an application made under section 24C, 24D, 25, 26B or 26D only if satisfied that—
 - (a) the applicant in an application under section 24C, 24D, 25 or 26B, or
 - (b) the proposed reserve withdrawer in an application under section 26D, is a fit and proper person to intromit with the funds of the adult.
- (2) In deciding whether a person is fit and proper, the Public Guardian must have regard to any guidance issued in relation to that matter by the Scottish Ministers.

27E Determination of applications: opportunity to make representations

- (1) The Public Guardian must not grant an application under section 24C, 24D, 25, 26B, 26D, 26F or 26G without affording to any person who receives intimation of the application under section 27C or any other person who wishes to object an opportunity to make representations.
- (2) Where the Public Guardian proposes to refuse the application the Public Guardian must intimate the proposed decision to the applicant and advise the applicant of the prescribed period within which the applicant may object to the proposed refusal.
- (3) The Public Guardian must not refuse an application without affording to the applicant, if the applicant objects, an opportunity to make representations.

27F Referral of application to sheriff

- (1) The Public Guardian may remit an application under section 24C, 24D, 25, 26B, 26D, 26F or 26G for determination by the sheriff at the instance of—

- (a) the Public Guardian;
 - (b) the applicant; or
 - (c) any person who objects to the granting of the application.
- (2) The sheriff's decision on an application remitted under subsection (1) is final.

27G Multiple applications etc.

- (1) Where a person who has made an application under section 24C, 24D or 25 in respect of an adult makes another application under any of those sections in respect of the same adult, the Public Guardian may disapply any of the provisions in sections 27 to 27B to that application.
- (2) Where the Public Guardian is to issue more than one certificate under this Part to the same person, the Public Guardian may instead issue a combined certificate to the person.
- (3) References in this Part to a withdrawal certificate or other certificate issued under this Part include references to any combined certificate issued by the Public Guardian instead of the withdrawal or other certificate.

Fundholders

28 Fundholders of adult's current account and adult's second account

- (1) The fundholder of an adult's current account may act on the instructions of a withdrawer to the extent authorised by the withdrawal certificate issued to the withdrawer.
- (2) The fundholder of an adult's current account presented with a withdrawal certificate must not allow any operations to be carried out on that account other than those carried out in accordance with the certificate by the withdrawer.
- (3) The fundholder of an adult's current account or an adult's second account presented with a withdrawal certificate may provide the withdrawer with a copy of any statement or other correspondence issued by the fundholder to the adult during the period when the withdrawal certificate is valid.

28A Fundholder of original account

The fundholder of an original account may act on the instructions of a withdrawer to the extent authorised by the certificate issued to the withdrawer under section 26G(4).

29 Fundholder's liability

The fundholder of an account mentioned in section 28 or 28A is liable to the adult for any funds removed from the account under that section at any time when it was aware that the withdrawer's authority had been terminated or suspended by the Public Guardian under section 31A but, on meeting such liability, the fundholder of the account has a right of relief against the withdrawer.

Withdrawers

30 Use of funds by withdrawer

- (1) Any funds used by the withdrawer must be applied only for the benefit of the adult.
- (2) Despite subsection (1), where the withdrawer lives with the adult, the withdrawer may, to the extent authorised by the certificate, apply any funds withdrawn towards household expenses.

30A Notification of change of address

- (1) A withdrawer must notify the Public Guardian—
 - (a) of any change in the withdrawer's address; and
 - (b) of any change in the address of the adult.
- (2) A notice under subsection (1) must be given within 7 days of the date of the change to which it relates.

30B Records and inquiries

- (1) A withdrawer must keep records of the exercise of the withdrawer's powers.
- (2) The Public Guardian may make inquiries from time to time as to the manner in which a withdrawer has exercised the withdrawer's functions under this Part.

Duration etc. of authority

31 Duration of withdrawal certificate

- (1) Unless this Part provides otherwise, a withdrawal certificate issued under section 25 is valid for a period of 3 years commencing with the date of issue of the certificate.
- (2) The Public Guardian may reduce or extend the period of validity of a withdrawal certificate; and an extension may be without limit of time.
- (3) Subsections (1) and (2) are without prejudice to the right of the withdrawer to make subsequent applications under section 25 after the withdrawal certificate ceases to be valid or, as the case may be, a suspension or termination of the withdrawer's authority.
- (4) The validity of a withdrawal certificate ceases—
 - (a) on the appointment of a guardian with powers relating to the funds or account in question;
 - (b) on the granting of an intervention order relating to the funds or account in question; or
 - (c) on a continuing attorney's acquiring authority to act in relation to the funds or account in question,

but no liability is incurred by any person who acts in good faith under this Part in ignorance of the withdrawal certificate ceasing to be valid under this subsection.

31A Suspension and termination of authority

- (1) The Public Guardian may suspend or terminate the authority of a withdrawer under a withdrawal certificate.
- (2) The Public Guardian must without delay intimate the suspension or termination to—
 - (a) the withdrawer whose authority is suspended or terminated;
 - (b) any other joint withdrawer;
 - (c) any reserve withdrawer; and
 - (d) the fundholder of the designated account; and
 - (e) such other persons as the Public Guardian thinks fit.
- (3) A suspension or termination under subsection (1) suspends or, as the case may be, terminates all operations on the designated account by the withdrawer whose authority is suspended or terminated.
- (4) The Public Guardian must on suspending or terminating the authority of the withdrawer enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii).
- (5) The Public Guardian may on terminating the authority of the withdrawer issue to the withdrawer an interim withdrawal certificate to continue to intromit with the adult's funds for a period not exceeding 4 weeks from the date of the termination.

31B Renewal of authority to intromit

- (1) This section applies to an application under section 25 if condition A or B is satisfied.
- (2) Condition A is that the application is made by a person holding an existing withdrawal certificate.
- (3) Condition B is that—
 - (a) the main withdrawer has died or become incapable or the main withdrawer's authority under this Part has been terminated; and
 - (b) the application is made, without undue delay, by an individual who was the reserve withdrawer at the time of the death, incapacity, or termination, as the case may be.
- (4) Where this section applies, the Public Guardian may disapply any of the provisions in sections 26(1), 27A and 27B to an application to which this section applies (but may require the applicant to provide such other information as the Public Guardian requires to determine the application).
- (5) Where condition A is satisfied in relation to an application under section 25, the existing withdrawal certificate will continue to be valid until the application is determined.

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- (6) Where an application to which this section applies is granted, the existing withdrawal certificate ceases to be valid.

31C Duration of certificates issued under section 24C, 24D, and 26G etc.

- (1) A certificate issued under section 24C, 24D or 26G is valid for such period as it may specify.
- (2) But the Public Guardian may cancel the certificate at any time before the end of any period so specified.
- (3) The Public Guardian must without delay intimate such a cancellation to—
- (a) the person to whom the certificate was issued,
 - (b) where the certificate was issued under section 26G, the fundholder of the original account, and
 - (c) such other persons as the Public Guardian thinks fit.

Appeals

31D Appeals

- (1) A decision of the Public Guardian—
- (a) to grant or refuse an application under section 24C, 24D, 25, 26B, 26D, 26E, 26F or 26G;
 - (b) to refuse to remit an application to the sheriff under section 27F;
 - (c) to reduce or extend the period of validity of a withdrawal certificate under section 31(2); or
 - (d) to suspend or terminate the authority of a withdrawer under section 31A,
- may be appealed to the sheriff.
- (2) The sheriff's decision on an appeal under subsection (1) is final.

Transition from guardianship

31E Transition from guardianship

- (1) This section applies where—
- (a) there is a guardian with powers relating to the property or financial affairs of an adult; and
 - (b) an application is made under section 25 in relation to the adult's funds.
- (2) Section 27A does not apply to the application if it is made by the adult's guardian.
- (3) The Public Guardian may disapply section 27B to the application.
- (4) Where—
- (a) it appears to the Public Guardian that, if the application were granted, the adult's interests in the adult's property and affairs can be

- satisfactorily safeguarded or promoted otherwise than by the existing guardianship; and
- (b) the Public Guardian proposes to grant the application,
- the Public Guardian must initiate the recall of the guardianship under section 73.
- (5) The Public Guardian may not grant the application unless the guardianship is recalled.
- (6) Where the Public Guardian grants the application, the withdrawal certificate issued to the withdrawer is valid for such period as the Public Guardian specifies at the time the Public Guardian grants the application.
- (7) This section does not apply, and no application under this Part may be made, in the case of an adult if there is a person who is—
- (a) appointed or otherwise entitled under the law of any country other than Scotland to act as a guardian (however called) in relation to the adult's property and financial affairs during the adult's incapacity; and
- (b) recognised by the law of Scotland as the adult's guardian.
- (8) Despite subsection (7), no liability is incurred by any person who acts in good faith under this Part in ignorance of any guardian of the type mentioned in that subsection.

Miscellaneous

32 Joint accounts

Where an individual who along with one or more others is the holder of a joint account with a fundholder becomes incapable in relation to decisions about, or of safeguarding the individual's interests in, the funds in the account, any other joint account holder may continue to operate the account unless—

- (a) the terms of the account provide otherwise; or
- (b) the joint account holder is barred by an order of any court from so doing.

Interpretation

33 Interpretation of Part

- (1) In section 24B, 27A and 31 any reference to—
- (a) a guardian includes 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 includes 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 includes a reference to a person granted, under a contract, grant or appointment governed by the law of any country,

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powers (however expressed) relating to the granter’s personal welfare and having effect during the granter’s incapacity.

- (2) In this Part—
- “fundholder” means a bank, building society or other similar body which holds funds on behalf of another person;
 - “withdrawal certificate” means a certificate issued under section 25, 26B, 26E, 26F or 31A.”.

59 Intervention orders

- (1) In section 53 (intervention orders) of the 2000 Act—
- (a) in subsection (4), for “Section 57(3) and (4)” substitute “Subsections (3), (3A), (3B) and (4) of section 57”,
 - (b) in subsection (7)—
 - (i) the word “and” and the words from “shall” to the end of paragraph (b) are repealed, and
 - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
 - (c) in subsection (10)—
 - (i) the word “and” which immediately follows paragraph (a) is repealed,
 - (ii) after paragraph (a) insert—
 - “(aa) when satisfied that the person authorised under the order has found caution or given other security if so required, issue a certificate of appointment to the person; and”,
 - (iii) in paragraph (b), after “Commission” insert “of the terms of the interlocutor”.
- (2) In section 55 (notice of change of address), for the words from “notify”, where first occurring, to “Guardian”, where second occurring, substitute “, not later than 7 days after any change of the person’s or the adult’s address, notify the Public Guardian of the change who”.
- (3) After section 56 insert—

“56A Death of person authorised to intervene

Where a person authorised under an intervention order dies, the person’s personal representatives shall, if aware of the existence of the authority, 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 intervention order relates to the adult’s personal welfare or factors including it, the Mental Welfare Commission; and
- (b) enter prescribed particulars in the register maintained under section 6(2)(b)(v).”.

60 Guardianship orders

- (1) In section 57 (guardianship orders) of the 2000 Act—
- (a) in subsection (3)(a), for “an approved” substitute “a relevant”,
 - (b) after subsection (3), insert—
 - “(3A) Subsection (3B) applies where a report lodged under subsection (3) (a) relates to an examination and assessment carried out more than 30 days before the lodging of the application.
 - (3B) Where this subsection applies, the sheriff may, despite subsection (3) (a), continue to consider the application if satisfied that there has been no change in circumstances since the examination and assessment was carried out which may be relevant to matters set out in the report.”,
 - (c) in subsection (6)(b), for the words from “period” to “appointment” substitute “effective period”,
 - (d) after subsection (6) insert—
 - “(6A) The “effective period”, for the purposes of subsection (6), means—
 - (a) the period of 3 months beginning with the date of appointment; or
 - (b) such longer period (not exceeding 6 months) beginning with that date as the sheriff may specify in the order.
 - (6B) In subsection (3)(a), “relevant medical practitioner” means—
 - (a) an approved medical practitioner;
 - (b) where the adult concerned is not present in Scotland, a person who—
 - (i) holds qualifications recognised in the place where the adult is present and has special experience in relation to the diagnosis and treatment of mental disorder which correspond to the qualifications and experience needed to be an approved medical practitioner; and
 - (ii) has consulted the Mental Welfare Commission for Scotland about the report concerned; or
 - (c) any other type of individual described (by reference to skills, qualifications, experience or otherwise) by regulations made by the Scottish Ministers.
 - (6C) The Scottish Ministers shall consult the Mental Welfare Commission before making regulations under subsection (6B)(c).”
 - (e) in subsection (7), for “(3)(a)” substitute “(6B)”.
- (2) In section 58 (disposal of application for guardianship) of the 2000 Act—
- (a) in subsection (6)—
 - (i) for the words from “shall” to the end of paragraph (b) substitute “may”,
 - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
 - (b) in subsection (7)(b), after “caution” insert “or given other security”.

- (3) In section 60 (renewal of guardianship)—
- (a) for subsection (3) substitute—
- “(3) There must be lodged in court along with an application under this section—
- (a) at least one report, in the prescribed form, of an examination and assessment of the adult carried out by a medical practitioner not more than 30 days before the lodging of the application;
- (b) where the application relates to the adult’s personal welfare, a report, in the prescribed form, from the mental health officer (but where it is in jeopardy only because of the adult’s inability to communicate, from the chief social work officer), containing the officer’s opinion as to—
- (i) the general appropriateness of continuing the guardianship, based on an interview and assessment of the adult carried out not more than 30 days before the lodging of the application; and
- (ii) the suitability of the applicant to continue to be the adult’s guardian; and
- (c) where the application relates to the adult’s property or financial affairs, a report from the Public Guardian, in the prescribed form, containing the Public Guardian’s opinion as to—
- (i) the applicant’s conduct as the adult’s guardian; and
- (ii) the suitability of the applicant to continue to be the adult’s guardian.
- (3A) In a case where the incapacity is by reason of mental disorder—
- (a) where a single report is lodged under subsection (3)(a), the related examination and assessment must be carried out by a relevant medical practitioner;
- (b) where 2 or more reports are so lodged, at least one of the related examinations and assessments must be carried out by a relevant medical practitioner.
- “Relevant medical practitioner” has the same meaning in this subsection as it has in section 57(3)(a) (see definition in section 57(6B)).”
- (b) after subsection (4) insert—
- “(4A) A sheriff may determine an application made under this section without hearing the parties.”
- (4) In section 61(3) (application for registration of guardianship order) of the 2000 Act, after “caution” insert “or giving other security”.
- (5) In section 62(5)(b) (duty to issue certificate of additional guardian’s appointment) of the 2000 Act, after “caution” insert “or given other security”.
- (6) In section 63 (substitute guardian) of the 2000 Act—
- (a) in subsection (5)—

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- (i) for the words from “shall” to the end of paragraph (b) substitute “may”,
 - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
 - (b) in subsection (9)(b), after “caution” insert “or given other security”.
- (7) In section 64(2)(b) (medical treatment to which a guardian cannot consent), for “mentioned in section 48(1) or (2)” substitute “in relation to which the authority conferred by section 47(2) does not apply by virtue of regulations made under section 48(2)”.
- (8) In section 70 (non-compliance with guardian’s decisions)—
- (a) in subsection (1), the words “or by any other person”, “or other person” and “or any person named in the order” are repealed,
 - (b) after subsection (4) insert—
 - “(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.”.
- (9) In section 71 (replacement etc. of guardian) of the 2000 Act—
- (a) in subsection (2)—
 - (i) for the words from “shall” to the end of paragraph (b) substitute “may”,
 - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
 - (b) in subsection (3)(b)—
 - (i) in sub-paragraph (i), after “caution” insert “or given other security”,
 - (ii) in sub-paragraph (ii), after “caution” insert “or given other security”.
- (10) In section 72(1) (discharge of guardian with financial powers), after paragraph (a) insert—
- “(aa) the expiry of such a guardianship order;”.
- (11) In section 73 (recall of guardian’s powers) of the 2000 Act—
- (a) in subsection (3), the words from “(other” to “guardian)” are repealed,
 - (b) after subsection (3) insert—
 - “(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.”,
 - (c) after subsection (10) insert—
 - “(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.”.
- (12) After section 73 of the 2000 Act insert—

“73A Recall of chief social work officer’s guardianship powers

- (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).”.
- (13) In section 74 (variation of guardianship) of the 2000 Act—
- (a) in subsection (2)—
 - (i) for the words from “shall” to the end of paragraph (b) substitute “may”,
 - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
 - (b) in subsection (5)(c), after “caution” insert “or other security”.
- (14) In section 75(3)(b) (duty to issue certificate of substitute guardian’s appointment) of the 2000 Act, after “caution” insert “or given other security”.
- (15) After section 75 insert—

“75A Death of guardian

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.”.

(16) After section 79 insert—

“Guardianship orders: children

79A Guardianship orders: children

Sections 57 to 79 apply in relation to a child who will become an adult within 3 months as they apply in relation to an adult; but no guardianship order made in relation to a child shall have effect until the child becomes an adult.”.

(17) In paragraph 6 (application of 2000 Act to curator bonis, tutor-dative or tutor-at-law treated as guardian appointed under that Act) of schedule 4 to the 2000 Act—

- (a) in sub-paragraph (3), for the words from “to the period” to the end of that sub-paragraph substitute “—
 - (a) in the case of a curator bonis who, under paragraph 1(2), became guardian to a person on the person attaining the age of 16 years, to the period of 2 years from the later of the following dates—
 - (i) the date on which section 60(17) (which amends this paragraph) of the Adult Support and Protection (Scotland) Act 2007 (asp 10) came into force;
 - (ii) the date on which the person attained the age of 16 years,
 - (b) in any other case, to the period of 2 years from the date on which section 60(17) (which amends this paragraph) of the Adult Support and Protection (Scotland) Act 2007 (asp 10) came into force.”,
- (b) after sub-paragraph (3) insert—

“(3A) A person who has become a guardian to an adult by virtue of this schedule and who was a curator bonis, tutor dative or tutor-in-law to that adult shall cease to be authorised to act as that adult’s guardian—

- (a) where the person does not apply for renewal of guardianship within the 2 year period set by sub-paragraph (3), on the expiry of that period;
- (b) where—
 - (i) the person applies for such a renewal within that period; and
 - (ii) the sheriff refuses the application, on the date of refusal;
- (c) where—
 - (i) the person applies for such a renewal within that period; and

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(ii) the sheriff grants the application,
in accordance with the provisions of this Act.

(3B) Sub-paragraph (3A) does not prevent the authority of a guardian of the type mentioned in that sub-paragraph from being terminated (by virtue of the terms on which the guardian is authorised to act or sections 71, 73, 75 or 79A) earlier than the date on which it would otherwise terminate by operation of that sub-paragraph.

(3C) Where—

- (a) a person (“G”) who was a curator bonis, tutor dative or tutor-at-law to an adult becomes the adult’s guardian by virtue of this schedule; and
- (b) another person is appointed under section 62 as an additional guardian to the adult before G’s appointment as guardian has been renewed in accordance with the provisions of this Act,

subsection (3A) applies in relation to the additional guardian as it applies in relation to G.

(3D) The Public Guardian must take reasonable steps to give notice of the effect of sub-paragraph (3A) to any person who—

- (a) is a guardian to an adult by virtue of this schedule;
- (b) was a curator bonis to that adult; and
- (c) has not applied for renewal of guardianship.

(3E) A local authority must take reasonable steps to give notice of the effect of sub-paragraph (3A) to any person who—

- (a) is a guardian to an adult residing within the local authority’s area by virtue of this schedule;
- (b) was a tutor dative or tutor-in-law to that adult; and
- (c) has not applied for renewal of guardianship.”.

61 Power to obtain records

After section 81 of the 2000 Act insert—

“81A Public Guardian’s power to obtain records

(1) The Public Guardian may, when carrying out an investigation under section 6(2)(c) or (d) or inquiries under section 30B(2)—

- (a) require any person falling within subsection (2) to provide the Public Guardian with—
 - (i) the person’s records of the exercise of the person’s powers in relation to the adult to whom the investigation relates; and
 - (ii) such other information relating to the exercise of those powers as the Public Guardian may reasonably require,

- (b) require any person who holds (or who has held) funds on behalf of the adult to whom the investigation relates to provide the Public Guardian with—

- (i) its records of the account; and

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- (ii) such other information relating to those accounts as the Public Guardian may reasonably require.
- (2) A person falls within this subsection if the person is or has been—
- (a) a continuing attorney appointed by the adult to whom the investigation relates;
 - (b) a withdrawer with authority to intromit with that adult's funds;
 - (c) a person authorised under an intervention order to act in relation to that adult; or
 - (d) that adult's guardian.
- (3) A fundholder may charge a reasonable fee for complying with a requirement under subsection (1)(b) and may recover that fee from the account concerned.”.