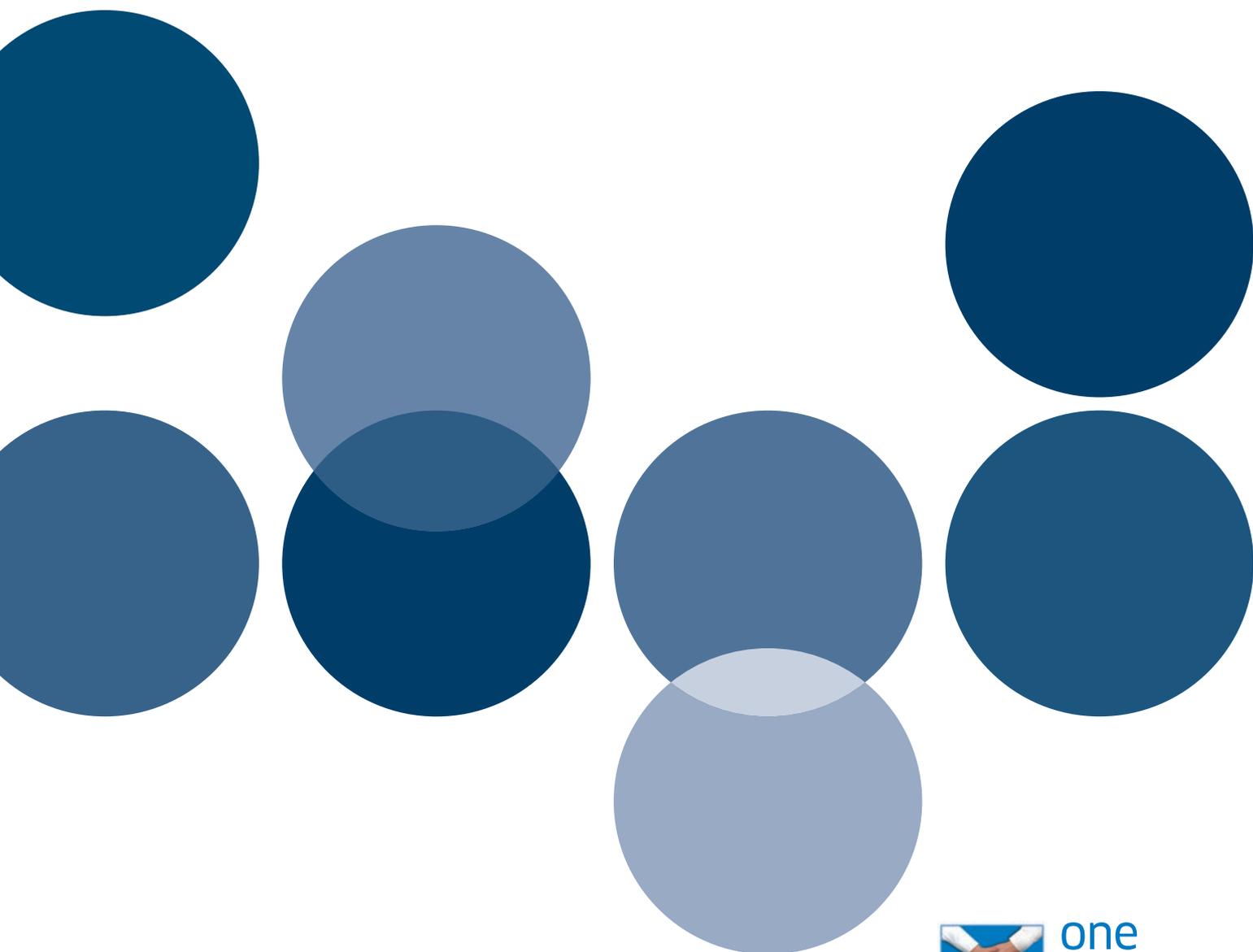


ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000

Code of Practice

For persons authorised under intervention
orders and guardians



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scotland
SCOTTISH GOVERNMENT

ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000

Code of Practice

For persons authorised under intervention
orders and guardians



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Introduction



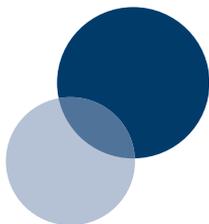
The Adults with Incapacity (Scotland) Act 2000 ('the Act') was introduced to protect individuals with incapacity and to support their families and carers in managing and safeguarding the individuals' welfare and finances. The Act was one of the earliest pieces of legislation passed by the Scottish Parliament. A two-year project was funded by the Executive to monitor how the Act was working. The results were positive, but showed that some improvements could be made¹ to streamline procedures and enable more adults and their carers to benefit from the Act.

Since 2004 several changes to the Act have been introduced. This revised code of practice takes account of the amendments made to part 6 of the Act.

WHO THE CODE OF PRACTICE IS FOR

This code is for anyone who is authorised under an intervention order or guardianship order. In this code 'you' means you as the intervener or guardian. The code applies equally to a lay person and to a professional such as a solicitor or accountant. If you are a professional, you will also need to apply your own code of conduct, professional ethics and good practice, and follow professional regulatory requirements in relation to your duties as an intervener or guardian.

¹ Scottish Executive (2004) Adults with Incapacity (Scotland) Act Learning from Experience



Status of the code

Section 13 provides that Scottish Ministers must prepare codes of practice containing guidance for those exercising functions under the Act. This code is for persons authorised under Part 6 of the Act.

Whilst these codes of practice are guidance and therefore not binding, failure to comply with them may be one of the factors considered by the Public Guardian, the Mental Welfare Commission, the local authority or the sheriff in considering matters such as the continuing suitability of the person to exercise those functions, in investigating circumstances in which the adult appears to be at risk or in applications before the court.

Health and social work professionals with duties and responsibilities in relation to the implementation of the Act will also need to be familiar with this code.

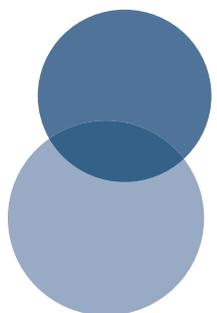
What does this code of practice cover?

The code of practice sets out:

- the background to the Act and the principles that must be followed;
- the legal requirements for intervention orders and guardianship orders to be made;
- how to decide whether an order is needed;
- the types of powers that could be included in an order;
- how to go about applying and getting the necessary reports;
- guidance on how to exercise your powers once you have them, and on keeping records;
- how supervision works and what will happen if things go wrong;
- what you need to do if there is a change of circumstances;
- how to go about renewing your powers when the order is nearing the end of its term; and
- what happens if the adult no longer requires a guardian and your powers need to be recalled.

Terms used

- Throughout the code of practice the Adults with Incapacity (Scotland) Act is referred to as the **‘the Act’**.
- **‘adult’** refers to the person aged 16 and over with impaired capacity – also referred to as the ‘person’ or ‘individual’ in this code.
- **‘carer’** refers to a partner, spouse, relative or friend who cares, in an unpaid capacity, for an adult.
- **‘primary carer’** means the person who is the main carer (usually a family member or friend) but, where there is no unpaid main carer it could be an organisation mainly engaged in the day to day provision of care for the person.
- **‘named person’** means the person nominated by the adult under the Mental Health (Care and Treatment) Scotland Act 2003. The named person can represent the adult’s interests or support him or her. This is automatically the primary carer where the person had not named someone else.
- **‘relevant others’** is used to refer to the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, the named person, primary carer and any other person with an interest in the welfare and financial affairs of the adult (such as a health or social work care manager).
- **‘intimation’** – term used for informing relevant parties (nearest relative, carer, primary carer, named person and anyone else with an interest in the welfare of the adult) of an application and allowing the opportunity for comment or objection.
- **‘independent advocate’** this is someone employed by an independent advocacy service to support the adult in having his/her views and wishes heard. This is different from a legal advocate who represents someone at court.
- **‘caution’** this is bond which serves as a type of insurance to safeguard the adult from loss caused by the actions of the guardian or intervener.
- **‘security’** this means an alternative to caution to provide adequate protection to the adult’s estate.
- **‘interlocutor’** is an order or decision of the court.
- **‘order’** is used where reference applies to both intervention and guardianship orders.
- **‘MWC’** is the abbreviation for the Mental Welfare Commission for Scotland.
- **‘OPG’** is the abbreviation for the Office of the Public Guardian (Scotland).
- **‘MHO’** is the abbreviation for a Mental Health Officer.
- **‘practising solicitor’** is a solicitor holding a practising certificate in accordance with Part 2 of the Solicitors (Scotland) Act 1980 (c.46).



Chapter 1



ABOUT THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

This chapter sets out how a carer or another person can gain legal authority to support a person who lacks the ability to make some or all decisions for himself or herself. It briefly explains:

- who the Act can help
- the range of measures available
- what incapacity means under the Act
- the importance of the principles
- communicating with the person with incapacity
- the safeguards in place through the Public Guardian, courts, Mental Welfare Commission and local authorities
- Legal Aid.

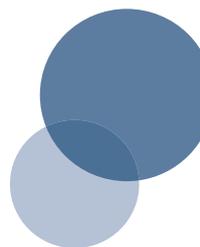
WHO THE ACT CAN HELP

- 1.1 The Adults with Incapacity (Scotland) Act 2000 ('the Act') was introduced to protect individuals (aged 16 and over) who lack capacity to make some or all decisions for themselves. It covers people whose incapacity is caused by a mental disorder, such as severe dementia, learning disability, acquired brain injury, or severe mental illness. It also covers people who are unable to communicate due to a physical condition such as a stroke or a severe sensory impairment. It supports their families and carers in managing and safeguarding the individuals' welfare and finances.
- 1.2 The Act introduced arrangements for making decisions about personal welfare and managing the finances and property of individuals whose capacity to make or carry out specific decisions is impaired. It allows carers and others to have authority to act and make decisions on their behalf.
- 1.3 The law in Scotland generally presumes that adults (those aged 16 or over) are capable of making personal decisions for themselves and of managing their own affairs. That presumption can only be overturned on evidence that the person lacks capacity to make a decision. It is important to remember that having a diagnosis of, for example, dementia, does not mean, of itself, that the person is unable to make decisions for him/herself.

WHAT INCAPACITY MEANS UNDER THE ACT

- 1.4 'Incapable' is defined under the Act only for the purposes of the Act. The Act recognises that a person may be legally capable of some decisions and actions and not capable of others. The Act allows for intervention in a wide range of property, financial and welfare matters where the adult lacks capacity; but an intervention is only allowed where the adult lacks capacity in relation to the subject matter of the intervention.
- 1.5 For the purposes of the Act, 'incapable' means incapable of:
 - acting on decisions; or
 - making decisions; or
 - communicating decisions; or
 - understanding decisions; or
 - retaining the memory of decisions

in relation to any particular matter due to mental disorder or inability to communicate because of physical disability.



An individual will not fall within this definition solely because of a communication difficulty if that difficulty can be overcome, for example, through the use of an interpreter, equipment to assist communication or the help of a specialist professional, e.g. learning disability social worker, speech and language therapists. Similarly, memory loss due, for example, to dementia does not automatically mean that the person lacks capacity.

HOW THE ACT CAN HELP

- 1.6 The Act provides the following ways for managing and safeguarding a person's welfare, financial affairs or both:

Power of attorney – this is a means by which individuals, whilst they have capacity, can grant someone they trust powers to act as their continuing (financial) and/or welfare attorney, in case capacity is lost at some future point. One or more persons can be appointed.

Access to Funds scheme – this is a way of accessing the person's bank or building society account in order to meet his/her living costs. An application can be made to the Public Guardian by an individual or organisation. The person or organisation appointed is called a 'withdrawer'.

Guardianship order (welfare and/or financial) – may be applied for by one or more individuals acting together or local authority and granted by the sheriff. This is appropriate where the person requires someone to make specific decisions on his or her behalf over the long term. Financial guardianship may be appropriate where the person's finances are complex.

Intervention order (welfare and/or financial) – may be applied for by an individual or local authority and granted by the sheriff to carry out a one-off action or to deal with a specific issue on behalf of the adult.

Management of residents' funds (living in a care home or hospital) – A certificate of authority may be granted to a care home manager by the supervising body (local authority or health board) where the resident lacks capacity to manage his or her own funds and there is no other arrangement in place to manage those funds.

Medical treatment decisions – a doctor is authorised to provide medical treatment and care to someone who is unable to consent, subject to certain safeguards and exceptions. In addition, certain other health care practitioners, if accredited to do so, have authority to provide treatments which they are qualified to administer.

Medical research decisions – involving adults who cannot consent to take part in research may also be authorised subject to stringent safeguards and conditions.

- 1.7 The Act aims to ensure that solutions focus on the needs of the individual. For example, a person with dementia may be able to decide what sort of support he/she would prefer to help with day to day living, but be unable to manage his/her money. In such a case a financial intervention may be all that is needed. In other circumstances a combination of welfare and financial measures may be necessary.

Several people may be involved in supporting the adult through appointments under the Act or in other ways, e.g. as a Department for Work and Pensions appointee.² They should communicate with each other in carrying out their responsibilities.

- 1.8 Details about the above measures under the Act are provided in the relevant codes of practice and guides available from the Office of the Public Guardian (Scotland) (OPG) and the Scottish Government – see Annex 3.

CO-EXISTENCE OF THE ACT WITH OTHER MEASURES

- 1.9 The Act does not authorise an intervention in every matter where the adult may have impaired capacity. There are certain decisions which can never be made on behalf of a person who lacks capacity to make those specific decisions. This is because they are either so personal to the individual concerned, or governed by other legislation. For example consent to marriage or making a will are not matters where an intervention under the Act would be competent.

The Act co-exists with other interventions in the affairs of the adult, for example the setting up of a trust for the benefit of the adult, a joint account which can be operated by any one of the account holders. In addition, a local authority may be able to provide services under the Social Work (Scotland) Act 1968 in certain circumstances to an adult who lacks capacity to consent to accept them.

² www.dwp.gov.uk

PRINCIPLES TO BE FOLLOWED

1.10 The Act requires the following principles to be applied when deciding which measure will be most suitable for meeting the needs of the individual. The principles must also be used whenever decisions need to be made on behalf of the adult. The Act aims to protect people who lack capacity to make particular decisions, but also to support their involvement in making decisions about their own lives as far as they are able to do so.

Principle 1 - benefit

- Any action or decision taken must benefit the adult and only be taken when that benefit cannot reasonably be achieved without it.

Principle 2 - least restrictive option

- Any action or decision taken should be the minimum necessary to achieve the purpose. It should be the option that restricts the person's freedom as little as possible.

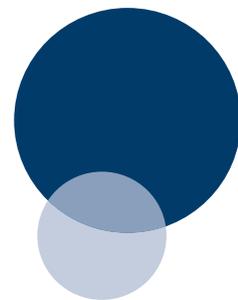
Principle 3 - take account of the wishes of the adult

- In deciding if an action or decision is to be made, and what that should be, account shall be taken of the present and past wishes and feelings of the adult, as far as they can be ascertained. The person should be offered appropriate assistance to communicate his or her views (for further guidance see Annex 1).

Note: it is compulsory to take account of the present and past wishes and feelings of the adult if these can be ascertained by any means whatsoever.

Principle 4 - consultation with relevant others

- In deciding if an action or decision is to be made and what that should be, account shall be taken of the views of: the nearest relative and the primary carer of the adult; the adult's named person any guardian or attorney with powers relating to the proposed intervention; any person whom the sheriff has directed should be consulted; any other person appearing to have an interest in the welfare of the adult or the proposed action, where these views have been made known to the person responsible – in so far as it is reasonable and practicable to do so.



Principle 5 - encourage the adult to exercise existing skills and to develop new skills

- Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he or she has concerning property, financial affairs or personal welfare, as the case may be, and to develop new such skills. While this is a requirement for the categories of appointee stated above, it represents good practice for all others with decision making or management powers.

COMMUNICATING WITH THE PERSON

- 1.11 Principle 3 means that you, as the guardian or intervener, must take account of the person's present and past feelings and wishes so far as you are able to ascertain these. Some adults will be able to express their wishes and feelings clearly, even although they would not be capable of taking the action or decision which you are considering. For example, the person may continue to have opinions about a particular item of household expenditure without being able to carry out the transaction personally.
- 1.12 In some cases special effort may be required to communicate with the person. This could mean using memory aids, pictures, non-verbal communication or advice from a speech and language therapist. (See Guide to Communicating with the adult with incapacity in Annex 1).

Deciding when a person needs the help of the Act

- 1.13 If you are unsure about the needs of the person you are concerned about or if the Act can help, it is advisable to contact the local authority social work department in the area where the person lives. The local authority has a duty to assess the needs of a person who may lack capacity due to a mental disorder or severe communication difficulty caused by a physical condition. You can also seek advice and information from the OPG on financial matters and from the Mental Welfare Commission (MWC) on welfare matters. Specialist voluntary organisations may also be able to help (see Annex 3).
- 1.14 A formal assessment of capacity will be needed in relation an application under the Act. For further details on getting a medical certificate to accompany an application for an intervention or guardianship order, see Annex 2.

BODIES INVOLVED IN REGULATION OF INTERVENERS AND GUARDIANS

1.15 The appointment of an intervener or guardian is, in effect, imposed on an adult by the sheriff. It is essential for the sheriff to take into account the adult's wishes and feelings about such an appointment. As the adult's agreement to the appointment is not required, it is necessary to provide appropriate protection for the adult, and for third parties who conduct business with an intervener or guardian in place of the adult. In order to ensure such protection, the Act provides for various bodies to be involved in the regulation of interveners and guardians in the exercise of their functions. These are the Public Guardian, the courts, the local authority, and MWC.

The Public Guardian (Scotland)

The Public Guardian has a number of functions under the Act including:

- establishing, maintaining and making available to the public, on payment of the prescribed fee, registers of all documents relating to:
 - intervention and guardianship orders under Part 6 of the Act;
 - powers of attorney; and
 - access to funds;
- providing guidance and non-legal advice to anyone considering applying for an intervention order in relation to property or financial affairs, or for financial guardianship;
- sending notification of registration of welfare powers of attorney to local authorities and the MWC. Both the MWC and local authorities will be able to request a copy of the document;
- supervising any guardian or any intervener in the exercise of his or her functions relating to the property or financial affairs of the adult;
- receiving and investigating any complaints regarding the exercise of functions relating to the property or financial affairs of an adult made in relation to guardians, interveners, withdrawers and attorneys;
- requesting records and information from financial interveners, guardians and withdrawers as required; requesting information and records from fundholders;
- investigating any circumstances in which the property or financial affairs of an adult seem to be at risk;

- when requested to do so, providing a guardian, intervener, withdrawer or continuing attorney with information and advice;
- consulting with the MWC and any local authority where there is a common interest;
- initiating or taking part in court proceedings when to do so appears to be necessary to safeguard the property or financial affairs of an incapable adult.

The Courts

1.16 Most of the judicial proceedings under the Act will take place in the sheriff court. The sheriff will make specific orders under the Act. Section 3 of the Act gives the sheriff wide and flexible powers to:

- make orders consequential or ancillary to specific orders made under the Act. The sheriff may also impose conditions and restrictions on orders granted;
- make interim orders where quick action may be needed while the court works to resolve an issue in full;
- vary an order;
- order that the adult be assessed or interviewed;
- give directions to an intervener or guardian under section 3(3). The adult and anyone else claiming an interest in the adult's affairs (including the intervener or guardian) are entitled to apply to the court for such a direction. This provides an important method of resolving disputes and difficulties about how to exercise powers under the Act, and it will be referred to later in this code.

The Court of Session has a role if there are appeals against sheriffs' decisions, and in determining certain medical treatment matters.

The adult may not be able or may not wish to appear in court, or may not be able to represent his or her own interests. The sheriff may in such circumstances appoint a person to safeguard the adult's interests, and may, if appropriate, also appoint a person to convey the adult's views to the court. Sheriffs must take account of the adult's views as expressed by a person providing an independent advocacy service.

Local Authorities

- 1.17 Local authorities have a major role in looking after the welfare of adults with impaired capacity. This role includes:
- supervising welfare guardians in the exercise of their powers;
 - supervising interveners with powers relating to personal welfare if ordered to do so by the sheriff;
 - consulting the Public Guardian and the MWC where they share common interests;
 - investigating complaints about the exercise of welfare powers;
 - investigating any circumstances made known to them in which the personal welfare of an adult seems to them to be at risk;
 - providing information and advice in connection with the performance of functions under the Act relating to personal welfare;
 - applying for welfare guardianship, or for the appointment of someone as financial guardian, or for a financial intervention order, where necessary and no one else is putting forward an application;
 - acting as intervener, or welfare guardian, where necessary and no-one else is suitable or prepared to do so.

The Mental Welfare Commission for Scotland

- 1.18 The MWC has a role in protecting the interests of adults with incapacity. This role is only in relation to those whose incapacity is the result of mental disorder. The MWC has no role in relation to adults whose incapacity is due solely to an inability to communicate because of physical disability, except in certain cases, where it would have to nominate a medical practitioner due to disagreement over medical treatment.

The MWC has:

- a duty to consult the Public Guardian and local authorities where there are cases or matters of common interest;
- a duty to provide a guardian, welfare attorney or intervener with information and advice in connection with the performance of his or her functions in relation to personal welfare under the Act;

The MWC has powers to:

- visit adults on whose behalf others are acting under the Act;
- investigate complaints about the exercise of welfare powers, where the Commission is dissatisfied with local authority action or where the local authority has failed to act;
- investigate any circumstances made known to it in which the welfare of the adult seems to be at risk, even if there is no complaint;
- 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.

PROVISIONS RELATING TO NEAREST RELATIVE

- 1.19** Under section 4(1) of the Act it is possible for anyone, (including the adult him/herself), who has an interest in the adult's property, financial affairs or personal welfare to apply to the sheriff to have the nearest relative displaced, or to have information withheld from the nearest relative. Such applications cannot be made in advance of any incapacity.

Displacement or withholding of information from nearest relative

- 1.20** On an application the court may, having regard to the principles and being satisfied that to do so will benefit the adult, make an order that:
- certain information shall not be disclosed, or intimation of certain applications shall not be given, to the nearest relative of the adult;
 - 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:
 - is a person who would otherwise be entitled to be the nearest relative in terms of this Act;
 - in the opinion of the court is a proper person to act as the nearest relative; and
 - is willing to so act; or
 - no person shall, during the continuance in force of the order, exercise the functions of the nearest relative.

- 1.21** If you are appointed as an intervener or guardian you will need to be aware if any order has been made displacing the nearest relative. You will also need to know if someone else has been ordered by the sheriff to replace the nearest relative. This is so that you know who you need to consult when making a major decision on behalf of the adult. If you are not sure about whether or not the nearest relative has been displaced or replaced you should contact the sheriff court nearest to where the adult lives or seek advice from the OPG.

LIMITATION OF LIABILITY

- 1.22** Section 82 of the Act provides that 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 a residential establishment for any breach of any duty of care or fiduciary duty owed to the adult if he, she or they have:

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

This is a crucial provision which emphasises the importance of anyone exercising powers under the Act being fully familiar with the principles and applying them properly to decisions and actions taken.

HOW DOES THE ACT PROTECT THE ADULT WITH INCAPACITY FROM ABUSE?

- 1.23** The Act provides a number of safeguards for adults through the roles and functions of the statutory bodies described above and in other ways. These include:

- checks on the suitability of the proposed guardian, intervener or withdrawer;
- the possibility of displacing of the nearest relative as described in paragraphs 1.20-21 above;
- a formal assessment of the adult's capacity; and
- the registration of all appointments with the OPG.

The Act makes provision for investigations and where a complaint is upheld, a range of measures may be taken. In serious cases the OPG, MWC and/or local authority will refer the matter to the sheriff court.

It is an offence for anyone exercising welfare powers under the Act to ill treat or neglect an adult. The penalties for someone found guilty on summary conviction of the offence under the Act are up to 6 months imprisonment or a fine of up to £5,000. Someone convicted of the offence on indictment may be imprisoned for up to 2 years or given an unlimited fine.

LEGAL AID

1.24 An adult, someone authorised to act on his or her behalf under the Act, or anyone claiming or having an interest in the adult's welfare or affairs may be eligible for legal aid. For example, costs may be incurred in making an application to the courts or in seeking legal advice. Two sorts of legal aid are available in relation to the Adults with Incapacity (Scotland) Act 2000.

Advice and Assistance

- will be available, subject to the statutory financial eligibility test being satisfied, to enable people to seek advice from a solicitor on any aspect of the Act. It is the solicitor who applies the financial eligibility test in respect of applications for legal aid for Advice and Assistance. Where the application is being made by someone other than the adult, the financial eligibility test will be assessed on the resources of the adult and not the applicant.

Civil Legal Aid

- will be available without a means-test in respect of applicants for an intervention or guardianship order which include welfare powers or a mix of welfare and financial powers. In this case the solicitor applies to the Scottish Legal Aid Board (SLAB) who decides if the application meets the eligibility criteria. Where there is no welfare element and the application is for financial powers only, the Board will look at the income and capital of the adult;
- will be available for all other proceedings, including appeal proceedings under the Act (subject to the usual statutory tests of financial eligibility, probable cause of action and reasonableness).

The SLAB website www.slab.org.uk provides information by region on solicitors registered for legal aid work. A fact sheet on the Adults with Incapacity Act and legal aid is available at:

<http://www.scotland.gov.uk/topics/justice/civil/awi>

FURTHER INFORMATION

- 1.25 If you are unsure about the needs of the person you care for and whether the provisions of the Act will help, there are several sources of help: the local authority social work department in the locality of the adult; a Citizen's Advice Bureau, or a specialist voluntary organisations. The OPG will provide advice on financial matters in relation to the Act and the MWC has a helpline to deal with welfare queries where the person has a mental disorder. See Useful Addresses at Annex 3. You can also consult the Scottish Government's website at:
<http://www.scotland.gov.uk/topics/justice/civil/awi>

Chapter 2

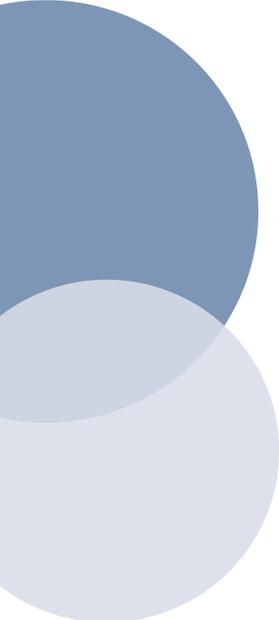


OBTAINING AN INTERVENTION ORDER

This chapter provides the following information and guidance on:

- what an intervention order is, who can apply and the circumstances in which an application will be appropriate
- the duties which interveners have once appointed
- making an application
- supervision arrangements
- what to do if there is a change of circumstances
- what happens if there is a complaint against you.

WHAT IS AN INTERVENTION ORDER?

- 
- 2.1** The general nature of an intervention order is set out in Section 53(5) of the Act. An intervention order is appropriate to deal with single decisions or actions, or an action requiring a longer timescale provided the benefit is clear and the outcome can be predicted (see list of examples in 2.13 and 2.16). An application for an intervention order would have to state the precise decision or action for which authorisation is sought. An application can be made for a financial and/or welfare intervention. The application, which must be accompanied by certain reports, is made to the sheriff court. Once granted, the order is registered with the Office of the Public Guardian. The person authorised to act under an intervention order is called an ‘intervener’. **Annex 2 sets out the requirements for making an application.**
- 2.2** Many intervention orders will involve the adult’s property or financial affairs. Under section 6(2)(a) of the Act, if you are authorised under such an order you will be supervised in its exercise by the Public Guardian.
- 2.3** Where the person’s affairs are moderately complex or uncertain, intervention orders might prove to be insufficient to secure the necessary benefits and a guardianship order may be more suitable. A guardianship order is likely to be more suitable in circumstances where there is one or more major welfare or financial matters to be dealt with and decision-making is likely to be necessary in the long term. A guardianship order can also provide flexibility so that the guardian can respond quickly to new situations without having to go back to court.
- 2.4** It is impossible to give hard and fast rules about when to apply for an intervention order and when to apply for guardianship. Everything will depend on the circumstances of the adult concerned. Professional advice may be helpful in making such a decision.
- 2.5** If the person has not received a recent assessment of his/her needs, it would be advisable to make a request for an assessment from the person’s local authority social work office. A full assessment should help to identify the support needs of the adult, including any decision-making powers that may be appropriate.

- 2.6 It is important to give careful consideration to the precise powers required and therefore whether an intervention or guardianship order is most appropriate. It is worth noting that whilst the sheriff can change an application for guardianship into an intervention order, it cannot be done vice-versa (section 58(3) of the Act). In such cases where the sheriff thinks guardianship is appropriate where an intervention order has been applied for, the process of application begins again. The sheriff's decision can be appealed to the sheriff principal and with his or her leave, to the Court of Session.

WHO CAN APPLY FOR AN INTERVENTION ORDER?

- 2.7 The following individuals or organisations may apply:

- **anyone with an interest in the adult** (normally the person's carer) or professional person can apply to the sheriff court to become an intervener. A person authorised under an intervention order will always be a specific person named in the order. It could also be a named officer of an organisation. Usually the person who wishes to act for the adult makes the application and nominates him/herself;
- the **adult** can apply for an intervention order and nominate someone to become his or her intervener in respect of a specific decision or action he or she cannot take him or herself;
- the **local authority** can apply for a welfare or financial intervention order and nominate itself. Under section 53(3) of the Act, the local authority has a duty to apply for an order in circumstances where the person has been assessed as needing one, but there is no one else willing or able to do so. (For details see the local authority code of practice.)

Note: It is possible for the applicant and the person named in the order to be different people. For example, you may be willing to be authorised under an intervention order but you may prefer the local authority to carry out the technical business of applying for the order, obtaining the necessary reports and appearing before the sheriff. However, this would be at the discretion of the local authority.

- **The court – in criminal proceedings.** Under the Criminal Procedure (Scotland) Act 1995, a court may make an intervention order where it considers that it would be appropriate to do so, and where there is no order already in place with the same powers.

CIRCUMSTANCES IN WHICH YOU MIGHT WISH TO APPLY FOR AN INTERVENTION ORDER

2.8 As a **private individual** you may wish to become an intervener, because, for example:

- you are the adult's carer, relative or friend, and have become aware of a need which the adult cannot meet by taking action or making a decision personally;
- you already have powers in relation to the adult as an attorney, a guardian, or withdrawer, but the scope of your powers does not extend to taking the action or making the decision in question.

If an order is needed you should consider if you have the skills, knowledge and time to exercise the powers required, or whether someone else might be better placed.

2.9 As **someone with a professional involvement** with the adult you may wish to become an intervener or may identify the need for someone else to apply for an intervention order, because, for example:

- You are already involved in the assessment and care management of the adult and the adult's incapacity is preventing a particular identified need to be met;
- you are already the adult's continuing attorney or financial guardian, but the scope of your powers does not cover a particular identified need which you or others involved with the adult have identified, e.g. additional financial powers are required or a short term welfare need has arisen;
- the adult's attorney or guardian is not the appropriate person to deal with a particular matter because of a potential conflict of interest.

2.10 A **local authority's involvement** in applications for an intervention order will normally stem from enquiries and assessments under section 10 of the Act as well as from care management procedures and will normally relate to a personal welfare need which has been identified through those procedures. Under section 53(3) of the Act, a local authority must seek an intervention order to protect the adult's property, financial affairs or welfare where necessary and where no one else is doing so.

- 2.11 A local authority's involvement could also stem from the involvement of the criminal justice team with the adult if he or she has been prosecuted or diverted from prosecution.
- 2.12 A court may, instead of sentencing an offender in criminal procedure, make a guardianship order or an intervention order, under amendments made by the Act to the Criminal Procedure (Scotland) Act 1995.

Further guidance in respect of the duties of local authorities in relation to intervention orders is given in the Code of Practice for Local Authorities exercising functions under the Act.

FACTORS TO CONSIDER BEFORE APPLYING FOR AN ORDER

Circumstances when an intervention order might be suitable

- 2.13 A financial intervention order could be suitable in the following circumstances (the list is illustrative, not exhaustive).

Financial

- for dealing with the adult's interest in the estate of a deceased relative;
- taking legal action to protect the adult's interests;
- setting up a trust;
- dealing with the adult's income tax;
- selling moveable property held by the adult to obtain necessary income, e.g. paintings, antiques, subject to considerations of any bequests;
- winding up the adult's business affairs;
- a transaction to buy and sell property;
- acquisition or sale of the adult's home (dwelling house – special provisions apply see below) e.g. buying a home more suitable to the adult's needs;
- freezing an adult's assets or funds in order to protect them while suspicions of exploitation are investigated by the Public Guardian;
- selling the adult's home (but any longer term welfare aspects of moving the adult to different accommodation would be better dealt with through welfare guardianship).

Special provisions where an intervention order covers acquisition or disposal of dwelling house

- 2.14** Section 53(6) makes special provision in relation to an intervention order which directs the acquisition of accommodation for, or the disposal of any accommodation used for the time being as a dwelling house by, the adult. In such a case the consent of the OPG to the price paid or to be obtained is required before the accommodation is acquired or, as the case may be, disposed of. The OPG is able to make a timely response in circumstances where a swift decision is necessary in relation to the property.

This provision will be particularly relevant in the case of an individual or body which seeks to sell an adult's house in order to move the adult into residential accommodation, or acquire a specially adapted house for the adult in place of his or her current home. The intervention order could be used to deal with the property and financial aspects of the transaction. If, however, the adult required ongoing support in relation to financial or welfare issues then a guardianship application may be more appropriate and could incorporate a request for a specific power to sell or acquire the adult's home.

Welfare

- 2.15** A welfare intervention order may be appropriate in the following circumstances:
- you already have powers in relation to the person, for example as an attorney or guardian, but the scope of your powers does not extend to taking the action or decision in question e.g. moving the person to a care home;
 - where the person is unable to give consent to significant medical, dental or other treatments, or operations;
 - you require the adult to attend hospital for specific medical treatment or assessment (see below for restrictions).

The above lists are examples and there may be other circumstances in which an intervention order might be suitable.

Matters which may not be authorised under an intervention order

- 2.16** Under section 53(14) read with section 64(2), an intervention order may not authorise:
- placing the adult in hospital for the treatment of mental disorder against his or her will;
 - consent to any form of medical treatments set out in The Adults with Incapacity (Specified Medical Treatment) (Scotland) Regulations 2002 made under section 48(2) of the Act, which came into force on 1 July 2002.

Advisability of consulting the local authority or MWC about intervention order relating to personal welfare

- 2.17** Given that the local authority will be required to prepare a report in connection with an application for an intervention order relating to personal welfare, it would be good practice to consult the appropriate social work office informally if you think you want to apply. If the adult already has a social work officer or care manager, that is the person you should consult. If the adult does not, it would still be advisable to seek social work assistance in reaching your decision whether or not to apply. This will avoid possible later difficulties when the appropriateness of the application has to be assessed against a tight deadline. You should in the first instance contact your local social work office whose address can be found in the telephone book under the local authority for your area. You may also wish to consult the MWC if the order concerns the welfare of an adult whose incapacity is as a result of mental disorder. If the proposed intervention order is likely to involve the delivery of services, an early approach to the bodies or agencies expected to deliver the services would be well advised.

Advisability of consulting the Public Guardian (Scotland)

- 2.18** If the order will involve property or financial affairs, and you are in doubt about what will be involved, it would be a good idea to consult the Public Guardian informally before applying.

CRITERIA FOR SEEKING AN INTERVENTION ORDER

- 2.19** The main criterion for seeking an intervention order is the adult's incapacity in relation to the decision or action for which authorisation will be sought and the application of the principles in terms of the least intervention necessary to benefit the adult.

2.20 Bearing in mind this criterion, the need for an intervention order can be determined by applying the following reasoning process:

- What is the adult's current situation regarding personal welfare and/or property and financial affairs?
- Consideration should be given as to what needs of the adult are not being met and what changes should be made to the current situation to take account of the adult's needs. The principles must be applied, i.e. benefit to the adult, minimum intervention, taking account of the adult's past and present wishes and feelings, and consultation with nearest relative, primary carer, named person and anyone else with an interest in the adult's personal welfare or property and financial affairs.
- For example, you should ask yourself whether the adult would want the intervention, if capable. Guidance on ascertaining the adult's wishes and feelings is given in Annex 1. You should also consult other people on whether they think the intervention is necessary to benefit the adult, whether they can think of any less restrictive option, and so on.
- Has the adult sufficient capacity to take decisions and action him or herself to meet these needs, e.g. appoint an attorney to take the necessary decisions?
- If not, is there anyone already authorised to take the necessary decisions or action on behalf of the adult? If there is such a person or persons, is he or she, or are they, able and willing to take the necessary decisions or action? This may require you to clarify in your own mind any doubts you have about someone who is already exercising management or decision making powers on behalf of the adult. For example, such a person may be a Department of Work and Pensions appointee who will have authority to claim and receive benefits on behalf of the adult and who will also have authority to act generally on their behalf in respect of social security matters.
- If there is no-one already authorised, or you have concerns about the ability of someone already appointed (such as attorney or withdrawer) to take the necessary action or decision, should someone be appointed with new powers?

Examples:

- your relative may have appointed a financial attorney at a time when he or she had modest means;
- your relative's estate may have increased, for example by inheriting a house, and the financial attorney may not wish to take on responsibility for selling the house and investing the proceeds for your relative's benefit;
- your relative may have a DWP appointee who has powers to claim and receive benefit on his or her behalf and to deal, generally, with social security matters. The appointee's powers are restricted to dealing with social security benefits, so it may be the case that someone, e.g. a withdrawer, an intervener or financial guardian should be appointed to deal with other financial matters if required.

Nature of the intervention order to be sought

2.21 It will be important in seeking an intervention order to specify in terms what powers are sought. The **principles** should be applied to the framing of the order. In particular:

- The precise order sought should **benefit** the adult and there should be no reasonable way of achieving the benefit without the intervention. The applicant must be able to demonstrate that alternatives have been considered and give reasons for rejecting them.
- The precise order sought should be the **least restrictive option** in relation to the freedom of the adult, consistent with the purpose of the intervention. The order should not be sought at all if there is a means of achieving the desired aim without it. The order sought should only seek to impose changes on the adult to the degree that is necessary and no further.
- Account must be taken of the **adult's past and present wishes and feelings**. Every effort must be made to ascertain these in whatever way is appropriate and practicable in relation to the particular adult. See Annex 1.

The applicant must be able to explain the steps which have been taken to ascertain the past and present wishes and feelings of the adult about the order being sought and any possible alternatives, and report what these are. The adult will be able to challenge this aspect of the application, as will relatives.

For example, if it is proposed that the adult should sell a valuable painting in order to purchase mobility aids, the adult's sentimental attachment to the painting, and wishes as to a possible purchaser (e.g. an art gallery rather than private) or to dispose of the property in a particular manner, say as a bequest in a will, should be taken into account.

It will be particularly important to be clear about the sources of evidence for the adult's past wishes and feelings. Guidance on obtaining the views of an adult with communication difficulties is set out in the Annex 1. Where the adult cannot communicate present wishes and feelings despite every effort being made, undue reliance must not be placed on information from one or a restricted number of relatives and associates but a spectrum of views should be obtained.

Under section 53(1) of the Act the sheriff has power to grant an intervention order if he/she is satisfied that the adult is incapable of taking the action, or is incapable in relation to the decision about his or her property, financial affairs or personal welfare to which the application relates, and that the person nominated to act is suitable to do so.

- Account must be taken of the **views of the nearest relative, named person, primary carer, and of any attorney and anyone else the sheriff has directed should be consulted, and any other person having an interest in the welfare of the adult or the proposed intervention, in so far as it is reasonable and practicable to do so.**

DEALING WITH CONFLICTS OF INTERESTS

2.22 If you are close to the adult in another capacity such as relative, or carer this could create a conflict of interest between your personal interests and your fiduciary duty to the adult. For example you may stand to inherit money or property under the adult's will but the action required would involve expenditure that would erode this inheritance.

2.23 It is quite reasonable and proper for a person authorised under an order sometimes to take action which would benefit both him or herself and the adult.

- For example, if the adult is elderly and frail, and his or her carer is also elderly and frail but not lacking capacity, and the carer seeks an intervention order to sell a jointly occupied house in order move into sheltered accommodation, this is likely to be of benefit to both parties.

This balancing of different benefits will be particularly important if the adult is resisting the intervention proposed.

- 2.24** You can expect, therefore, that the author of the report on your application will consult the adult to find out as far as possible, whether the application is consistent with his or her wishes and feelings, so far as they can be ascertained. The report writer will also consult relevant others and may become aware through this that there is a conflict of interest or views between yourself as applicant and other relatives or others with an interest in the welfare of the adult. (See Annex 2 for details of reports required to accompany an application).
- 2.25** If you are not sure how to deal with conflict of interest, there are a number of options you could pursue. These would include:
- asking an independent advocacy project for support for the adult in discussing the matter with you and with the local authority;
 - consulting the Public Guardian, where property and financial affairs are concerned;
 - consulting the local authority or MWC where personal welfare matters are concerned;
 - engaging an independent solicitor to represent the interests of the adult in discussing the matter with the local authority (request information about eligibility for legal aid);
 - requesting the sheriff to make consequential or ancillary orders, or provisions or directions under section 3 of the Act. For example you could ask the sheriff at the time of application or subsequently to order local authority supervision.
- 2.26** It may be that after consideration of all these factors the person responsible will produce a report which does not support your application. It would not be good practice for the person to do this without discussing the matter with you first and proposing alternative plans to protect and safeguard the adult's interests. You should ask for these points to be provided in writing.

Safeguarding the adult's assets

- 2.27** Under section 53(7) the sheriff may require a financial intervener to find caution. Caution is an insurance bond to safeguard the adult from loss caused by the actions of the person authorised under the order. The sheriff may dispense with caution or may instruct the Public Guardian to accept an alternative form of security instead of caution (for example, to consign a sum of money through the Accountant of Court).

EFFECT OF INTERVENTION ORDER

- 2.28** Section 53(9) provides that anything done under an intervention order shall have the same effect as if done by the adult if he or she had the capacity to do so.
- 2.29** Under section 31(4), the authority of a withdrawer of funds under part 3 of the Act, or of a continuing attorney, will come to an end on the granting of an intervention order relating to the funds or account in question.
- 2.30** Under section 46(1)(b), managers of an authorised establishment may not manage the funds or hold, or dispose of, the property of a resident under part 4 of the Act, if an intervention order has been granted in relation to the same matter.
- 2.31** Under section 49(1), if the medical practitioner primarily responsible for the medical treatment of the adult knows that an application has been made for an intervention order in relation to the treatment, then the treatment should not be given unless it is required to preserve the life or prevent serious deterioration of the adult. This can also be applied to permit the doctor to take action under section 50 of the Act, which deals with medical treatment once the intervention order has been granted.

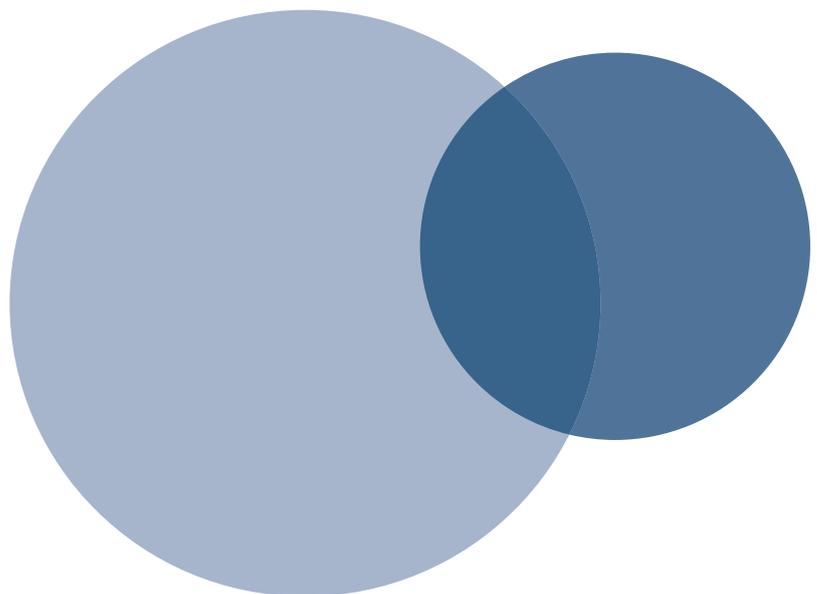
REIMBURSEMENT OF OUTLAYS

- 2.32** Section 53(12) provides that a person authorised under an intervention order may recover from the estate of the adult the amount of such reasonable outlays as he/she incurs in doing anything directed or authorised under the order.

HOW TO MAKE AN APPLICATION FOR AN INTERVENTION ORDER

The process for making an application for an intervention order is the same as that for a guardianship order. **See details in Annex 2.**

Note: It is important to ensure that you make the appropriate application. If you apply for an intervention order, the sheriff may consider that this will not give you enough powers and will ask you to make an application for guardianship. For example, you may have thought that an intervention order was enough to authorise the sale of the house, but because the proceeds of the sale must be used to benefit the adult on a continuing basis, a financial guardianship order would be necessary to manage the funds. This would mean starting the whole application process again. However if you apply for guardianship and the sheriff decides that an intervention order would be adequate, he/she is able to grant the intervention order without you having to make a new application.



Chapter 3



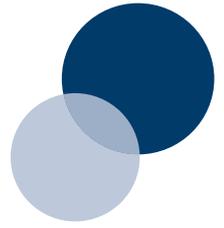
EXERCISING YOUR POWERS AS AN INTERVENER

DUTIES OF INTERVENERS

- 3.1 This section sets out the statutory duties which you, as an intervener, are expected to carry out in exercising your powers. If challenged you should have no problem justifying your actions if you are able to demonstrate that you have acted in good faith.

Duty of care

- An intervener or other person acting under the Act is held at common law to owe a duty of care to an adult whose affairs he or she is managing. You must act with due skill and care in exercising the powers you have been given in relation to the adult. Neglect or abuse by an intervener could be an offence in terms of section 83 of the Act if you have welfare powers. Where you have financial powers, if you abuse your position, it is possible that your actions may be considered as theft or fraud and the matter will be reported to the police or, if a professional person, to your supervisory body (or both as appropriate). A professional person acting under an intervention order must demonstrate the skill and care that would be expected of a reasonably competent member of that profession.



Fiduciary duty (position of trust)

- A person authorised under the Act has what is known as a ‘fiduciary duty’ to the adult. This means that you are in a position of trust with respect to the matters covered by your powers. If you abuse your position, for example by using the adult’s funds for your own benefit rather than that of the adult, you may be liable to make good the adult’s losses. If you act reasonably and in good faith, you will not be liable for any breach of fiduciary duty. As part of your position of trust, you have a general duty to keep the adult’s affairs confidential.

Duty to keep accounts and records

- A financial intervener must keep records of what he or she has done with the adult’s funds or property over which they have control). For details see 3.3 and 3.4 (below).

Duty to take apply the principles

- (see chapter 1 paragraph 1.10)

Duty of confidentiality

There are three separate issues that arise under the heading of confidentiality. These are:

- your right to have access to confidential information about the adult;
- the use and proper disclosure of confidential information about the adult;
- your fiduciary duty (the trust placed in you) to maintain the adult’s confidentiality.

The issue of access to confidential information concerning the adult should be covered in the intervention order. Similarly your right to disclose information about the adult should have been covered in the order.

Where someone holding confidential information refuses to disclose it to you and your powers do not explicitly authorise you to demand it, then you should consider whether the party in question owes to the adult other duties in addition to the duty of confidentiality which may override the duty of confidentiality, and if so to explain this.

Duty to inform the Office of the Public Guardian (Scotland) of any change in circumstances

- For details of requirements see paragraph 3.8.

MAKE A PLAN TO IMPLEMENT THE ORDER

3.2 It would be good practice for you to draw up a plan to implement the order, specifying when action will start, when it will be completed, and what steps have to be taken in between.

- For example, in order to sell an adult's home it will be necessary to plan a timetable for advertising the property, receiving offers, consulting the Public Guardian, accepting an offer and concluding the transaction.

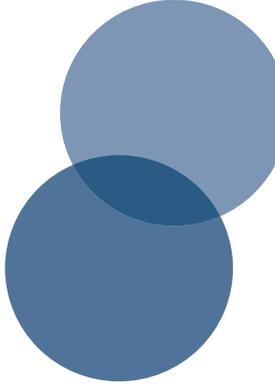
RECORDS TO BE KEPT

3.3 Under section 54 of the Act, a person authorised under an intervention order shall keep records of the exercise of his/her powers.

- The records kept should relate clearly to the scope of the powers conferred.

3.4 If the intervention order relates to financial or property matters, it would be good practice for you to start a file containing the following information:

- a copy of the interlocutor containing the intervention order;
- in the case of an order relating to heritable property, copies of the endorsed interlocutor or updated Land Certificate received from the Keeper of the Registers;
- your brief written plan for implementing the order;
- any correspondence concerning exercise of the powers – for example if the powers concern dealing with tax, any correspondence with the Inland Revenue or tax accountants or lawyers; if the powers refer to claiming and receiving benefits, correspondence with the Department for Work and Pensions if the powers refer to taking legal action on behalf of the adult with respect to compensation etc., all correspondence with solicitors and all court documents, etc.;

- 
- if the powers relate to the opening, operating, or closing of an adult's account, or freezing an account to prevent mismanagement while new management arrangements are put in place, any bank statements, passbooks, statements of interest received or other financial information concerning the account, and any correspondence with the fund-holder;
 - if the powers relate to buying or selling heritable property, a note of all steps taken including advertising the property, showing the property, setting a closing date for offers, and acceptance of a suitable offer; or alternatively, properties viewed, offers made and final acceptance of an offer. Correspondence with the Public Guardian relating to the price paid or accepted must also be retained;
 - if the powers relate to buying or selling property such as shares, antiques etc, any relevant documents such as invoices, receipts, share certificates etc.;
 - a note of one or more reviews of the intervention if it is likely to last some time, for example operating a bank account;
 - a note of any expenses incurred in exercising the powers authorised under the intervention order, with receipts, so that reimbursement can be claimed;
 - a note of the completion of action under the intervention order.

3.5 If the order relates to personal welfare, it would be good practice for you to start a file as above containing:

- a copy of the interlocutor containing the intervention order;
- a brief written plan for implementing the order;
- a note of action actually taken. For example, this could include the medical or dental appointments actually attended by the adult following consent, and the outcome of the any tests or treatment;
- any correspondence with medical practitioners, care home managers or others concerning the matters covered in the intervention order;
- if the intervention order is to last a significant time, such as covering a long course of treatment for the adult, the order should be reviewed at appropriate intervals and a note kept of any review;
- a note of any incidental expenses arising out of the intervention order, with receipts, so that reimbursement can be claimed;
- a note of completion of the order.

LIABILITY AND PROTECTION FOR THIRD PARTIES ACTING IN GOOD FAITH

- 3.6** Section 53(11) provides that a transaction for value (e.g. services provided in return for payment) between a person authorised or purporting to be authorised under an intervention order and a third party acting in good faith shall not be invalid on the grounds of some irregularity in the authorisation, etc. Under section 53(13), a similar protection is also extended to a third party acquiring in good faith and for value a title to any interest in heritable property.
- 3.7** Under section 53(14) read with section 67(4), the person authorised under an intervention order would be personally liable if he or she acts without disclosing that he or she is acting under an intervention order or if he or she exceeds the authority conferred by the order. But if the liability arises only from non-disclosure, the person authorised can be reimbursed from the adult's estate for any claim against him or her personally, in order to safeguard the intervener from personal loss as a result of accidentally forgetting to disclose the capacity in which he or she is acting.

NOTIFYING THE OPG ABOUT CHANGE OF CIRCUMSTANCE

- 3.8** The Act requires that the OPG is notified of the following changes in circumstances for yourself or the adult, should they occur.

Notifying change of address

- If you change address, or the adult changes address, you are responsible for notifying the Public Guardian within 7 days of the change, who will register the new particulars and notify the local authority and where appropriate the MWC.

Death of a person authorised to intervene

- In the event of the death of a person authorised to act under an intervention order, his or her personal representatives should inform the Public Guardian.

Change in circumstances of the adult

- The circumstances of the adult may change, for example he or she may regain the capacity to manage their his or her affairs for him or herself or his or her requirements may change – for example if the adult inherits property the intervener may need to apply for more powers in order to have authority to manage.

Under section 53(8), the sheriff may, on an application by the intervener, the adult or any person anyone claiming an interest in the property, financial affairs or personal welfare of the adult, make an order varying the terms of, or recalling, the intervention order or any other order made for the purposes of the intervention order.

Death of the adult

- In the event of the death of the adult, the intervener must notify the Public Guardian so that the order may be cancelled (see chapter 7 for details).

SUPERVISION BY THE PUBLIC GUARDIAN

- 3.9** The Act requires the Public Guardian to supervise any person who is authorised under an intervention order in the exercise of his/her functions relating to the property or financial affairs of the adult.
- 3.10** Supervision is intended to ensure that you are carrying out your functions properly and, depending upon the content of the court order, may relate to some or all of your actions with the adult's estate.
- 3.11** The Public Guardian will in due course call for a report or account from you detailing your actions in implementing the powers you have been given and may also call for sight of bank books, invoices or other material to support the entries in your report or account. Accordingly, it is important that you keep the type of records referred to in paragraphs 3.4-5 above.
- 3.12** The Public Guardian will inform you of the date by which you require to lodge the initial report or account of your financial management. Failure to provide the report/account by the due date can result in the matter being reported to court and the possible termination of the intervention order. Subsequent progress reports or accounts may be required, dependent on the terms of the intervention order.
- 3.13** Should the Public Guardian not be satisfied with the account or records produced she will strive to resolve the matter with you but, ultimately may report her concerns to the court and seek to have your powers revoked.
- 3.14** Your account will be available for inspection by anyone with an interest in the adult's estate.

- 3.15** If the Public Guardian considers it necessary he may consult the MWC and the local authority if there appears to be a common interest.

SUPERVISION BY THE LOCAL AUTHORITY

- 3.16** There is no specific provision to order supervision of a person authorised under an intervention order which relates to personal welfare matters. However this may be done by the sheriff under his general powers and is envisaged under section 10(3)(b)(i) of the Act.
- 3.17** As indicated earlier, supervision can in certain circumstances be a desirable safeguard for you in the exercise of your powers, especially if there are relatives or associates of the adult who disagree with your actions or decisions.
- 3.18** In some cases, supervision may be imposed after you have started exercising your powers because someone has concerns and has applied to the sheriff for your role to be brought under closer scrutiny.
- 3.19** If you find yourself in this situation, this does not mean an end to your functions under the intervention order. If you have kept records as recommended above you should have little difficulty in producing the necessary records to reassure the local authority and others that you have carried out your functions correctly.
- 3.20** Depending on the nature of the intervention order and its duration, supervision may involve visits by a social work officer to yourself and to the adult as well as communication by telephone or in writing.
- 3.21** If you are ordered to be subject to local authority supervision, you should regard this as a help rather than a threat. The officer of the local authority responsible for your supervision will provide you with necessary advice and support. You should have a meeting with this officer, show him or her your file, and ask what records he or she would like you to keep in future, and what form the supervision will take.

WHAT IF THERE IS A COMPLAINT AGAINST YOU?

- 3.22** If someone has a complaint against you, and either does not put it to you or is not satisfied with your response, he/she has recourse to the local authority or Public Guardian. The local authority has a duty to receive and investigate all complaints regarding the exercise of functions relating to personal welfare of an adult made in relation to interveners. The Public Guardian has a duty, while the adult is alive, to receive and investigate all complaints regarding the exercise of functions relating to the property or financial affairs of an adult made in relation to interveners.
- 3.23** The MWC also has an interest where the adult's incapacity is due to mental disorder. The complainer can contact the Commission direct, although the Commission will only investigate a complaint if it is not satisfied with the outcome of a local authority investigation or the local authority has not carried out any or an insufficient investigation.
- 3.24** The local authority or Public Guardian will contact you about any complaint received and ask you for your version of the facts. If you have applied the principles correctly, have taken advice, have kept relevant documents such as correspondence, have co-operated with supervision and have kept records as recommended above, you should have nothing to fear from such an investigation.
- 3.25** You will need to produce similar information should the MWC have cause to investigate or reinvestigate the complaint.

POSSIBLE COURT PROCEEDINGS IN THE EVENT OF A COMPLAINT

- 3.26** A person who is dissatisfied with your actions as intervener also has recourse to the sheriff. An application to the sheriff may be made by any person claiming an interest in the property, financial affairs or personal welfare of the adult. You can also apply to the sheriff for directions under section 3(3).
- 3.27** The sheriff may dismiss such an application from a person challenging your actions, or may give the applicant or yourself directions. Everything will depend on the case which is put to the sheriff and his or her view of what is required by the principles in the situation which has been set out.
- 3.28** If necessary the sheriff can vary or recall the intervention order (for further details see chapter 7).

Chapter 4



OBTAINING A GUARDIANSHIP ORDER

This chapter provides information and guidance on:

- what a guardianship order is
- statutory requirements
- general powers that may be granted
- circumstances when an application may be appropriate.

Note: Guidance for local authorities on the use of guardianship is provided in the Code of Practice for Local Authorities in exercising their functions under the Act.

WHAT IS A GUARDIANSHIP ORDER?

- 4.1 A guardianship order gives authority to act and make specific decisions over the long term on behalf of an adult who is unable to do so for him/herself. The powers granted may relate to the person's money, property, personal welfare and health. An application can be made for a financial and/or welfare order depending on the needs of the individual. The application, which must be accompanied by certain reports is made to the sheriff court for the area where the person lives or has property. The sheriff decides if the individual will benefit from having a guardian and on the suitability of the person or persons who wish take on the duty of guardianship. Once granted the order is registered with the OPG and can then be put into operation. **Annex 2 sets out the requirements for making an application** for an intervention or guardianship order. The process is the same for both types of order.

STATUTORY REQUIREMENTS

Sheriff's power to make guardianship order

- 4.2 Section 58(1) provides that the sheriff may grant the application, if:
- he or she is satisfied that the adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare, and is likely to continue to be so incapable; and
 - no other means provided by or under the Act would be sufficient to enable the adult's interests in his property, financial affairs or personal welfare to be safeguarded or promoted.

The default period of guardianship is 3 years although the sheriff has discretion to extend this period (including an indefinite period) or reduce it (section 58 (4)). The Act provides for renewals of guardianship when the approved period is coming to an end. For further information on renewals see chapter 7.

WHO CAN BE A GUARDIAN?

4.3 Under section 57(1) of the Act, the following individuals or organisations may apply:

- **anyone with an interest in the adult** (normally the person's carer, i.e. family member or friend), or professional person, such as a solicitor or accountant. Only a named individual or individuals can be appointed as a guardian (this could also be a named officer in a voluntary organisation). An application may be made for a joint and/or a substitute appointment – see paragraphs 3-9 below).
- **Local Authority** – the only exception to the above is in relation to welfare guardianship where the local authority may apply and nominate the chief social work officer (CSWO).

Under section 57(2) of the Act, the local authority has a duty to apply where it appears to the local authority that:

- the adult is incapable in terms of section 58(1)(a) and (b); and
- no application has been made or is likely to be made for guardianship; and
- guardianship is necessary for the protection of the property, financial affairs or personal welfare of the adult.

Note: It is quite possible under the Act for the applicant and the person named in the order to be different people. Example: a family member may be willing to be nominated, but may not feel able to make the application. In such circumstances the local authority has the discretion to carry out the technical business of applying for the order, obtaining the necessary reports and appearing before the sheriff. However, the local authority will only consider this if it agrees that the guardianship order is necessary and there is no one else willing or able to make the application.

4.4 The local authority is not allowed to act as financial guardian itself, but, where an order is necessary, and where no application is being made by anyone else and no one else is willing to be nominated, the local authority will have to find a suitable person to nominate. This is usually a solicitor or accountant.

For further details of the duties on local authorities see Code of Practice for Local Authorities exercising their functions under the Act.

- **the adult** him or herself can apply for guardianship and nominate someone to become a guardian in respect of a specific decision or action he/she lacks the ability to take.
- **The court – in criminal proceedings.** Under the Criminal Procedure (Scotland) Act 1995, a court may make a guardianship order where it considers that it would be appropriate to do so and where an order with the same powers is not already in place.

Joint guardians and substitute guardians

- 4.5** It is possible (sections 62 and 63 of the Act) to apply for the appointment of joint or substitute guardians. This might be suitable if you are concerned about your ability to be available at all times to the adult; or you feel that someone else may have more expertise in relation to the exercise of certain powers, for example, property management.
- 4.6** The sheriff will normally only appoint as **joint guardians** parents, children or siblings of the adult. However, if he/she is satisfied that in the circumstances it is appropriate to appoint someone else as a joint guardian he/she can do so. A special case would need to be made for the appointment of a non-relative as joint guardian. For example, you might want to be a joint guardian with personal welfare powers, while financial guardianship is exercised by a professional person.
- 4.7** Where the guardianship order relates to both financial affairs and the personal welfare of the adult and **joint guardians** are to be appointed (see below), the chief social work officer (CSWO) may be appointed guardian in relation only to the personal welfare of the adult.
- 4.8** If an application seeks the appointment of one or more joint guardians, the accompanying report will need to cover the suitability of each of them.
- 4.9** Joint guardians are jointly and severally liable for each other's actings. This means that each is fully responsible for the decisions and actions of the other. It is therefore important that each joint guardian should make sure that the others do not act outwith their powers or misuse them. There is an obligation to consult other joint guardians on the exercise of your powers, unless you have agreed in advance that consultation on some aspect is unnecessary or consultation is impracticable in certain circumstances.



4.10 Substitute guardians are provided for under section 63. The substitute guardian is an individual appointed to act as guardian in the event of the original guardian becoming unable to act. An application for the appointment of a substitute guardian may be made at the same time as, or separately after, the original application. The substitute guardian can be an individual or the CSWO. For example, if the original application nominates a relative, but the ability of the relative to continue to act during the full term of the guardianship order is in doubt, the original application may nominate the CSWO as substitute guardian. Note that this would only be in agreement with the local authority and happen in unusual circumstances). Alternatively, if the original guardian lost capacity, an application for a substitute could be made at that stage. This will avoid a fresh application for guardianship having to be made before the expiry of the original term of the order with new reports, etc. The appointment of a substitute (other than the CSWO) is subject to a ‘suitability report’ (see Annex 2). The powers of the substitute guardian and the expiry date of the appointment would be the same as in the case of the original guardian.

4.11 If, for example, you are concerned that your own health may fail before the term of your guardianship expires, you might like to consider asking for a substitute guardian to be appointed from the outset.

Financial Guardians - supervision by Public Guardian (Scotland)

4.12 Many guardianship orders will involve the adult’s property or financial affairs. Under section 6(2)(a) of the Act, if you apply to be a financial guardian you will be supervised in the exercise of your functions by the Public Guardian. The complexity of the requirements will vary according to the size and complexity of the adult’s estate.

Welfare Guardians - supervision by the local authority

4.13 Local authority supervision is similarly automatic for welfare guardians under section 10(1)(a). Supervision should be seen as a support and help in exercising your powers and is discussed further in chapter 6.

POWERS OF GUARDIAN - GENERAL PROVISIONS

- 4.14** An application for guardianship must specify the powers sought in the guardianship order. The principles must be satisfied for each power sought. The Act allows wide flexibility. Where adequate arrangements are already in place to deal with particular matters these should not be displaced by the guardianship order unless there is good reason for doing so. Section 64(1) makes some general provisions. In particular, an order appointing a guardian may confer on him or her:
- power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the order;
 - power to deal with all aspects of the personal welfare of the adult, or with such aspects as may be specified in the order;
 - power to pursue or defend an action of declarator of nullity of marriage, or of divorce or separation in the name of the adult;
 - power to manage the property or financial affairs of the adult, or such parts of them as may be specified in the order;
 - power to authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.
- 4.15** A guardian shall (unless prohibited by an order of the sheriff, and subject to any conditions or restrictions specified in such an order) have power by virtue of the appointment to act as the adult's legal representative in relation to any matter within the scope of the power conferred by the guardianship order.
- 4.16** A guardian with powers over property and financial affairs shall, subject to certain restrictions, be entitled to use the capital and income of the adult's estate for the purpose of purchasing assets, services or accommodation so as to enhance the adult's quality of life. Such guardians should consider whether the adult is entitled to other forms of financial support to assist in the cost of providing services or accommodation. It will be good practice to involve the adult, the adult's family and carer to ensure appropriate claims are made.



Restrictions on the powers that may be conferred on a guardian

- 4.17** A guardian does not have the power to consent to marriage or to make a will on behalf of an adult.
- 4.18** A guardian cannot have the power to place the adult in a hospital for the treatment of mental disorder against his or her will or consent on behalf of the adult to any form of treatment being given under sections 234, 237, 240, 242, 243 and 244 of the Mental Health (Care and Treatment) (Scotland) Act 2003 or prescribed in The Adults with Incapacity (Specified Medical Treatment) (Scotland) Regulations 2002 made under section 48(2) of the Act which came into force on 1 July 2002.
- 4.19** Other statutes or rules of law may preclude a guardian from exercising certain powers. For example the law on applications to acquire or renounce UK nationality require the adult him or herself to be of ‘full capacity’, which is normally interpreted as meaning that the adult must have some understanding of the meaning and effect of such an application. If you are in doubt as to what powers a guardian can exercise, you should seek legal advice.

EFFECT OF GUARDIANSHIP ORDER

- 4.20** Section 67 provides for the effect of the appointment and transactions of a guardian.
- 4.21** Under section 67(1), the adult shall have no capacity to enter into any transaction which is within the scope of the guardian’s powers unless the guardian has authorised the adult to carry out the transaction. Where a third party is aware that the guardian has authorised the transaction it will not be void only on the ground that the adult lacked capacity in relation to the transaction. The adult’s capacity in respect of matters not covered by the guardianship order is unaffected.
- 4.22** Under section 24(2), the authority of an attorney comes to an end where a guardian is appointed with the same powers.
- 4.23** Under section 31(4), the authority of a withdrawer of funds under part 3 of the Act comes to an end on the granting of a guardianship order relating to the funds or account in question.

- 4.24** Under section 46(1)(a), managers of an authorised establishment may not manage the funds, or hold or dispose of the property, of a resident under part 4 of the Act, if a guardianship order has been granted in relation to the same matter.
- 4.25** Under section 49(1), if the medical practitioner primarily responsible for the medical treatment of the adult knows that an application has been made for a guardianship order in relation to the treatment, then the treatment should not be given unless it is required to preserve the life or prevent serious deterioration of the adult. This can also be applied to permit the doctor to take action under section 50 of the Act, which deals with medical treatment once the guardian has been appointed.

LIABILITY AND PROTECTION FOR THIRD PARTIES ACTING IN GOOD FAITH

- 4.26** Section 67(6) provides that a transaction for value (e.g. services provided in return for payment) between a guardian purporting to act in this capacity and a third party acting in good faith shall not be invalid on the grounds of some irregularity in the appointment, etc. Under section 79, a similar protection is also extended to a third party acquiring in good faith and for value a title to any interest in heritable property.
- 4.27** Under section 67(4) a guardian is personally liable if he or she acts without disclosing that he or she is acting as guardian or if he or she exceeds the authority conferred by the order. But if the liability arises only from non-disclosure, the guardian can be reimbursed from the adult's estate for any claim against him or her personally in order to safeguard the guardian from personal loss as a result of accidentally forgetting to disclose the capacity in which he or she is acting.

REIMBURSEMENT AND REMUNERATION OF GUARDIAN

- 4.28** Section 68(1) provides that a guardian may recover from the estate of the adult the amount of such reasonable outlays as he or she incurs in doing anything directed or authorised under the order.
- 4.29** Section 68(3) provides that the local authority shall meet the cost of any application which it makes in respect of welfare guardianship and shall not be entitled to recover the cost from the estate of the adult. However in the case of an application for financial guardianship made by the local authority, it shall be entitled to reimbursement from the adult's estate. If there is a combined application, the sheriff shall apportion the cost as he or she thinks fit.

- 4.30** Under section 68(4) a non-local authority welfare guardian can only receive remuneration where special cause is shown to the sheriff at the time of making the application. For example, this might be where a voluntary organisation employee is appointed as welfare guardian, or where the private individual has to travel a distance to visit the adult.
- 4.31** Where the CSWO is appointed welfare guardian, there is no entitlement to remuneration.
- 4.32** A financial guardian is entitled to remuneration. Remuneration and the amount of outlays to be allowed are fixed by the Public Guardian and may be appealed to the sheriff.

REGISTRATION AND NOTIFICATION OF ORDERS

- 4.33** Under section 58(7) the sheriff clerk must send a copy of the order to the Public Guardian who must register it.
- 4.34** The Public Guardian (Scotland) must notify the adult (unless the court has directed notification not to be given under section 11), the local authority and the MWC (where the adult's incapacity is a result of mental disorder) and the order relates to the adult's welfare.
- 4.35** Once you have received a copy of the certificate from the Public Guardian you can take the decision or action authorised in the order, unless, in the case of a financial order, you were required by the sheriff to find caution before acting. The sheriff has the discretion to dispense with the requirement for caution and allow the Public Guardian to accept alternative forms of security (which if required would need to be provided before acting).

A GUIDE TO FACTORS TO CONSIDER BEFORE MAKING AN APPLICATION

Circumstances in which you might wish to become a guardian

4.36 As a private individual you may wish to become a guardian because, for example:

- You are the adult’s carer, relative or friend, and have become aware that the adult can no longer act or make decisions to safeguard or promote his or her interests in financial affairs, property, personal welfare or health care. This circumstance might arise, for example, where the person has severe dementia or severe acquired head injury or stroke.
- You already have powers in relation to the adult as an attorney or withdrawer, but the scope of your powers is insufficiently wide to enable you to take actions or decisions on behalf of the adult in a range of situations that regularly occur.
- You are, for example, the parent of a young person with learning disability and will need to take some or all important decisions on behalf the person in the long term. Section 79(a) of the Act allows for a guardianship order to be applied for in the **three month period prior to a young person’s sixteenth birthday** and for that order to come into effect on the person’s sixteenth birthday.

For further details see: ‘Guardianship and Intervention Orders – making an application. A Guide for Carers’ – details in Annex 2.

4.37 As someone with a professional involvement with the adult, you may wish to become a guardian (or in the case of a social work officer, you think the CSWO should be appointed guardian), or may identify a need for someone else to apply for guardianship, because, for example:

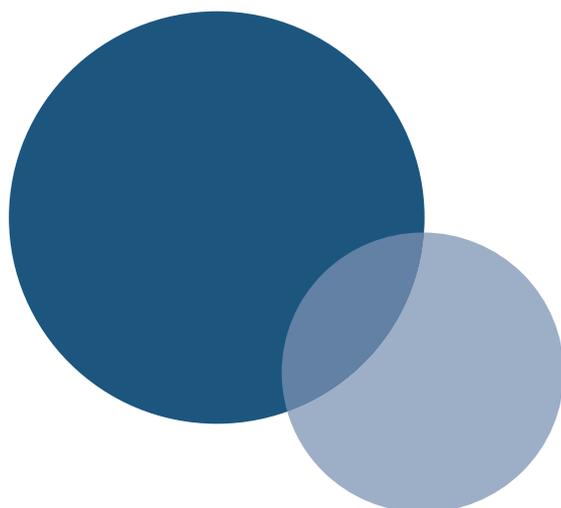
- you are already involved in providing assessment and care management for the adult, and the adult’s incapacity is preventing a complex or unpredictable range of needs being met;
- you are already the adult’s attorney, but the scope of the powers granted to you by the adult is inadequate in relation to a variety of matters that are coming before you or are likely to come before you in the near future.

4.38 A local authority's involvement in applications for guardianship will normally stem from assessment and care management procedures and will normally relate to personal welfare needs which have been identified through those procedures.

- In the case of guardianship dealing purely with property and financial matters there might be no local authority involvement since there is no need for a social work report to support such an application. However it is likely that the need for financial guardianship will come to light through assessment and care management procedures, for example if a person with moderate means requires to be moved into residential care. In such a case, the CSWO may not be appointed guardian, but if guardianship is the only way to deal with the management of the adult's estate, and no-one else is applying, the local authority has a duty to make the application. This will require the local authority to identify someone prepared to take on the role of financial guardian.
- The identification of a need for welfare guardianship could stem from the involvement of the **criminal justice team** with the adult if he or she has been prosecuted or diverted from prosecution. A court may, instead of sentencing an offender in criminal proceedings, make a guardianship order, under amendments made by the Act to the Criminal Proceedings (Scotland) Act 1995.

Further guidance for local authority officers on applying for guardianship orders is given in the code of practice for local authorities exercising functions under the Act.

Annex 2 provides detailed information on requirements for making an application for a guardianship or intervention order.



ADVISABILITY OF SEEKING ADVICE - WELFARE GUARDIANSHIP

Local Authority - Social Work

4.39 Given that the local authority will be required to prepare a report in connection with an application for guardianship relating to personal welfare, it would be good practice to consult the appropriate social work office informally if you think you want to apply. The adult may already have a social work officer, in which case that officer should be approached. If he or she does not, it would still be advisable to seek social work assistance in reaching your decision whether or not to apply, to avoid possible later difficulties when the appropriateness of your application has to be assessed against a tight deadline. You should in the first instance contact your local social work office whose address can be found in the telephone book under the local authority for your area.

MWC

4.40 You may also wish to contact the MWC if the incapacity of the adult is as a result of mental disorder. If the proposed guardianship order is likely to involve the delivery of services, an early approach to the bodies or agencies expected to deliver the services would be well advised.

ADVISABILITY OF SEEKING ADVICE - FINANCIAL GUARDIANSHIP

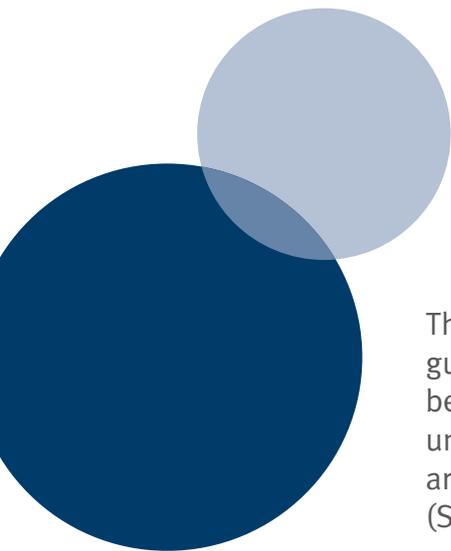
Office of the Public Guardian (Scotland) (OPG)

4.41 The Public Guardian has a responsibility under the Act to support and supervise financial guardians in the exercise of their functions. If you are in any doubt as to what will be involved in becoming a financial guardian, it would be a good idea to consult informally with the OPG before applying, if the order will involve property or financial affairs.

CRITERIA FOR SEEKING GUARDIANSHIP

4.42 The criteria for seeking guardianship are:

- the adult's incapacity; and
- there being no other means under the Act or other appropriate legislation to achieve the necessary result.



The principles provide a guide to deciding whether an application for guardianship is necessary. For example, welfare guardianship may not be the least restrictive intervention necessary to benefit someone who is unable to consent to community care services. Where certain conditions are met the local authority can use its powers under the Social Work (Scotland) Act 1968 to provide services.³

4.43 Bearing this in mind, the need for guardianship can be determined by applying the following reasoning process:

- What is the adult's current situation regarding personal welfare and/or property and financial affairs?
- Consideration should be given as to what needs of the adult are not being met and what changes should be made to the current situation to take account of the adult's needs. The principles must be applied, i.e. benefit to the adult, minimum intervention, taking account of the adult's past and present wishes and feelings, and consultation with nearest relative, primary carer, named person and anyone else with an interest in the adult's personal welfare or property and financial affairs.

For example, you should ask yourself whether the person would want something to be done about his/her situation, if capable. A brief guide to communicating with the adult is provided in Annex 1. You should also consult certain other people on whether they think that guardianship is necessary to benefit the adult and whether they can think of any less restrictive option.

- In some cases the adult's wishes and feelings may not be a very good guide to what is needed.

For example, an adult with severe mental illness may be suicidal; or wish to spend all his or her money; or an adult with a learning disability may be over-anxious to please a particular relative or friend, or not understand the value of his or her own possessions. You will have to explain in applying for guardianship in such a case, why you have decided that the adult's own wishes and feelings are not a good guide to what should happen.

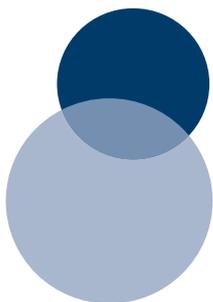
- In some situations, the adult may accept the need for guardianship to protect him or herself against poor judgement which is directly caused by incapacity.

³ Scottish Executive Circular CCD5/2007 Guidance for local authorities: provision of community care services to adults with incapacity.

- Has the adult sufficient capacity to take decisions and action him or herself to meet the needs, e.g. appoint an attorney to take the necessary decisions? An adult may be capable of understanding his or her limitations and the significance of appointing an attorney even if he or she is not capable of actually acting or taking decisions. This could be a suitable course in the case of someone with a relapsing mental illness, as a less restrictive alternative to guardianship.
- If the adult lacks capacity to appoint an attorney, is there anyone already authorised to take the necessary decisions or action on behalf of the adult? If there is such a person or persons, is he or she, or are they, able and willing to take the necessary decisions or action? This may require you to clarify in your own mind any doubts you have about someone who is already exercising management or decision making powers on behalf of the adult.
- If there is no-one already authorised, or you have concerns about the ability of someone already appointed (such as attorney or withdrawer) to take the necessary action or decision, should someone be appointed with new powers?

For example, your relative may have appointed a financial attorney at a time when he or she had modest means. The relative's estate may have increased, for example by inheriting a house, and you have doubts about the willingness or competence of the financial attorney to take on responsibility for selling the house and investing the proceeds for your relative's benefit.

- Could the necessary powers be exercised by you or someone else under an intervention order (see part 2 of this code). This would normally be less intrusive than guardianship. Moreover an intervention order would offer the possibility of trying out less restrictive measures before more restrictive measures are deemed necessary. Guardianship is likely to be more suitable where there are several issues to be dealt with and where there is likely to be a need for continuing intervention in the adult's affairs and flexibility is required to respond to new situations without having to go back repeatedly to court.
- Do you have the necessary knowledge and skills to exercise the powers if you are authorised to do so? Even if you do, might it be in the best interests of the relationship between you and the adult for someone else to be guardian?



NATURE OF THE GUARDIANSHIP ORDER TO BE SOUGHT

4.44 It will be important in seeking guardianship to specify in terms what powers are sought. The **principles** should be applied to the framing of the order. In particular:

- The precise order sought should **benefit** the adult and there should be no reasonable way of achieving the benefit without the intervention. The applicant must be able to demonstrate that alternatives have been considered and give reasons for rejecting them.
- The precise order sought should be the **least restrictive option** in relation to the freedom of the adult, consistent with the purpose of the intervention.

For example, if guardianship is sought to move an adult into residential care, it should be demonstrated that other options, such as the adult's continuing to live in his or her own home with an enhanced package of support, have been considered and rejected.

Some powers which you may wish to seek (e.g. to move the adult into a residential care home or attendance at a day centre) may not be able to be implemented unless the adult has been assessed by the local social work department as needing the service to which the power relates. It may be best to discuss this beforehand with the officer from the social work department providing the report to accompany the application or the adult's social worker or care manager if he/she has one.

- Account must be taken of the **adult's past and present wishes and feelings**. These must be ascertained in whatever way is appropriate and practicable in relation to the particular adult. See Appendix 1.
- The applicant must be able to report the steps which have been taken to ascertain the past and present wishes and feelings of the adult about the order being sought and any possible alternatives. The adult will be able to challenge this aspect of the application, as will others with an interest.
- It will be particularly important to be clear about the sources of evidence for the adult's past wishes and feelings. Guidance on obtaining the views of an adult with communication difficulties is set out in the Appendix 1. Where the adult cannot communicate present wishes and feelings despite every effort being made a spectrum of views should be obtained. Undue reliance must not be placed on information from one or a restricted number of relatives and associates.

- Account must be taken of the views of the nearest relative and primary carer, the adult's named person and of any attorney and anyone else the sheriff has directed should be consulted, including any views expressed on behalf of the adult by a person providing an independent advocacy service, and any other person having an interest in the welfare of the adult or the proposed intervention, in so far as it is reasonable and practicable to do so.

ANTICIPATE THE POWERS THAT YOU ARE LIKELY TO NEED

Financial guardianship

4.45 You should try to foresee all the property and financial affairs which may need to be managed for the particular adult. These could include in particular power to:

- have vested in you any right of the adult to deal with, convey or manage heritable property (land or buildings);
- open, close and operate any account containing the adult's funds;
- claim and receive on behalf of the adult all pensions, benefits, allowances, services, financial contributions, repayments, rebates and the like to which the adult may be entitled; and vary or appeal arrangements;
- deal with the adult's income tax;
- pay all proper debts and liabilities due by the adult;
- instruct or vary the investment of the adult's estate;
- make any necessary decisions in relation to any business belonging to the adult;
- borrow money on behalf of the adult;
- pursue, defend or compromise any legal action or other claim on behalf of the adult involving a claim for property or money;
- obtain and pay for any goods or services which are of benefit to the adult;
- have access to relevant confidential information to which the adult would have been entitled to have access.

Where the adult's affairs are very simple or the estate modest

- 4.46 Where the adult's affairs are very simple or the estate modest, you may feel that it would be better not to ask for an elaborate list of powers but only those which are immediately necessary to improve the management of the estate. In these circumstances guardianship may not be the least intervention necessary to benefit the adult and you should consider whether an application for a financial intervention order or application to the OPG to Access Funds might not be more appropriate.

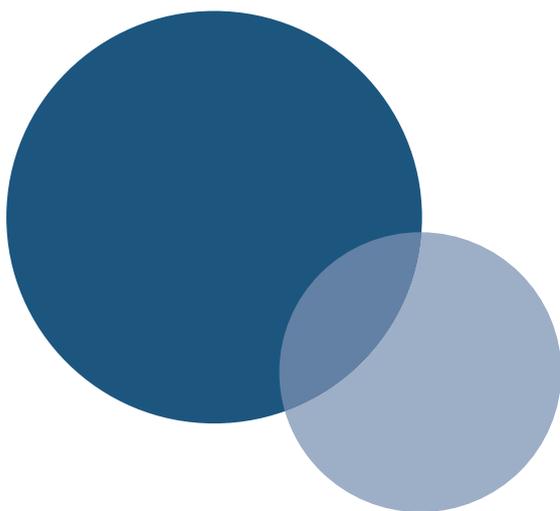
Special provisions where guardianship relates to heritable property

- 4.47 Section 61 makes special provision in relation to a guardianship order which vests in the guardian any right of the adult to deal with heritable property, e.g. acquiring or disposing of a house, or renouncing or assigning the tenancy of a shop held by the adult on a long lease. In such a case, the application will have to specify each property affected by the order in such a way that it can be identified on the Register of Sasines or Land Register.

Note: that these are only examples of powers that might be included. In any particular case, some powers may be inappropriate and others may need to be added.

Safeguarding the adult's assets

- 4.48 Under section 58(6), the sheriff may require a financial guardian to find caution. This is an insurance bond to safeguard the adult from loss caused by the actions of the person authorised under the order. The sheriff may dispense with caution or may instruct the Public Guardian to accept an alternative form of security instead of caution (for example, to consign a sum of money through the Accountant of Court).





Direction waiving requirement for management plan

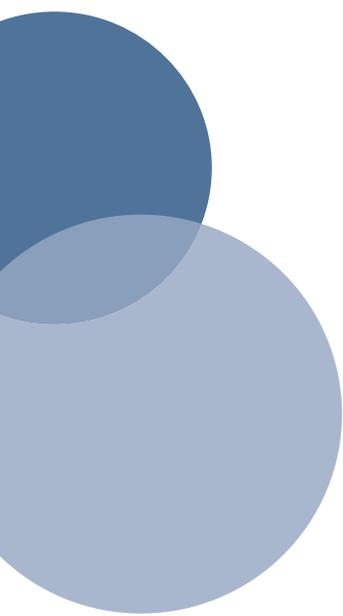
- 4.49** You may also consider that the management and accounting requirements of the Act are unduly complex and onerous, given the size of estate and the simplicity of the affairs involved (see Part 5 for guidance on the normal requirements). You may decide at this stage to ask the sheriff to make a direction waiving the requirement for a management plan to be submitted to the Public Guardian. Once you have been appointed the Public Guardian has discretion to waive certain other requirements, for example, to dispense with the need for an inventory of estate or accept something else as an alternative. This might be where the estate is small or if the guardian has limited powers. In most cases however, an inventory will be needed as it provides a clear picture of the estate under the guardian's control at the date appointed.

Welfare guardianship

- 4.50** You should assess the immediate need for specific welfare decisions which need to be taken on behalf of the adult and consider what decisions may be needed in the foreseeable future that the adult lacks the capacity to make for him/herself. These could include in particular power to:
- decide where the adult should live;
 - apply for a community care assessment for the adult;
 - consent to community care services;
 - apply to receive and manage self-directed support (previously known as direct payments) from the local authority social work department;⁴
 - have access to personal information concerning the adult, held by any body or organisation, such as medical records or personal files held by social work services;
 - consent or withhold consent to medical treatment for the adult, where not specifically disallowed by the Act;⁵
 - arrange for the adult to undertake work, education or training;

⁴ National Guidance on Self-Directed Support (4 July 2007) – Annex B – ‘Who can receive direct payments?’ <http://www.scotland.gov.uk/Publications/2007/07/04093127/0>

⁵ Part 5 of the Act provides and qualifies a general authority under which a medical practitioner may give treatment to an adult. Where you have relevant powers, and the medical practitioner primarily responsible for the adult is aware of this, the authority to treat does not apply, except where it has not been reasonable and practicable for the doctor to obtain your consent. However, you should note that, even where you and the doctor agree, the Act gives a right to ‘any person having an interest in the personal welfare of the adult’ to appeal to the Court of Session about the medical treatment in question. The Act disallows placing the adult in a hospital for the treatment of mental disorder against his or her will; and consent on behalf of the adult to certain medical treatments specified in regulations.

- 
- take the adult on holiday or authorise someone else to do so;
 - consent to the adult's participation in research, in accordance with safeguards set out in Part 5 of the Act;
 - provide access to the adult for medical treatment, dentistry etc. where this will benefit him or her;
 - make decisions on the adult's dress, diet and personal appearance;
 - make decisions on the social and cultural activities that the adult may pursue;
 - pursue, defend or compromise any legal action on behalf of the adult involving his or her personal welfare;
 - decide with whom the adult should or should not consort.

4.51 You may not need to exercise all the powers that you are given, for example to support a legal action on behalf of the adult. Either the occasion may not arise to exercise particular powers, or different options for the provision of services may be forthcoming. You may find that when you **apply the principles**, the exercise of your powers would not be justified in a particular situation because the adult is able to act for themselves. This will be particularly relevant where the person has a chronic mental illness with fluctuating capacity.

DEALING WITH CONFLICTS OF INTEREST

4.52 You should be aware of any possible conflict of interest and be ready to discuss these with the Mental Health Officer (MHO), social work officer or anyone else preparing a report on your application. Conflicts of interest may arise because of the close relationships that are likely to exist between the adult and those seeking to intervene in his/her affairs. They may arise between yourself and the adult or yourself and other relatives and associates of the adult. The key to dealing with possible conflicts is to apply the principles. It may also be helpful to seek an independent view on the appropriate way forward. If there is likely to be an ongoing conflict you could consider whether an application to the sheriff for an order or directions under section 3 of the Act would resolve matters.

4.53 If you are close to the adult in another capacity such as relative, or carer this could create a conflict of interest between your personal interests and fiduciary duty to the adult.

For example you may stand to inherit money or property under the adult's will but financial guardianship would involve incurring expenditure from the adult's estate to benefit the adult, which would have the additional effect of eroding your inheritance.

- 4.54** It is quite reasonable and proper for a guardian sometimes to take action which would benefit both him or herself and the adult. A financial guardian living with the adult could for example, spend some of the adult's resources on home improvements to benefit both of them.
- 4.55** There are a number of ways of examining this issue. Firstly, the author of the report will want to consider whether the intervention will in fact benefit the adult, and whether the benefit could be achieved in any other less restrictive way. This may not be straightforward because it may be a case of balancing different benefits.

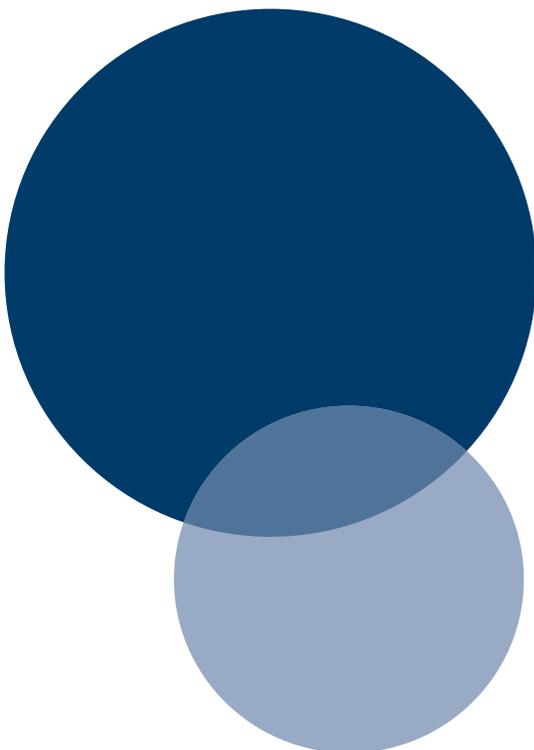
For example, the adult's welfare could be undermined where a carer has difficulty with stairs but the adult is able bodied and could climb stairs and get into dangerous situations out of reach of the carer. A move to more suitable accommodation would benefit the carer, but would also allow the adult to continue to be cared for at home.

This balancing of different benefits will be particularly important if the adult is resisting guardianship or the carer him or herself has concerns about the level of accountability involved.

- 4.56** You can expect, therefore, that the author of the report on your application will consult the adult to ascertain, if possible, whether the intervention is consistent with his or her wishes and feelings and assess whether there is any question of your having exerted undue influence on the adult. The report writer will also consult relevant others and may become aware through this that there is a conflict of interest or views between yourself as applicant and other relatives or associates of the adult.
- 4.57** If you are not sure how to deal with conflict of interest, there are a number of options you could pursue. These would include:
- involving an independent advocacy project to support the adult in expressing his/her views and wishes in discussing the matter with you and with the local authority;

- consulting the Public Guardian, where property and financial affairs are concerned;
- consulting the local authority or MWC where personal welfare matters are concerned;
- engaging an independent solicitor to represent the interests of the adult in discussing the matter with you and the local authority. (Request information about entitlement to legal aid to meet legal fee);
- inviting the sheriff to make consequential or ancillary orders, or provisions or directions under section 3 of the Act. For example you could ask the sheriff to place limits on the powers you are seeking, which cannot be exceeded without some further supervisory or judicial procedure.

4.58 It may be that after consideration of all these factors the MHO or social work officer will write an adverse report on your application. It would not be good practice for the officer to do this without discussing the matter with you first and proposing alternative plans to protect and safeguard the adult's interests. You should ask for these points to be provided in writing.



Chapter 5



EXERCISING FINANCIAL GUARDIANSHIP

This chapter sets out guidance for single and joint guardians on:

- the duties on financial guardians
- how to proceed
 - consulting the adult and others
 - preparing an inventory of the adult's estate
 - preparing a management plan
 - keeping records
- the ongoing functions of a financial guardian
- what to do if there is a conflict of interests
- what happens if there is a complaint against you.

DUTIES ON FINANCIAL GUARDIANS

5.1 This section sets out the statutory duties which you, as a financial guardian, are expected to carry out in exercising your powers. If challenged you should have no problem justifying your actions if you are able to demonstrate that you have acted in good faith.

- **Duty of care**

A guardian or other person acting under the Act is held at common law to owe a duty of care to an adult whose affairs he or she is managing. You must act with due skill and care in exercising the powers you have been given in relation to the adult. Where a guardian has financial powers and he or she abuses his or her position, it is possible that his or her actions may be considered as theft or fraud and the matter will be reported to the police or, if a professional person, to their supervisory body (or both as appropriate). A professional person acting under a guardianship order must demonstrate the skill and care that would be expected of a reasonably competent member of that profession.

- **Fiduciary duty (position of trust)**

A guardian has what is known as a ‘fiduciary duty’ to the adult. This means that you are placed in a position of trust with respect to the matters covered by your powers. The court has placed trust in you to exercise the powers properly.

- **Duty to apply the principles** – for details see paragraphs 4.45-50.
- **Duty to keep accounts and records** – for details see paragraph 5.64.
- **Duty of confidentiality** – for details see 3.1.
- **Duty to inform the Office of the Public Guardian (Scotland) of any change in circumstances** – for details of requirements see paragraph 5.70.

GENERAL REQUIREMENTS OF FINANCIAL GUARDIANS

5.2 As a financial guardian you will not have a purely reactive role. Financial guardianship is not just a matter of waiting until someone else comes to you with a problem about the adult’s property or financial affairs.

The Act requires you to take charge of these affairs in an active way and very detailed requirements for doing this are set out in Schedule 2 of the Act as well as in the body of the Act. Schedule 2 is reproduced in full at the end of this part.

- 5.3** The sheriff and the Public Guardian both have discretion to waive certain requirements of the Act and are likely to do so if the adult's affairs are simple and the estate modest. This will be done where necessary to avoid undue expense falling on the estate and unduly burdensome requirements falling on you as guardian. In applying for financial guardianship you may yourself have asked the sheriff to direct that the requirement for a management plan be waived.
- 5.4** If you are unsure of what to do in specific circumstances you can contact the OPG for advice.
- 5.5** If you abuse your position, for example by using the adult's funds for your own benefit rather than that of the adult, you will be liable to make good the adult's losses. It is also possible that anyone investigating your actions may consider such use as theft or fraud and report the matter to the police or, if you are a professional person, to your supervisory body (or both as appropriate).
- 5.6** If you live in the same household as the adult, the use of the adult's funds for an appropriate share of the household expenses that benefit you as well as the adult will not count as abuse.
- 5.7** If you act reasonably and in good faith, and in accordance with the management and accounting requirements of the Act and the Public Guardian, and the principles, you will not be liable for any breach of any duty of care or fiduciary duty.

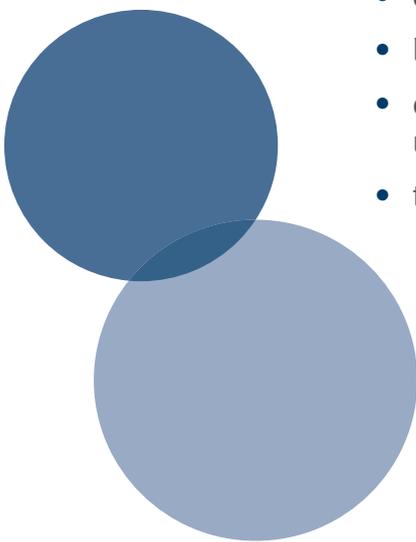
MAKE A PLAN TO IMPLEMENT THE ORDER

Initial meeting

- 5.8** As soon as possible after receiving your certificate of appointment from the Public Guardian, you should arrange to meet with the adult, his or her nearest relative, carer and anyone else with an interest to discuss what should happen next. The adult must be involved in this meeting unless there is good reason for that not to happen. This initial meeting should take place before you prepare any management plan or inventory of the estate under your control.

INVENTORY

- 5.9** As financial guardian, your first responsibility under Schedule 2 paragraph 3 will be to prepare an inventory of the adult's estate. The inventory is an essential first stage before you can prepare a management plan (see below). The Public Guardian has powers to dispense with an inventory or can require you to take other action instead of preparing an inventory.
- 5.10** The point of the inventory is so that you, and the Public Guardian, know exactly what financial and property interests the adult has that you will be responsible for managing. The inventory is only of those matters which fall within the scope of your authority as guardian, so you will need to check your powers very carefully before preparing the inventory. If in doubt you can consult the Public Guardian as to whether an item should or should not be included.
- 5.11** An inventory is basically a list of what the adult owns and may cover:
- buildings, land and other heritable property;
 - vehicles;
 - cash, bank accounts, building society accounts, ISAs, money held in the post office or a credit union, etc.;
 - moveable property such as furniture, ornaments, jewellery, household equipment, electronics;
 - stocks and shares;
 - business assets and interests;
 - debts owed to the adult;
 - life assurance policies where there is a cash return expected;
 - compensation payable to the adult now or at some stage in the future under a structured settlement;
 - the adult's income, e.g. from benefits, annuities or rents.



- 5.12** As guardian, provided it is within the scope of your authority, you have a right to obtain confidential financial information about the adult's property and financial affairs. For example, producing your certificate of appointment, you can require from a bank or other financial institution, statements of the adult's accounts or deposits.
- 5.13** In the course of compiling an inventory you may need to do some research by asking relatives, a solicitor, an accountant or a bank manager for information about the adult's affairs.
- 5.14** For all valuable items that it appears the adult owns, you should check that there is some proof of ownership, for example in the case of heritable property, title deeds or a land certificate; in the case of a vehicle, the registration document.
- 5.15** The Public Guardian will prescribe the form and the information to be contained in the inventory and will issue a form to you along with your certificate of appointment.
- 5.16** You should submit the inventory as soon as possible but in any event within 3 months from the date of registration of your appointment, unless the Public Guardian allows a longer period.

MANAGEMENT PLAN

- 5.17** As financial guardian, you must submit a management plan, in draft, to the Public Guardian unless the sheriff directs otherwise, along with the inventory. You have to take account of any directions given by the sheriff when he or she appointed you with powers over the management, investment and realisation of the adult's estate. A financial guardian's powers are restricted before approval of the management plan, unless the sheriff directs otherwise, to ingathering and taking control of assets and providing necessary payments for the adult's day to day needs. It is good practice for financial guardians to have an informal plan, if the sheriff has waived the need for a formal management plan.
- 5.18** The Public Guardian will issue a form and guidance to you on how to prepare a management plan. The management plan is designed to satisfy the Public Guardian that you will be taking a proactive role in managing the adult's property and financial affairs. The primary purpose of your appointment is to benefit the adult, not to conserve the estate.

- 5.19** Section 64(5) of the Act states that the guardian shall, subject to
- (a) such restrictions as may be imposed by the court;
 - (b) any management plan prepared under paragraph 1 of schedule 2;⁶ or
 - (c) paragraph 6 of that schedule,

be entitled to use the capital and income of the adult's estate for the purpose of purchasing assets, services or accommodation so as to enhance the adult's quality of life.

- 5.20** It will, however, be necessary to exercise prudent financial management to ensure that the assets within the estate are used so as to benefit the adult for the whole foreseeable period of his or her incapacity. Benefit to the adult must be seen as relating to his or her likely means both now and in the future. It would not be sensible to use funds to procure large benefits now, at the risk of leaving the adult inadequately provided for at a later stage in life. In determining this, full account must of course be taken of the adult's realistic expectations of other income by way of pensions, state benefits, etc.

- 5.21** While you must take account of the adult's wishes in exercising your management function, you cannot be ruled by them. For example, if the adult was inclined to spend imprudently, perhaps on leisure or fashion, or on presents to please family and friends, that does not mean you have to do the same. The adult's wishes must be taken into account and some steps should if at all possible be taken towards meeting them, but benefit is the primary consideration.

REVIEW THE ADULT'S PROPERTY AND FINANCIAL AFFAIRS

- 5.22** The following good practice guidance is written mainly from the point of view of a guardian who has not had any day to day knowledge or experience of the adult's affairs but should also be used as a check by guardians who believe that they are reasonably familiar. It is good practice for all guardians to review the adult's property and financial affairs. This might involve:

- checking whether the adult owns his or her own home, whether solely or jointly, whether there is any outstanding loan, and what arrangements are in place to pay such a loan;

⁶ Schedule 2 as introduced by section 64 of the Act is reproduced at the end of this chapter.

- if the adult resides in someone else's home, whether he or she has occupancy rights by reason of being a spouse or cohabitant;
- if the adult is renting, what arrangements are in place to pay the rent and what security of tenure the adult has over the property;
- the size and location of the adult's savings and investments;
- checking what regular outgoings the adult has or is likely to have, for example bills for utilities, council tax, hire purchase or catalogue, and what arrangements are in place to pay these;
- checking what income the adult is receiving, what are the payment arrangements, and whether the adult is receiving all the benefits and other sources of income to which he or she may be entitled;
- checking what liabilities the adult may have to give financial support to other members of his or her family.

Find out if anyone else has powers over the adult's financial affairs

- 5.23** You should be aware that, as guardian, you may not be the only person with powers to intervene in the adult's affairs.
- 5.24** You should remind yourself whether there is a joint guardian and if so how the powers are distributed between you. You should always consult your joint guardian or guardians before exercising your functions unless you have already agreed that consultation is unnecessary or consultation is impracticable in the circumstances.
- 5.25** You should also check whether there is any other person with powers over the adult's financial affairs, in particular:
- Any trustees of a trust set up for the benefit of the adult, or in which the adult has an interest;
 - Any holder of a joint account with the adult;
 - Any Department for Work and Pensions appointee who will have authority to claim and receive benefits on behalf of the adult and who will also have authority to act generally on his or her behalf in respect of social security matters;
 - Anyone who has been managing the adult's affairs under arrangements involving no official appointment.

5.26 It is likely that your powers will supersede those of any such person, but you will need to check the scope of your guardianship order to make sure that you do not interfere in arrangements which are outwith your powers, or that you seek additional powers to deal with these matters.

5.27 If your powers include making necessary decisions in relation to an adult's business, you will need to consider how the adult's business should be run and administered, taking advice as necessary. You will need to ensure that you identify any partner or co-director in the business, and obtain copies of all partnership agreements and other relevant documents.

Note who has welfare powers in relation to the adult

5.28 You should note whether there is anyone who has welfare powers in relation to the adult, such as a welfare attorney or guardian or someone authorised under an intervention order. You and they should consult with each other (and you must consult any joint guardian unless you have agreed in advance not to do so). This consultation is important because you may be required to deal with the financial consequences of decisions by a person exercising welfare powers. There will also be financial decisions which will impact on the adult's welfare.

Community care services

5.29 You should also ascertain whether the adult is in receipt of community care services and how these are paid for. You should ascertain who the contact is within the local authority social work department regarding the adult's community care.

5.30 It will be a matter for any person with welfare powers in relation to the adult to ensure that the adult is receiving appropriate services. However it may fall to you as financial guardian to arrange to continue, vary or start payments for these services.

Deciding what to put in the management plan

5.31 You will need to make your own assessment of whether the adult's property and financial affairs are in a satisfactory shape. For example:

- Are current standing orders adequate to pay for any regular and ongoing expenses?
- Are funds being fully used for the adult's benefit?

- Are any surplus funds invested so as to secure a reasonable return bearing in mind the size of the funds?
- Are there benefits or other income to which the adult may be entitled and which are not being claimed?

Taking stock of the need and timescale for future changes

5.32 You should ascertain when it will become necessary to meet the adult, nearest relative, carer named person and any others with an interest to make decisions about various matters, such as:

- the renewal of any lease;
- the repayment of any outstanding loan;
- the reinvestment of any funds that reach maturity, such as a life assurance policy;
- the future support of any persons for whom the adult had accepted some responsibility;
- any possible move to residential care.

OBTAINING SPECIALIST ADVICE

5.33 Schedule 2, paragraph 5, requires you to take proper financial advice about the adult's investments or business affairs.

5.34 You should consider whether decisions require to be made now or in the near future on which you require specialist advice.

5.35 For example, if the adult has significant surplus funds, or will have in the near future, you will require independent financial advice as to how they can best be applied for the adult's benefit, for the balance of income against capital and present against future value. The Public Guardian will expect you to take independent advice if the adult's moveable estate exceeds a prescribed limit. You will need to consult the PG on the prescribed limit, which may be subject to review.

5.36 You may also want to obtain specialist advice of another kind, for example from an occupational therapist about acquiring specialist aids, equipment or services.

5.37 If the adult's financial affairs are complex, or you have to fill in financial forms such as a tax return, you may need the advice of an accountant.

- 5.38** If the question of the sale or purchase of a house or other heritable property arises, you will certainly need legal advice.
- 5.39** You will also be well advised to seek legal advice if it appears to you that the adult may have a claim against a third party for damages such as for personal injury.
- 5.40** If you are empowered to take decisions about a business belonging to the adult, you will need legal and accountancy advice.
- 5.41** If you require an accountant or a financial adviser and do not already have one you should look in the local yellow pages.
- 5.42** If you require a solicitor and do not have ready access to one, you should contact the Law Society of Scotland (see Annex 3 for details).

Updating your file

- 5.43** When you have carried out the initial review of the adult's financial affairs (see above), it would be good practice to update your file to record the following information. This may of course form part of the inventory and management plan, but you may not be required to produce an inventory or management plan. The sheriff may have dispensed with the requirement for a management plan and, in cases where the estate is small or the guardian has limited powers, the Public Guardian may dispense with the need for an inventory or allow for an alternative. In most cases however, an inventory will be required. You may find it helpful to note down the information and use this as a basis for preparing the necessary documents for submission to the Public Guardian. For example:
- list of the adult's sources of income and the weekly or monthly amounts;
 - list of the adult's outgoings and how these are met;
 - list of the adult's accounts with financial institutions, including account name and number, and address of financial institution, and if possible the amount in each account, and where and by what means any income is paid;
 - note of any loans for which the adult is liable and arrangements for paying these;
 - note of any insurance or life assurance policies held by the adult;
 - note of any bonds, shares or other investments held by the adult, and wherever possible the actual bonds or share certificates;

- note of any regular payments which the adult is liable to make in relation to dependants, such as aliment to separated spouse; or support for children whom the adult is liable to maintain; or school fees;
- list of any other people with power to intervene in the adult's financial affairs;
- note of name, address and other contact details of any person with welfare powers in relation to the adult and any officer of the social work department providing community care services to the adult;
- names, addresses and other contact details of any professional advisers with whom you will be dealing over the adult's financial affairs, such as financial adviser, accountant or solicitor;
- names and addresses and other contact details of any persons with whom you are working jointly.

PROPOSALS IN THE MANAGEMENT PLAN

5.44 The review described above should lead you to reach conclusions about what you should do with the adult's property and financial affairs and, where appropriate, to be able to formulate your proposals in the management plan. It may be that little change will be needed, but if the step has been taken of appointing you financial guardian, then that is unlikely. Your appointment probably reflects the fact that all was not going well and some major changes do need to be made.

5.45 In justifying your proposals you must apply the principles.

5.46 Firstly, you must consider whether the proposals would **benefit** the adult, and such benefit cannot reasonably be achieved without the decision or action of the type proposed.

For example, if a substantial amount of the adult's surplus funds is in a current account, it will benefit the adult in terms of maximising income to place the funds in an interest bearing account and it will not be possible to maximise income without making some change.

5.47 Secondly, you must consider whether the proposals are the **least restrictive option** in relation to the freedom of the adult, consistent with the purpose of the proposals.

Continuing the example of the account, you will wish to consider how much freedom the adult should retain to divert the funds to alternative use. If the purpose of the intervention is to maximise income, but the adult may also need access to the capital, you should not recommend tying up the funds in an account where there will be no early access or a substantial penalty for such access.

- 5.48** You also need to **take into account the past wishes and feelings of the adult**. You may also have known the adult when he or she was capable, or more capable, and have been able to ascertain his or her wishes or feelings at that time. Or you may be able to consult others. This principle does not mean you have to do exactly what the adult would have wanted. It may be that the adult was inclined to spend too much for the benefit of others or on things that were harmful to him or herself. But the adult may also have had reasoned views which should be respected.

For example, there is no point in considering that the adult invest in stocks and shares if the adult has already made it clear that he or she prefers safe investments with a lower return to more risky investments. You should also respect the adult's wishes and feelings regarding ethical investments.

- 5.49** In relation to every particular intervention that you are recommending you will also need to **take account of the present wishes and feelings of the adult so far as they can be ascertained**. In order to do this you will need to follow the guidance in Annex 1. Again, you do not have to do exactly what the adult wants, but some steps should be taken to meet his or her preferences,

For example, by agreeing that the adult should have a modest amount of pocket money to spend each week as he or she pleases, or should personally manage some aspect of his or her affairs such as taking bills in to be paid.

- 5.50** You also need to take account of the views of:
- the adult's nearest relative (or anyone nominated by the sheriff to act in place of the nearest relative);
 - the adult's primary carer;
 - the adult's named person, in so far as it is reasonable and practicable to do so; and
 - anyone else with an interest in the welfare of the adult.

You might wish to write to or hold a meeting to consult. They may also have information about the adult that would be helpful to you.

- 5.51** It is essential for you to consult any joint guardian, unless you have agreed in advance that you will not consult each other about certain matters or consultation is impracticable in the circumstances for example, because the joint guardian is seriously ill.

Check your powers

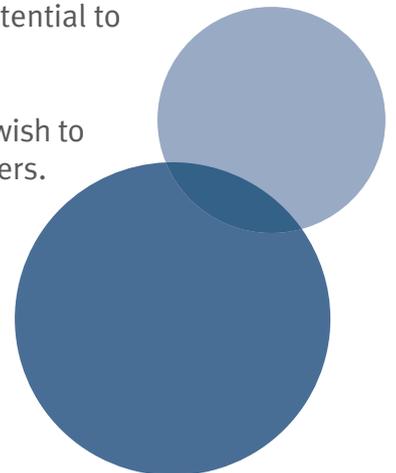
- 5.52** If you decide that some action is needed, you should check whether your powers would cover that particular type of intervention.
- 5.53** You will only be able to intervene as guardian where you have been granted the powers to do so, but it may be that only the detailed examination of the adult's estate which you will undertake once appointed will highlight areas where your powers are deficient. It is therefore worth identifying those interventions which you consider necessary but which are not included within the scope of your powers. The Public Guardian, or your solicitor, can advise you whether it is worth applying to the sheriff to vary or add to your powers or to apply for an intervention order.

Consultation on your draft management plan

- 5.54** When you have reached the stage of a draft inventory and management plan, although this is not required by the Act, it would be good practice to let the adult and relevant others see the documents in draft before submitting them to the Public Guardian. This will provide an additional check that you have not overlooked any important property, or area of management. It will also help to identify any areas of possible conflict between yourself as financial guardian and others.

For example, someone with welfare powers may think you should be spending more on present needs, rather than saving against the future or that you are not maximising the adult's potential to manage some aspects of his or her finances.

- 5.55** If you have taken professional advice, you may also wish to seek the views of your professional adviser or advisers.



- 5.56** You should highlight for the adult any proposals that will have a particular impact on his or her day to day life.

For example, if you are proposing to sell items of furniture which are not needed but with which the adult is very familiar, the adult may react badly if the items suddenly disappear. Or if the adult has decided that a particular person should have a treasured item after he or she moves into residential care, this wish should be taken into account. Also take account of relevant past wishes and feelings.

- 5.57** If the adult has communication difficulties, the guide in the Annex 1 may help.

- 5.58** You should also ascertain the views of the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, primary carer and named person. If the nearest relative is unable to respond, for example, because he or she lives far away, or does not respond to letters, then you may not be able to ascertain the nearest relative's views. Similarly, if the primary carer is unable or unwilling to give views, then you may not be able to ascertain the primary carer's views, but you should do so as far as is reasonable or practicable.

- 5.59** You are obliged to ascertain the views of any joint guardian, and of any person appearing to you to have an interest in the finances or property of the adult and who has made their views known in so far as it is reasonable and practicable to do so. Such a person is likely to have made their interest known to you and to be willing to express views.

- 5.60** Finally, you should, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he or she has concerning his or her property and financial affairs, and to develop new such skills. That means you should discuss with the adult, and put in your management plan, any proposals for delegating areas of management to the adult, such as the spending of small amounts of pocket money, paying small bills, taking responsibility for an annual clothing allowance, etc.

SUBMITTING THE INVENTORY AND MANAGEMENT PLAN

5.61 Once you have submitted the inventory and management plan, the Public Guardian may approve it or approve it with amendments. If you disagree with the Public Guardian's decision, you can appeal to the sheriff, whose ruling will be final.

5.62 Before submitting the inventory and management plan, as indicated above, you will only have power to:

- ingather and take control of the assets of the adult's estate so as to enable you, when the management plan has been approved, to deal with them.

For example, this could mean that you have to put property into your name, as a guardian on behalf of the adult, for example, a bank account – for the purpose of paying for the adult's day to day needs. Or, it could also mean that the guardian takes physical control – for example a bank card/book, stock and share certificates, antique furniture, etc., for protection, but will be unable to 'intromit'.

- make such payments as are necessary to provide for the adult's day to day needs.

5.63 The Public Guardian can, however, authorise you to exercise any function within the scope of your authority before the management plan is approved if it would be unreasonable for you to delay exercising that function.

For example, if the adult had suddenly lost capacity because of an accident, and could no longer run a business, it would not be reasonable to have to delay dealing with the adult's business until after approval of the management plan.

KEEPING RECORDS

5.64 As a financial guardian you have to keep records of the exercise of your powers. You have to satisfy the accounting requirements set out in paragraph 7 of Schedule 2. You may need the help of an accountant to prepare your accounts.

5.65 In order to ensure that accounts do not present you with undue difficulty as you reach the deadline for submission, you should keep systematic records and retain relevant documents on a file which you retain for this purpose. These might include:

- photocopies or electronic copies of any correspondence relating to the adult's property or financial affairs;
- a copy of any instructions that you give to a financial institution, utility company or other body in relation to payments by the adult or to the adult;
- invoices and receipts for any purchases incurred on behalf of the adult;
- receipts for any sales made of the adult's property;
- any correspondence with the Inland Revenue on behalf of the adult;
- any correspondence with the adult's employer or pension provider;
- any correspondence concerning insurance or life assurance policies relating to the adult or the adult's property;
- certificates or other evidence of ownership of stocks and shares;
- actual life assurance or insurance policies and valuations certificates of any particular valuable items;
- title deeds or the land certificate of any heritable property owned or acquired by the adult;
- documents relating to any loan incurred by the adult; or any insurance policy.

5.66 You must keep the adult's financial affairs strictly separate from your own and be ready to account for how you have spent funds belonging to the adult and what you have done with any payments due to the adult and made to you.

5.67 You should keep all receipts for significant purchases on behalf of the adult and any guarantees or insurance policies in respect of purchases so that you can exercise the adult's rights as purchaser to have property repaired or replaced.

ONGOING FUNCTIONS AS A FINANCIAL GUARDIAN

Make sure you can be contacted

- 5.68** You should ensure that the adult, the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, the primary carer, the named person the welfare guardian (if any) and any other person with an interest in the welfare of the adult, is readily able to contact you. You should make available to all of these your full contact details, including any other names by which you may be known, your preferred contact address, telephone number, fax and e-mail, your emergency contact details and the name and contact details of any other person who can get a message to you quickly. You should warn the persons who have your contact details in relation to your functions as guardian if you are likely to be unavailable for any period of time.

DELEGATION OF FUNCTIONS

- 5.69** You may expressly delegate functions and tasks to one or more persons at any time. For example a guardian may arrange for a care worker to buy food and for a daughter to pay household bills. However, you remain responsible. If you ask someone else to carry out any of your functions as guardian, you have responsibility for ensuring that this is carried out properly. Where functions are delegated to someone else you should make every effort explain this to the adult.

NOTIFYING THE PUBLIC GUARDIAN (SCOTLAND) (OPG) OF CHANGE OF CIRCUMSTANCES

- 5.70** The OPG must be informed if any of the following changes occur:
- if you or the adult changes address, you have a responsibility to notify the Public Guardian within 7 days under section 64(4) of the Act;
 - if the guardian dies, his/her personal representative should notify the Public Guardian (under section 75A). This is to ensure that the registers maintained by the Public Guardian are kept up to date;
 - if the person dies you should notify the Public Guardian;
 - if the adult regains capacity the guardianship order should be recalled and you should notify the Public Guardian of your intention (see Chapter 7);
 - if you need to resign your appointment – see chapter 7.

HOLDING REGULAR REVIEW MEETINGS

5.71 You should ensure that you meet the adult, the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, the primary carer, the named person, the welfare guardian and any other person with an interest in the welfare of the adult at appropriate intervals. The frequency of such review meetings will depend on the extent of your day to day contact with these individuals but it would normally be good practice to hold a review at least once every six months. Your management plan should disclose your proposals in this respect.

Monitor the adult's property and financial affairs

5.72 It is your responsibility, within the scope of your powers, to monitor the adult's property and financial affairs.

For example, if it is within the scope of your powers to rent out property owned by the adult, it is your responsibility to make sure that rents are collected regularly and paid to the adult and that any landlord responsibilities are carried out.

5.73 You should also check that the adult's finances remain under control, by monitoring statements of account, and ensuring that deficits are not incurred. You should take the necessary steps to avoid the adult incurring unnecessary debt.

Determining the need for changes to the management plan

5.74 Either as a result of your own monitoring, or because you are approached by the Public Guardian or someone else with an interest, you may determine that the management plan requires amendment.

5.75 The process for proposing an amendment to the management plan is similar to that you will have carried out initially. Briefly, for each proposal, you must observe the principles, check that your powers as guardian will permit you to take the action or decision in question, and record what you have done.

SEEKING THE ADVICE OF THE PUBLIC GUARDIAN

- 5.76** Although you will be given set accounting intervals by the Public Guardian, it is a good idea to contact the Public Guardian if in doubt at any time about the scope of your powers, or about the course of action you propose to take. The Public Guardian's contact details are given Annex 3. The Public Guardian has a duty to provide guardians with information and advice about the performance of their functions, when requested to do so.
- 5.77** If you cannot obtain the information you need because of inadequacy of your powers as guardian, you might refer the matter to the Public Guardian, take legal advice, seek an extension of your powers in relation to the information in question, or consider applying for an intervention order.

WHAT TO DO WHERE THERE ARE CONFLICTING VIEWS ON YOUR PROPOSALS

- 5.78** When you hold reviews with the adult, prepare in advance by consulting everyone to be involved. This will help everyone's views to be given proper consideration at the meeting. The reviews will include the adult, the nearest relative etc. Do not take action that will come as a surprise to the others but make sure that you have taken proper account of their views.
- 5.79** Despite your best efforts, however, there may occasionally be disagreements which cannot be readily resolved.

For example, there may be a dispute as to how the adult's funds should be managed, with relatives who stand to inherit from the adult being concerned to maximise the profitability of investments; while you may believe or be more influenced by someone with an interest in the adult's welfare who believes that more money should be spent on the adult's present needs.

- 5.80** In seeking to persuade others of your point of view, you should direct those who disagree with you to your statutory responsibilities as guardian, to the powers that the court has conferred on you as guardian and for which you are accountable. It will assist you if you can show that:
- you have applied the principles systematically;
 - you have balanced one principle against another in a reasonable manner.



For example, you need to consider benefit to the adult as well as minimum intervention. If someone who disagrees with you takes minimum intervention as a starting point, they may be attaching insufficient weight to the need to benefit the adult.

- You have taken account of the past and present wishes and feelings of the adult so far as these can be ascertained.
- You are aware of the need to take account of the views of the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, primary carer, named person and anyone else appearing to you to have an interest in the welfare of the adult or in the proposed intervention. But you do not need to accord undue weight to any one view. Nor do you need to follow the majority view where you have carried out your own assessment, and it does not agree with the majority.

5.81 If you are unable to persuade others to accept your judgement, you may wish to seek additional advice, for example from the Public Guardian, from a solicitor, an accountant or an independent financial adviser. If you can produce written advice that supports your decision, this may help in defending your actions.

5.82 Ultimately you may find that you simply have to insist. If you are confident in your judgement, do not back down. You would be letting the adult down if you gave in for the sake of peace; or gave up being guardian in the face of opposition.

5.83 If you still encounter difficulty you can advise those who disagree with you of their right to complain to the Public Guardian. You can also direct those who disagree with you to section 3(3) of the Act which allows them to apply to the sheriff for directions. Alternatively you can exercise your own right to apply for directions under section 3(3).

Conflict of interest affecting you as guardian

5.84 As guardian, you may be someone close to the adult in another capacity such as relative, or carer. You may find that this occasionally creates a conflict of interest between your own personal interests and your fiduciary duty. Do not let this worry you unduly. The very person who is best to be guardian may be someone close to the adult and this situation will not be uncommon.

For example, if you are living in the same household as the adult you may be in some doubt as to how far you are entitled to spend the adult's resources on general household expenses. If you or your children are destined to inherit money from the adult, you may be conscious that expenditure on the adult's welfare will diminish the residual estate.

- 5.85** In these as in all other circumstances you should observe the principles. Ask the adult's opinion and consult anyone else with an interest in the adult's property or financial affairs and welfare. If the adult cannot express an informed opinion, consider what the adult would have done had he or she remained capable.

For example, if the adult was anxious to invest for your or your children's future, then you should continue that practice, provided it is not done at the expense of the adult's current welfare needs.

- 5.86** If you are in doubt about the proper course, or find that you are being challenged, there are various options open to you. You could:
- ask an independent solicitor or someone from an independent advocacy project to represent the interests of the adult in discussing the matter with you. The expense of this can be met from the adult's resources;
 - consult the Public Guardian;
 - seek directions from the sheriff under section 3(3) of the Act.

WHAT TO DO WHERE YOUR POWERS ARE INSUFFICIENT

- 5.87** You may find that your powers are insufficient to carry out steps which become necessary. For example, the time may come to sell the adult's house so that he or she can move into residential care, but the Court may not have granted you powers to deal in heritable property. You may find that the adult has a legal entitlement, but your powers do not allow you to claim it (or alternatively to renounce it) on his or her behalf. You may find that the adult's estate has grown larger than anticipated and powers not included in the guardianship order become necessary.
- 5.88** If you find that your guardianship order is inadequate in a number of ways, for example because of drafting flaws in the original document, or a significant change in the adult's means (say, a large inheritance or settlement of damages) you may need to apply to the sheriff for a variation of your guardianship order or for an intervention order.

- 5.89 Before taking such a step you will need to apply the principles to ensure that extension of your powers is indeed justified and necessary.

WHAT IF THERE IS A COMPLAINT AGAINST YOU?

- 5.90 If someone has a complaint against you, and either does not put it to you or is not satisfied with your response, he or she has recourse to the Public Guardian. The Public Guardian has a duty to receive and investigate all complaints regarding the exercise of functions relating to the property or financial affairs of an adult made in relation to guardians.
- 5.91 The Public Guardian will contact you about any complaint received and ask you for your version of the facts. If you have applied the general principles correctly, have taken advice, have kept relevant documents such as bank statements and receipts, and have recorded your decisions and actions on a file as recommended above, you should have nothing to fear from such an investigation.

Possible court proceedings in the event of a complaint

- 5.92 A person who is dissatisfied with your actions as guardian also has recourse to the sheriff. An application to the sheriff may be made by any person claiming an interest in the property, financial affairs or personal welfare of the adult. You can also apply for directions under section 3(3).
- 5.93 The sheriff may dismiss such an application from a person challenging your actions, or may give the applicant or yourself directions. Everything will depend on the case which is put to the sheriff and his or her view of what is required by the principles in the situation which has been set out.
- 5.94 In extreme cases the sheriff can revoke your powers or some of them.

APPOINTMENT OF AN ADDITIONAL GUARDIAN

- 5.95 Joint guardians have already been mentioned. It is also possible in the course of a guardianship order for someone else to apply to be appointed an additional guardian. The role of an additional guardian is the same as that of a joint guardian, but instead of its being foreseen at the outset, a fresh application to the sheriff is needed. This follows exactly the same procedure as the original application. This means that fresh reports of incapacity will be needed if the reports which accompanied the original application are more than 30 days old.

- 5.96** If you are finding the role of guardian onerous, and someone else is giving you a great deal of support in that role and may be prepared to share it with you, then you might wish to consider asking that person to apply to be an additional guardian. Alternatively, this could wait until the time comes to renew your own appointment, to avoid the additional trouble and expense of obtaining fresh reports to support such an application.

REIMBURSEMENT AND REMUNERATION OF FINANCIAL GUARDIAN

- 5.97** As guardian, you may claim for the expenses you incur in carrying out your duties. Section 68(1) of the act provides that a guardian shall be entitled to be reimbursed out of the estate of the adult for any outlays reasonably incurred by him/her in the exercise of his/her functions.
- 5.98** When you assume your duties as guardian, you should be clear about what you are entitled to by way of expenses and/or remuneration. You may need to seek the advice of the Public Guardian or be guided by any information leaflets she issues. In dealing with the adult's finances and your own expenditure as guardian, you should keep records.
- 5.99** Financial guardians who have considerable responsibility in the managing of an adult's estate may be remunerated unless the sheriff directs otherwise. For example, a professional person such as a lawyer or an accountant may be managing a large estate using professional expertise and the firm's time. The Public Guardian will set the level of payment, taking into account the adult's resources. Accounts submitted by the guardian will be settled at a fixed time, the end of the accounting period. The Act however allows for interim payments to be made if the accounting period is long and the guardian might encounter hardship in waiting.
- 5.100** Section 69 of the Act states that the guardian will forfeit awarded remuneration if found in breach of the duty of care or fiduciary duty to the adult or of contravening any obligation imposed by the Act. The sheriff on receiving a report from any person claiming to have an interest in the property, financial affairs or personal welfare of the adult, can order the penalty of losing all or part of the remuneration.

5.101 Section 81 of the Act requires those who have powers to act on behalf of the adult, i.e. continuing attorney, welfare attorney, withdrawer, guardian, person authorised under an intervention order, managers of authorised establishments to refund to the adult with interest, any funds which they misuse. Section 82 clarifies the limits of liability of those with responsibility for an adult's financial affairs. See paragraph 1.22.

5.102 Your expenses as guardian will be an additional burden on the adult's estate. Obviously you should keep your expenses to the minimum necessary. You can discuss any concerns with the Public Guardian, remembering that the adult or anyone else with an interest may also raise the matter with the Public Guardian if he or she thinks the repayments to you are unfair.

SUPERVISION BY THE PUBLIC GUARDIAN (SCOTLAND)

5.103 The Act requires the Public Guardian to supervise financial guardians. Supervision is intended to ensure that guardians are carrying out their functions properly and, depending upon the content of the court order, may relate to some or all of your actions with the adult's estate.

5.104 Upon appointment you will be sent a certificate of appointment. This will not be issued until the Public Guardian is satisfied that any caution (insurance) or, alternative form of security required by the court has been found. You will require to lodge an accounting of your transactions with the adult's estate. The initial account will require to cover a specified period. Accordingly, the account should commence by showing a description of the estate under your control at the start of the accounting period, detail income received and expenditure incurred, and conclude showing the balance under your control at the end of the account period. The Public Guardian may in due course call for sight of bank books, invoices or other material to support the entries in your account.

5.105 The Public Guardian will inform you of the date by which you require to lodge the initial account of your financial management. Failure to lodge the account by the due date will result in the matter being reported to court and your possible removal. Any subsequent accounts required will be due on the anniversary of the first account lodged.

- 5.106** Should the Public Guardian not be satisfied with the account or records produced she will strive to resolve the matter with you but, ultimately may report her concerns to the court and seek to have your powers revoked.
- 5.107** Your account will be available for inspection by anyone with an interest in the adult's estate.
- 5.108** While under the Public Guardian's supervision you will require to obtain her approval for any gifts you propose to make from the adult's estate (see the next section for further information) or for the sale or purchase of any accommodation used or to be used as a dwelling house by the adult. The Public Guardian may also require you to obtain advice in relation to the investments retained by you on behalf of the adult.
- 5.109** If the Public Guardian considers it necessary she will consult the MWC and the local authority if there appears to be a common interest.

GIFTS

- 5.110** As financial guardian, you do not have an automatic right to make gifts out of the adult's estate. The Public Guardian is required to authorise any giving you wish to do on behalf of the adult. This is set out in section 66 which states:
- 66 (1) A guardian having powers relating to the property or financial affairs of an adult may make a gift out of the adult's estate only if authorised to do so by the Public Guardian.
- 5.111** You can apply to make a specific gift, for example a wedding present to an adult's favourite niece or you can apply for a wider authority to make recurring gifts, for example birthday presents to certain people. The application, in that instance, entails indicating what you regard as an acceptable amount to spend annually. You will obviously involve the adult, in so far as is possible, in deciding whose birthdays are to be marked and what sort of presents should be given. The same applies to Christmas presents. However, the Public Guardian will not require you to seek permission for example, for small birthday, anniversary, wedding presents of a value of less than £100 each.

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- 5.112** There is an application form for authorisation to make a gift and the Public Guardian has to notify various people of the fact that she has received an application. They are the adult, the nearest relative, the primary carer, the adult's named person and any other person who the Public Guardian considers has an interest. She has to advise them of the period of time in which they may object to the granting of the application and he has to hear any objections. The Public Guardian can, however, decide that the value of the gift is not sufficient to justify such intimations.
- 5.113** It is also possible that the proposed gift could be substantial and form part of a tax-planning strategy. The Public Guardian will require such proposed gifts to be intimated to the adult, primary carer and others with an interest and will require the guardian to clearly display the benefit being obtained by the proposal and the past and present wishes of the adult in regard to that matter.
- 5.114** If the Public Guardian decides against granting the authority to make a gift for whatever reason, in telling the guardian she must allow for a period in which the guardian can object to the refusal and the objections be heard.
- 5.115** The Public Guardian may refer an application to the sheriff for a decision if she considers it appropriate to do so. She is likely to exercise this right only if the making of a particular gift is controversial or if the guardian requests that the sheriff decides on an application or if someone has objected to the application. If the Public Guardian declines to grant an application or to put an application to the sheriff when requested, her decision may be the subject of an appeal to the sheriff.
- 5.116** The principles of the Act require you to take account, as far as possible, of the present and past wishes and feelings of the adult, but you cannot give the gift unless you have approval from the Public Guardian. If the adult is very insistent and you are not sure whether it would be right for you as guardian to make the gift in the circumstances, you could seek the advice of the Public Guardian. The Public Guardian may reassure you that the gift is one she could readily approve, but it is your decision whether to apply or not.

DEALING IN HERITABLE PROPERTY

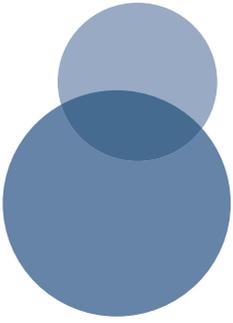
- 5.117** Special provisions apply where you obtain a guardianship order to deal in heritable property (normally land or buildings). Under section 61 of the Act you must apply to the Keeper of the Registers of Scotland to record the ‘interlocutor’ (court judgement) containing the order in the General Register of Sasines, or the Land Register of Scotland. Guidance is available from the Keeper’s Customer Services Centres (see Annex 3) or at www.ros.gov.uk.
- 5.118** Under Schedule 2 paragraph 6, if you are financial guardian with power which vests in you any right of the adult to deal with, convey or manage any interest in the adult’s heritable property, you may not decide in principle to sell or buy accommodation for the adult without the approval of the Public Guardian. The Public Guardian will give the opportunity to the nearest relative, primary carer, named person and others involved with the adult to object to such an application within a prescribed period. If no objections are received, the Public Guardian may decide the application but if she refuses, she will give you an opportunity to be heard, and you can appeal to the sheriff. If objections are received, the Public Guardian will remit the application to the sheriff whose decision will be final. She may also decide to remit the application to the sheriff even if no objections are received.
- 5.119** Having obtained agreement in principle to buy or sell accommodation for the adult, you will still have to obtain the Public Guardian’s approval for the actual price you propose to pay or accept. The Public Guardian’s decision on this will be final, but she will be willing to discuss with you any problems you are experiencing over obtaining an adequate selling price, or purchasing accommodation within the sum available.

TEXT OF SCHEDULE 2 OF THE ACT

SCHEDULE 2

Management plan

- 1 (1) A guardian with powers relating to the property and financial affairs of the adult shall, unless the sheriff otherwise directs, prepare a plan (a 'management plan'), taking account of any directions given by the sheriff in the order appointing him, for the management, investment and realisation of the adult's estate and for the application of the estate to the adult's needs, so far as the estate falls within the guardian's authority.
- (2) The management plan shall be submitted in draft by the guardian to the Public Guardian for his approval, along with the inventory of the adult's estate prepared under paragraph 3, not more than one month, or such other period as the Public Guardian may allow, after the submission of the inventory.
- (3) The Public Guardian may approve the management plan submitted to him under sub-paragraph (2) or he may approve it with amendments and the plan as so approved or as so amended shall be taken account of by the guardian in the exercise of his functions in relation to the adult.
- (4) Before the management plan is approved, the guardian shall, unless the sheriff on appointing him has conferred wider powers, have power only to –
 - (a) ingather and take control of the assets of the adult's estate so as to enable him, when the management plan has been approved, to intromit with them;
 - (b) make such payments as are necessary to provide for the adult's day to day needs.
- (5) The Public Guardian may authorise the guardian to exercise any function within the scope of his authority before the management plan is approved, if it would be unreasonable to delay him exercising that function until the plan had been approved.
- (6) The guardian shall keep the management plan under review and shall put forward to the Public Guardian proposals for variation of it whenever it appears to him to be appropriate.



- (7) The Public Guardian –
- (a) may at any time propose any variation to the management plan; and
 - (b) shall review the plan whenever the guardian submits his accounts for audit.
- (8) The Public Guardian shall notify the guardian of any variation which he proposes to make to the management plan and shall not make any such variation without affording the guardian an opportunity to object.
- (9) Having heard any objections by the guardian as mentioned in sub-paragraph (8) the Public Guardian may make the variation with or without amendment.

Directions from sheriff

- 2** Where the guardian disagrees with any decision made by the Public Guardian in relation to a management plan prepared under paragraph 1, he may apply to the sheriff for a determination in relation to the matter and the sheriff's decision shall be final.

Inventory of estate

- 3** (1) A guardian with powers relating to the property or financial affairs of the adult shall, as soon after his appointment as possible and in any event within 3 months of the date of registration of his appointment or such other period as the Public Guardian may allow, submit to the Public Guardian for examination and approval a full inventory of the adult's estate in so far as it falls within the scope of the guardian's authority, along with such supporting documents and additional information as the Public Guardian may require.
- (2) The inventory shall be in a form, and contain information, prescribed by the Public Guardian.
- (3) Errors in and omissions from the inventory which are discovered by the guardian after the inventory has been approved by the Public Guardian shall be notified by him to the Public Guardian within 6 months of the date of discovery or when submitting his next accounts to the Public Guardian, whichever occurs sooner.

- (4) The Public Guardian may dispense with the need for the guardian to submit an inventory under sub-paragraph (1) or may require the guardian to take such other action as he thinks appropriate in lieu of submitting an inventory.

Money

- 4 The guardian shall deposit all money received by him as guardian in a bank or a building society in an account in the name of the adult and shall ensure that all sums in excess of £500 (or such other sum as may be prescribed) so deposited shall earn interest.

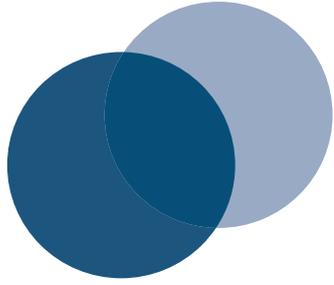
Powers relating to investment and carrying on of business by guardian

- 5 (1) Subject to the following provisions of this paragraph, a guardian with powers relating to the property or financial affairs of the adult shall be entitled –
- (a) after obtaining and considering proper advice, to retain any existing investment of the adult;
 - (b) to use the adult's estate to make new investments in accordance with the management plan prepared under paragraph 1 or with the consent of the Public Guardian.
- (2) For the purpose of sub-paragraph (1) –
- (a) proper advice is the advice of a person authorised to carry on investment business in the United Kingdom for the purposes of the Financial Services Act 1986 (c.60) who is not the guardian or any person who is an employer, employee or business partner of the guardian; and
 - (b) the advice must be given or subsequently confirmed in writing.
- (3) The guardian shall keep every investment under review and in doing so shall have regard to the following principles –
- (a) that the investment must be prudent;
 - (b) that there must be diversification of investments; and
 - (c) that the investment must be suitable for the adult's estate.
- (4) The Public Guardian may at any time direct the guardian to realise any investment.

- (5) The guardian may, subject to any direction given by the Public Guardian, carry on any business of the adult.
- (6) Any decision by the Public Guardian –
 - (a) under sub-paragraph (4) as to directing the guardian to realise investments;
 - (b) under sub-paragraph (5) as to giving directions to the guardian in carrying on the business of the adult,
 may be appealed to the sheriff, whose decision shall be final.

Purchase or disposal of accommodation

- 6 (1) The guardian shall not, without the consent of the Public Guardian –
 - (a) in principle; and
 - (b) to the purchase or selling price,
 purchase accommodation for, or dispose of any accommodation used for the time being as a dwelling house by, the adult.
- (2) On receipt of an application for consent in principle under sub-paragraph (1)(a) in the prescribed form, the Public Guardian shall intimate the application to the adult, his nearest relative, his primary carer, named person and any person who the Public Guardian considers has an interest in the application and advise them of the prescribed period within which they may object to the granting of the application.
- (3) The Public Guardian shall remit any objection under sub-paragraph (2) for determination by the sheriff (whose decision shall be final) and –
 - (a) if the sheriff upholds the objection, shall refuse the application;
 - (b) if the sheriff dismisses the objection, shall grant the application.
- (4) Where the Public Guardian proposes to refuse the application other than under sub-paragraph (3)(a) he shall intimate his decision to the applicant and advise him of the prescribed period within which he may object to the refusal; and he shall not refuse the application without affording the applicant, if he objects, an opportunity of being heard.



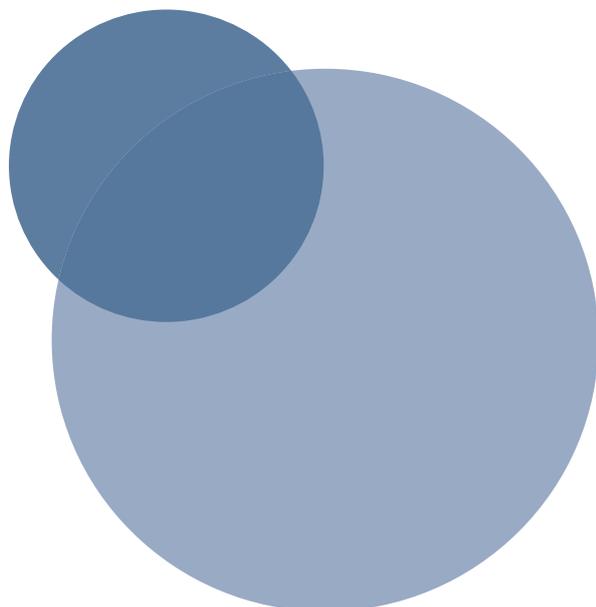
- (5) Having heard any objections as mentioned in sub-paragraph (4) or where there is no objection as mentioned in sub-paragraph (2), the Public Guardian may grant the application.
 - (6) The Public Guardian may at his own instance or at the instance of any person who objects to the granting or refusal (other than a refusal under sub-paragraph (3)(a)) of the application remit the application to the sheriff for determination by the sheriff, whose decision shall be final.
 - (7) If consent in principle to the purchase or disposal of the accommodation is given, the guardian shall apply to the Public Guardian for consent under sub-paragraph (1)(b) to the purchase or selling price.
 - (8) A decision of the Public Guardian –
 - (a) to grant or to refuse (other than under sub-paragraph (3)(a)) an application; or
 - (b) to refuse to remit an application to the sheriff under sub-paragraph (6), may be appealed to the sheriff, whose decision shall be final.
 - (9) A decision of the Public Guardian to give or to refuse consent under sub-paragraph (1)(b) shall be final.
- 7** (1) A guardian with powers relating to the property or financial affairs of the adult shall submit accounts in respect of each accounting period to the Public Guardian within one month from the end of the accounting period or such longer period as the Public Guardian may allow.
- (2) There shall be submitted with the accounts under sub-paragraph (1) such supporting documents as the Public Guardian may require, and the Public Guardian may require the guardian to furnish him with such information in connection with the accounts as the Public Guardian may determine.
 - (3) For the purposes of this paragraph, the first accounting period shall commence with the date of appointment of the guardian and end at such date not later than 18 months after the date of registration of the guardian's appointment as the Public Guardian may determine; and thereafter each accounting period shall be a year commencing with the date on which the immediately previous accounting period ended.

- (4) Notwithstanding the foregoing provisions of this paragraph, the Public Guardian may at any time –
 - (a) give directions as to the frequency of accounting periods;
 - (b) dispense with the need for the submission of accounts by the guardian; or
 - (c) require the guardian to do anything which the Public Guardian thinks appropriate in lieu of submitting accounts.
- (5) The accounts shall be in such form as is prescribed by the Public Guardian and different forms may be prescribed for different cases or descriptions of case.
- (6) Where the estate of the adult includes a business or an interest in a business that part of the accounts which relates to the business or to the interest in the business shall be accompanied by a certificate from such person and in such form as may be prescribed by the Public Guardian, certifying the accuracy of that part of the accounts.
- (7) The accounts submitted to the Public Guardian under sub-paragraph (1) (other than any part to which a certificate as mentioned in sub-paragraph (6) relates) shall be audited by the Public Guardian or by an accountant appointed by, and responsible to, the Public Guardian for that purpose.

Approval of accounts

- 8 (1) After the accounts of the guardian have been audited, the Public Guardian shall, if the accounts appear to him –
 - (a) to be a true and fair view of the guardian’s management of the adult’s estate, approve them and fix the remuneration (if any) due to the guardian;
 - (b) not to be a true and fair view of the guardian’s management of the adult’s estate, prepare a report as to the extent to which they do not represent such a true and fair view and adjusting the accounts accordingly.
- (2) The Public Guardian may approve the accounts, notwithstanding any minor inconsistencies or absence of full documentation in the accounts, if he is satisfied that the guardian acted reasonably and in good faith.

- (3) The Public Guardian shall send any report prepared by him under sub-paragraph (1)(b) to the guardian, who may object to anything contained in the report within 28 days of it being sent to him.
- (4) If no objection is taken to the report, the accounts as adjusted by the Public Guardian shall be regarded as approved by him.
- (5) Where any objection taken to the report cannot be resolved between the guardian and the Public Guardian, the matter may be determined by the sheriff on an application by the guardian, and the sheriff's decision shall be final.
- (6) Without prejudice to sub-paragraph (7), the guardian shall be liable to make good any deficiency revealed by the accounts as approved by the Public Guardian under sub-paragraph (1)(a).
- (7) Where a deficiency is revealed as mentioned in sub-paragraph (6), the Public Guardian may require the guardian to pay interest to the adult's estate on the amount of the deficiency at the rate fixed by Act of Sederunt as applicable to a decree of the sheriff in respect of the period for which it appears that the deficiency has existed.



Chapter 6



EXERCISING WELFARE GUARDIANSHIP

This chapter sets out guidance for single and joint guardians on:

- the duties on welfare guardians
- how to proceed
 - consulting the adult and others
 - keeping records
- ongoing functions as a financial guardian
- what to do if there is a conflict of interests
- what happens if there is a complaint against you.

DUTIES ON WELFARE GUARDIANS

- 6.1 This section sets out the statutory duties which you, as welfare guardian, are expected to carry out in exercising your powers. If challenged you should have no problem justifying your actions if you are able to demonstrate that you have acted in good faith.

Duty of care

A guardian or other person acting under the Act is held at common law to owe a duty of care to the adult with incapacity. You must act with due skill and care in exercising the powers you have as a welfare guardian. A professional person acting as a guardian must demonstrate the skill and care that would be expected of a reasonably competent member of that profession.

Fiduciary duty (position of trust)

A guardian has what is known as a ‘fiduciary duty’ to the adult. This means that you are placed in a position of trust with respect to the matters covered by your powers. The court has placed trust in you to exercise the powers properly.

- **Duty to apply the principles** (see paragraph 6.45)
- **Duty to keep records**

A guardians must keep records of: major decisions made and actions taken; over which they have control (see paragraph 6.43).

- **Duty of confidentiality**

There are three separate issues that arise under the heading of confidentiality. These are:

- your right to have access to confidential information about the adult;
- the use and proper disclosure of confidential information about the adult;
- your fiduciary duty (the trust placed in you) to maintain the adult’s confidentiality.

The issue of access to confidential information concerning the adult should be covered in the original guardianship order. Similarly your right to disclose information about the adult should have been covered in the original order.

Where someone holding confidential information refuses to disclose it to you and your powers do not explicitly authorise you to demand it, then you should consider whether the party in question has other duties to the adult which may override the duty of confidentiality, and if so to explain this.

For example, a medical practitioner might refuse to disclose the adult's medical history to you, but the medical practitioner may also have a duty to ensure that the adult continues with necessary medication or receives planned treatment at the proper time, and may recognise that you as welfare guardian are in a good position to assist in meeting this responsibility.

If you cannot obtain the information you need because of inadequacy of your powers as guardian, you might wish to seek the advice of the local authority or MWC, take legal advice, or seek an intervention order in relation to the information in question.

- **Duty to inform the Office of the Public Guardian of any change in circumstances**

For details of requirements see paragraphs 6.19.

OFFENCE OF ILL-TREATMENT AND WILFUL NEGLIGENCE

- 6.2 It is an offence for anyone exercising welfare powers under the Act to ill treat or neglect an adult. The penalties for someone found guilty on summary conviction of the offence under the Act are up to 6 months imprisonment or a fine of up to £5000 or both. Someone convicted of the offence on indictment may be imprisoned for up to 2 years or given an unlimited fine or both.

REVIEWING ARRANGEMENTS AND THE NEEDS OF THE ADULT

- 6.3** If you are the nearest relative and/or primary carer of the adult you may be conversant with the adult's affairs either because you have day to day contact with the adult, or you have already been exercising a power of attorney over property and financial affairs while the adult retained capacity.
- 6.4** The guidance below is written on the basis that you as guardian, the nearest relative and the primary carer are separate people. It is possible that two or all three of these roles are combined in the same person. While this simplifies some of the consultation requirements, it is nevertheless important that you read, understand and follow the code even if you are the nearest relative and/or primary carer, and perhaps already familiar with the adult's circumstances and needs.
- 6.5** Although it is helpful to be familiar with the adult's circumstances and needs, it can be important to step back and review the whole situation, in case there are elements which you have not previously thought about or may not previously have been fully aware of.
- 6.6** The guidance applies equally to single guardians and to joint welfare guardians with concurrent powers. The word 'you' should be read in the plural where there are two or more welfare guardians.

ACTION ON RECEIVING THE CERTIFICATE OF APPOINTMENT FROM PUBLIC GUARDIAN

- 6.7** As soon as you receive your certificate, you should arrange to meet the adult, the nearest relative, primary carer, named person and anyone else who has a close interest in the adult's welfare, in order to discuss what happens next. You may also wish to involve anyone with powers in relation to the adult's property and financial affairs in case the decisions you take have financial consequences for the adult.
- 6.8** You should discuss with the adult, the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative and primary carer how you will go about your functions. For example, you should clarify that you would like regular meetings and with what frequency. You should identify and discuss any matters of particular importance which need to be addressed or are likely to arise in future.

6.9 You will probably, before applying for guardianship, have undertaken a review of the arrangements in place for caring for the adult's personal welfare. Therefore your first actions under your powers will be based on the reasons which led you to seek guardianship in the first place, for example to:

- move an adult into residential care;
- support an adult who has suffered brain damage;
- protect a young person with a learning disability through a requirement to live in particular supported accommodation.

You should make it clear to the adult and relevant others how you propose to implement the necessary action and what the timescale will be.

6.10 When you sought the guardianship order, you should have ascertained the adult's wishes and feelings in relation both to the general idea of welfare guardianship and to the specific steps that were in contemplation. However it would be good practice to check again that you have a clear idea of the adult's wishes and feelings. If there has been a change of plan, for example, you originally recommended one specific residential establishment, but a choice of one or more others has emerged, you should certainly make it clear to the adult and others that there has been a change, and seek their views.

Where relevant, notify the adult's doctor

6.11 As noted in paragraphs 6.63-4, a doctor's authority to treat an adult under part 5 of the Act does not apply where you have relevant powers and the doctor is aware of this, except where it has not been reasonable and practicable for the doctor to obtain your consent. It is therefore very important if you have powers relating to medical treatment that you make sure that the doctor primarily responsible for the adult's treatment knows of your appointment and knows how to contact you.

What to do if the adult has communication difficulties

6.12 If the adult has communication difficulties, you should follow the guidance set out in the Annex 1.

6.13 In cases where the adult has seriously impaired capacity, it would be acceptable practice to meet the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, primary carer and named person separately from the adult; but also meet the adult and any person who can assist him or her with communication, such as someone from an independent advocacy project.

Delegating functions to the adult

- 6.14** If it is within the scope of your powers you may be able under section 64(1)(e) of the Act to authorise the adult to carry out such transactions or categories of transactions as you may specify. By doing so, the principles are being applied. You should make it clear when first meeting the adult and relevant others, whether you propose to delegate any decisions to the adult. Unless you expressly delegate your authority, the adult will have no lawful authority to take such decisions.

For example, you may have been given authority to determine the adult's diet, dress, appearance and with whom the adult shall consort. But you may want to make it clear at the outset that you will not be deciding on a day to day basis what the adult should wear or whether he or she should have his or her hair styled or cut. Or you may want to make it clear that over time you propose to delegate to the adult decisions about aspects of his or her social life, if he or she demonstrates the ability to cope with and manage his or her friendships and other associations.

Check your powers

- 6.15** Before embarking on the course of action which you have decided is appropriate, you should check that it is within the scope of your guardianship order.

For example, if you sought guardianship with a view to arranging for an adult to move into residential care, but in the meantime the adult has been diagnosed as having a condition requiring a routine operation, you should check whether you as guardian can consent to the operation and to any subsequent steps to rehabilitate the adult, before the residential place is taken up.

If your powers do not cover the action you may wish to apply to the sheriff for a variation of your guardianship order; or you may decide this is not necessary.

For example, if you as guardian have not been given powers to consent to medical treatment, a medical practitioner could give such treatment under the general authority in Part 5 of the Act.

(Section 52 of the Act provides that anyone having an interest in the adult's personal welfare can appeal to the sheriff about a decision on medical treatment taken under the general authority to treat.)

ONGOING FUNCTIONS AS A WELFARE GUARDIAN

- 6.16 Once you have taken the initial action to deal with the issues that led you to seek guardianship, you have responsibility to engage actively with the adult and relevant others to ensure that problems are anticipated and future planning undertaken to deal with these.

Make sure you can be contacted

- 6.17 You should ensure that the adult, the nearest relative or named person, or anyone nominated by the sheriff to act in place of the nearest relative, the primary carer, the named person, the financial guardian (if any), the general practitioner and any other person with an interest in the welfare of the adult, is readily able to contact you. You should make available to all of these your full contact details, including any other names by which you may be known, your preferred contact address, telephone number, fax and e-mail, your emergency contact details and the name and contact details of any other person who can get a message to you quickly. You should warn the persons who have your contact details in relation to your functions as guardian if you are likely to be unavailable for any period of time. If no substitute or joint guardian has been appointed, it would be in the adult's best interests for you to ask someone to undertake to contact your local authority supervisor in the event that, e.g. a serious accident, prevents you from undertaking your duties as guardian and from notifying the local authority yourself.

Delegation of functions

- 6.18 You may expressly delegate your functions to one or more other persons at any time. For example a guardian may ask a care worker to decide when the adult needs services such as hairdressing or chiropody. However, you remain responsible. You are not entitled to surrender or transfer any part of your functions to another person and the responsibility for ensuring that they are properly exercised therefore remains with you. Where functions are delegated to someone else you should make every effort to inform the adult of the details of this.

Notifying the OPG of change of circumstances

- 6.19 The Act requires that the OPG is notified if the following changes occur:
- If you or the adult changes address, you have a responsibility to notify the Public Guardian within 7 days under section 64(4) of the Act.
 - If the guardian dies, his/her personal representative should notify the Public Guardian (under section 75A). This is to ensure that the Registers maintained by the Public Guardian are kept up to date.
 - If the adult dies you should notify the Public Guardian.
 - If the adult regains capacity the guardianship order should be recalled (see chapter 7).

Hold regular review meetings

- 6.20 You should ensure that you meet the adult, the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, the primary carer, the named person, the financial guardian and any other person with an interest in the welfare of the adult at appropriate intervals. The frequency of such review meetings will depend on the extent of your day to day contact with these individuals. If you are a lay guardian your local authority supervisor will be able to advise on collaboration with others and assist with these meetings.
- 6.21 In preparation for such meetings, you might undertake a fuller review of the adult's welfare. This would be appropriate in the case of someone whose situation is changing over time, for example someone being rehabilitated after a brain injury or a person with a learning disability, who is displaying some degree of increasing maturity and insight; someone with a mental illness which is becoming more or less florid; or someone with an increasing level of dementia. Even if you are the primary carer as well as the guardian, it would be good practice to adopt the discipline of standing back from your immediate situation and looking at the adult's circumstances in an objective way.

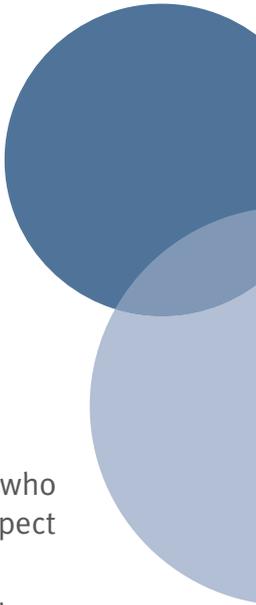
6.22 Depending on your powers, this might involve the following considerations and/or action.

- Checking whether the adult seems well and happy in his or her current circumstances. If not, can the circumstances be changed so as to improve matters for example by modifying the home in some way (see below), and obtaining further support such as a home help? Has the adult reached the stage of requiring residential care?
- Assessing the adult's accommodation and facilities for suitability for his or her needs. For example, could the adult benefit from special equipment to assist with a physical disability, or a move of bedroom nearer a bathroom; or more privacy? Is the accommodation warm enough?
- Has the adult adequate clothing? Is there any need for clothing to be purchased which would make it easier for the adult to dress independently?
- How is the adult supplied with meals? Can he or she cook meals or heat them up so as to learn or maintain the use of skills? Is there someone who cooks for the adult? Does the adult attend a luncheon club or could he or she do so if suitable arrangements were made? Does the adult receive meals on wheels and if not, could these benefit the adult? Does the adult have special dietary requirements, for example religious, vegetarian, low fat, low salt, gluten-free, etc.?
- Is the adult's home clean and well-maintained? Would the adult wish it to be cleaned by contractors or decorated? It is important, however, not to impose your own standards on the adult.
- How does the adult spend his or her time during the day, on weekdays and at weekends? Is he or she attending any kind of activities or day centre? Does he or she have friends or relatives who call? Does he or she have hobbies or interests? If the adult is bored, why is this the case and can anything be done about it? For example, it may be that the primary carer has no access to the adult's funds for outings.
- Is the adult in employment or training? If not, is there any possibility of improving the adult's welfare by arranging for training or employment within the adult's capacity?
- Does the adult need a holiday? Would it benefit the adult if his or her carer had a holiday or if the adult had a holiday away from the carer? Should periodic respite care be arranged?

- Does the adult have a religious affiliation that he or she would wish to maintain? Is there a member of the clergy who visits or might be willing to visit the adult? Are there arrangements to take the adult to his or her place of worship?
- Does the adult have any ongoing medical problems and how are these being tackled? What is the diagnosis, likely development of any illness, and longer term prognosis?
- Is the adult's personal appearance acceptable? It is important not to impose your standards on the adult, paying full respect to the adult's known preferences, wishes and feelings, but the adult's dignity is important and specific issues such as whether hair and nails are clean and well cut should be considered.
- If the adult is in residential care, does the setting afford a reasonable amount of personal dignity and privacy. Could his or her welfare be improved by increasing the adult's independence?
- Is the adult maintaining contact with others who are important to him or her? Could the adult's welfare be improved by facilitating such contact, for example by encouraging visitors or arranging payment for visits to and by others?

Make sure you always know who has powers over the adult's property and financial affairs

- 6.23** As welfare guardian, you will need to know and keep up to date your information on who has control over the adult's property and financial affairs as your decisions on welfare matters may require expenditure to be incurred and decisions taken in relation to the management of finances and/or property might impact on the adult's welfare.
- 6.24** You should have been clear at the time you applied for welfare guardianship whether there was anyone else authorised under the Act to deal with the adult's property and financial affairs, such as:
- a continuing attorney;
 - a person authorised to access funds in an account held by the adult;
 - managers of a residential home authorised to manage the adult's funds;
 - a person authorised under an intervention order with powers over property or financial affairs;
 - a financial guardian.

- 
- 6.25** You should also know whether there is any other person with powers over the adult's financial affairs, in particular:
- any trustees of a trust set up for the benefit of the adult, or in which the adult has an interest;
 - any discretionary pension fund arrangements;
 - any holder of a joint account with the adult;
 - any Department for Work and Pensions appointee who will have authority to claim and receive benefits on behalf of the adult and who will also have authority to act generally on his or her behalf in respect of social security matters;
 - anyone who has been managing the adult's affairs under informal arrangements.
- 6.26** You may find as welfare guardian, that if you yourself do not have any powers over the adult's property and financial affairs, and you cannot find anyone else who has these powers, or there is such a person but he or she is not co-operative, you are hampered in carrying out your functions properly.
- 6.27** If you have such difficulties you may wish to:
- consult your local authority supervisor;
 - consult the Public Guardian (in the case of a continuing attorney, person authorised to access funds, person authorised under an intervention order with powers over property or financial affairs, or financial guardian);
 - take legal advice.
- 6.28** You are entitled to complain to the Public Guardian if you feel that an adult's property or financial affairs are at risk, even if the person managing these is not appointed under the Act. The Public Guardian has a duty to carry out an investigation of any circumstances made known to him in which the property or financial affairs of an adult seem to him to be at risk. She also has a responsibility to investigate complaints against specific continuing attorneys, persons authorised to deal with the adult's funds, persons authorised under an intervention order or financial guardians. The MWC can also investigate any circumstances made known to them in which the property of an adult may be at risk of loss or damage because of the adult's mental disorder.

- 6.29** You may not have thought of seeking powers yourself over the adult's property and financial affairs, but this option would be open to you at any time, even if there is someone else exercising these powers. For example, you could apply to the sheriff for a continuing attorney to be removed, if you thought there was evidence that he or she was not carrying out his or her duty to care. You or someone else you trust could apply to be appointed financial guardian in his or her place.

Community care services

- 6.30** If the adult is in receipt of community care services, you should have the name of the care manager or social work officer within the local authority who has been involved in the his or her assessment and provision of services. If you don't have this already you can find out by contacting the social work office in the area where the person lives.
- 6.31** If the adult has not been assessed for community care, or has a disability and has not had his or her needs assessed in terms of access to particular services or allowances, you should consider asking for a needs assessment to be done. If you are the adult's carer, you can ask the local authority for a carer's needs assessment or, if someone else is the carer, you can suggest this to him or her.
- 6.32** If the adult is attending a day centre, or has a support worker you should also speak to these staff to find out how they are meeting the social and care needs of the person, and to agree arrangements for routine communication.
- 6.33** If the adult is in residential care, you should visit the home where the adult resides and check for yourself that the adult is being properly cared for.

Assessing the need for change

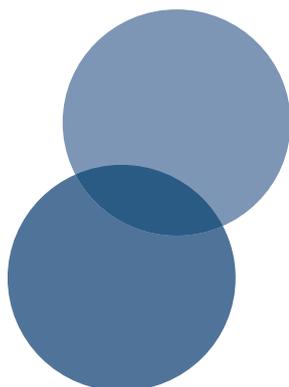
- 6.34** A review may result in one or more recommendations for steps to improve the adult's welfare. In reaching your assessment, you must have regard to your own powers and reread your guardianship order to make sure that you are clear about these. You may find, for example, that you identify a need, but that you would not be able to make a decision or take the necessary action because you do not have the powers. If this is the case then you should consult the social work officer responsible for care arrangements for the person. In certain situations the local authority may have the power to provide the necessary services under the Social Work (Scotland) Act 1968 and no further action by you will be necessary.
- 6.35** In some cases the adult's capacity may have improved, or it may be a decision or action he or she is capable of taking. In accordance with the principles, the adult should be enabled to do so.
- 6.36** You may find carrying out the duties of welfare guardianship too much for you on your own. In such circumstances it is advisable to seek the appointment of an additional guardian to help you.
- 6.37** There may be circumstances in which you need to seek additional powers. You may also wish to consider applying for an intervention order to enable you or someone else to take the action in question. Some decisions, such as marriage, cannot be taken by anyone else on behalf of an adult, but they may have welfare consequences which require to be taken into account by a guardian.

Looking ahead

- 6.38** A review should look ahead to anticipate the future needs of the adult.

Examples:

- If the adult's tenancy is due to come to an end, renewal or obtaining alternative accommodation.
- If the adult's spouse is seeking a divorce in which case you may need to make arrangements to ensure that the adult has adequate legal advice on his or her position regarding property and financial affairs, residence of and contact with children and so on.



- If the adult has decided to marry (but remember that you cannot consent to marriage, only the adult can do so. What you can do is take into account the consequences for the adult's living arrangements and so on).
- If the adult is due to come into funds, such as on the maturity of a life assurance policy, which would enable additional goods or services to be purchased.
- Any possible move to residential care.
- Any operation or other treatment required by the adult in respect of a medical condition.
- The provision of any aids, adaptations, etc. for the adult.
- Visits to the dentist, chiropodist, etc.
- The adult seeking or changing work, or training, or wishing to exercise or develop an artistic talent or to attend occupational therapy, or a different day centre placement.
- A holiday or respite care for the adult.
- Attendance at particular family or social occasions such as weddings, ceremonies related to the birth of a child, reunions, etc.
- Care of the adult should the current carer be threatened with illness or absence for some reason.

Obtaining specialist advice

- 6.39** You should consider whether decisions require to be made now or in the near future on which you require specialist advice.
- 6.40** Where you have medical/health care decision-making powers, and, for example, the adult has a developing medical condition, you will need to ensure that the adult receives adequate medical care. You will need to talk to any consultant or other medical practitioner caring for the adult, so that you can discuss and understand the adult's condition and treatment options. But remember that you do not have the right to consent to certain treatments (see paragraph 4.18). For information about what to do if you disagree with the doctor, see paragraph 4.50.

- 6.41** The adult may be able to obtain help and support from voluntary organisations which assist people with disabilities generally, or people with particular conditions. You may also find a source of help and support in these organisations. Some addresses are given in Annex 3.
- 6.42** If you need legal advice, contact your local Citizen’s Advice Bureau, or specialist voluntary organisation who may be able to provide the advice you need. If you need to engage a solicitor, the SLAB website has a list of solicitors registered to conduct legal aid work; the Law Society of Scotland provides information on solicitors with a special interest in mental health legislation. (See Annex 3).

KEEPING RECORDS

- 6.43** As a welfare guardian you are obliged to keep a record of the major decisions and actions you have taken on behalf of the person. It will be helpful to keep a file of information that you have gathered and that you need to refer to from time to time. Such a file might contain:
- a copy of your original guardianship order, and any variation and your certificate of appointment from the Public Guardian;
 - the contact details of your local authority supervisor;
 - the name, address and other contact details of all those involved in the adult’s day to day care;
 - the name and address of all those with powers over the adult’s property and financial affairs;
 - the name and address of any officer of the social work department providing community care services for the adult; and any home help or other service provider involved in the adult’s community care;
 - the name and address of any relatives or friends with an interest in the adult’s welfare;
 - the name and address of any relatives or friends with whom the adult maintains contact;
 - any forthcoming or regular appointments which should be kept by the adult in relation to personal welfare matters such as visits to the hospital, dentist, chiropodist, etc.;
 - the names, addresses and other contact details of any professional advisers with whom you will be dealing over the adult’s welfare, such as a psychologist, general practitioner, community nurse or solicitor;

- information about the adult’s disability and its consequences; special requirements; dietary requirements; aids used, etc.;
- the names and addresses of any voluntary body contacts which you have established;
- if you have welfare powers – a file a copy of the letter you will have received on appointment from the MWC; the helpline number for the MWC and name of any office you may have had contact with;
- a note of any key decisions required in the foreseeable future.

IF YOU THINK THAT A MAJOR DECISION/ACTION NEEDS TO BE TAKEN

6.44 As you continue to exercise your functions and review the adult’s welfare from time to time, you are likely to develop new ideas about what could be done to improve the adult’s welfare, or such ideas might be suggested to you by others. You should discuss such new ideas with your local authority supervisor and check that your powers would cover them. The following are points to consider before acting:

Apply the principles

- 6.45** In determining whether an action and/or decision needs to be made you must apply the principles.
- Firstly, you must consider whether the action and/or decision would benefit the adult, and such benefit cannot reasonably be achieved in any other way.

For example, If the adult is in a care home and appears undernourished and losing weight, discuss diet with the care manager and find out if food is being made available to the adult, and whether some help at mealtimes would enable the adult to eat properly. Appetite might be affected by a change in mood – talk to the adult about how he or she is feeling and what would help to feel better. If you are worried that the person may be depressed then a review of the care plan with the social worker, and a medical assessment may be advisable.

- Secondly, you must consider whether the action and/or decision is the **least restrictive option** in relation to the freedom of the adult, consistent with the benefit you want to achieve.

For example, if the adult becomes increasingly dependent you will need to consider the options for how best to meet his/her personal care needs, taking account the person's physical abilities, the person's home environment, social contacts as well as the person's past and present wishes. Moving the person to a care home may be more restrictive than necessary if additional support can be provided to the person at home.

- You also need to **take into account the past wishes and feelings of the adult**, as far as they can be ascertained. You should try every appropriate means to assist communication and try to interpret non-verbal signs and signals, such as resistance or discomfort. It will also be advisable to ask other people how best to communicate with the person and what they may know about the person's wishes and feelings about the matter in hand. Guidance on communicating with the adult is contained in Annex 1.

For example, you should think twice about recommending that the adult should attend a luncheon club if you know from previous discussions that the adult would feel embarrassed to be seen by others in such a setting. If the adult has said in the past that he or she would rather live in a residential home than be a burden to relatives, then that view should be taken into account.

For example, if you think the person should move to a care home but you know that this is not what he or she would have wanted, you should do everything you can to ensure adequate support at home before taking such a step. The adult's views are not overriding, and everything depends on the particular circumstances. If, for example, you intend to use your power to direct where the adult can live, you will be able to back that power up with compulsion (section 70 of the Act – see paragraphs 6.76-7).

- You also need, so far as it is reasonable and practicable to do so, to take account of the views of:
 - the adult's nearest relative (or anyone nominated by the sheriff to act in place of the nearest relative)
 - the adult's primary carer
 - the adult's named person, where there is one
 - anyone else with an interest in the welfare of the adult.

You might wish to write or phone if it is not convenient to meet these others. If the nearest relative is unable to attend meetings, for example, because he or she lives far away, or does not respond to letters, then you may not be able to ascertain the nearest relative's views. Similarly, if the

primary carer is unable or unwilling to give views, then you may not be able to ascertain the primary carer's views, but you should do what is reasonable and practicable to ascertain these views.

Consult anyone with financial powers

- 6.46 It would be prudent to consult any person with powers over the adult's property or financial affairs about any decision that would have financial consequences, or require the adult's home or other property to be sold.

Consult professional carers involved with the adult

- 6.47 If a community care worker or community nurse is involved in providing services to the adult, you should discuss your proposals with them.
- 6.48 If you have taken professional advice, you may also wish to involve your professional adviser or advisers in considering the matter, especially if it has wide repercussions, such as a move to residential care. Similarly, if you have regular support from a voluntary body, you may wish to involve them.

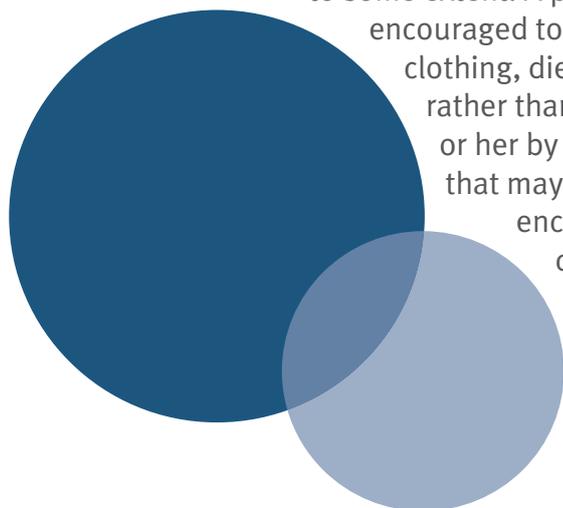
Check your powers

- 6.49 If you decide that an intervention is needed, you should check whether your powers would cover that particular intervention.

Encourage the adult to exercise residual capacity

- 6.50 Finally, you should, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he or she has concerning his or her personal welfare, and to develop new such skills.

A stroke victim who has lost substantial mental and physical capacity might, for example, with suitable support, learn to care for him or herself to some extent. A person with dementia should still be encouraged to take his or her own decisions about clothing, diet, appearance and how to pass time, rather than having these things dictated to him or her by someone else, however convenient that may be. For someone with a brain injury, encouragement to exercise skills and develop new such skills may be a major part of the rehabilitation process.



- 6.51** You should consider the extent to which the adult could be assisted to take the necessary action with support from yourself or others.

For example, visual aids may help the person choose his or her own meals and clothes. Aids to daily living may assist the person have an increased degree of independence. The adult could be provided with specialised equipment such as a motorised wheelchair, a stair lift, taps operated by levers or low level sinks in order to be able to do more for him or herself.

The adult, if mobile and able to do so without undue risk, could be encouraged to take walks, travel by public transport, attend recreational or social activities and make small shopping purchases independently. The use of personal alarms and other modern technology could enable the adult to enjoy more independence without running undue risks. Voluntary organisations could also be contacted to ascertain whether they provide services that could enable the adult to lead a fuller life. Such services are usually funded by the local authority social work department and require a formal referral.

RECORDING ACTION TAKEN

- 6.52** Having followed this process it should be possible to reach conclusions on the actions needed in relation to the adult's personal welfare, which are based on proper investigation, and which comply with the principles. You should record these conclusions on your file. For example, you should file

- photocopies or electronic copies of any correspondence relating to the adult's personal welfare;
- a note of any important telephone calls about the adult's welfare; for example if someone phones to inform you of any incident relating to the adult, such as involvement in an accident, argument or fight; or of the adult's being taken ill;
- copies of invoices and receipts for any purchases incurred on behalf of the adult. The Public Guardian will need to see this in order to authorise reimbursement from the adult's estate;
- any correspondence with anyone having powers over the adult's property or financial affairs or over how the adult's welfare needs are to be met. For example, you as welfare guardian may not wish to seek financial powers but you may be able to agree with the Public Guardian that you can make significant welfare purchases from the adult's estate, such as a motorised wheelchair or adaptations to a dwelling house.

MONITORING THE ADULT'S PERSONAL WELFARE

- 6.53** It would be good practice, within the scope of your powers, to monitor the adult's personal welfare on a regular basis and not just at the time of formal review meetings. Alternatively, you may be able to arrange that someone else with day to day contact with the adult contact you on a regular basis confirming the adult's circumstances.
- 6.54** Although you may not have any financial powers yourself, you should also check that the adult's finances remain under control, by regular liaison with anyone having such powers. You may need to seek financial powers under appropriate procedures if you find that lack of influence over the adult's property and financial affairs is impeding your functions as welfare guardian.

SEEKING ADVICE OF THE LOCAL AUTHORITY AND MENTAL WELFARE COMMISSION

- 6.55** The local authority must supervise a welfare guardian and your supervision will take the form of regular meetings, reporting arrangements, and visits both with and without warning to yourself and the adult. However, the local authority also has a responsibility at any time to give you advice and guidance on the exercise of your welfare powers. It is therefore a good idea to contact the local authority social work department if in doubt about the scope of your powers, or about the course of action you propose to take. Your normal contact will be your local authority supervisor, but you should keep a note of the contact details of any social work officer with whom you have had contact and record any conversation and action agreed. You should be aware of how to contact the social work department out of hours in the event of any crises.
- 6.56** The MWC will have been notified of your appointment by the Public Guardian following registration of your guardianship order. The MWC can provide valuable advice to anyone exercising welfare powers in relation to an adult whose incapacity is due to mental disorder. The MWC will also regularly visit adults on guardianship whose incapacity is due to mental disorder.

WHAT TO DO WHEN THERE ARE CONFLICTING VIEWS ON A PROPOSED INTERVENTION

6.57 When you hold reviews with the adult, the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, primary carer, named person any fellow guardian and anyone else having an interest in the property, financial affairs or personal welfare of the adult regarding the exercise of your powers, you should try to ensure that you have adequate warning if there is likely to be a disagreement. Do not take action that will come as a surprise to the others but make sure that you have taken proper account of their views. Keep an open mind until you have heard, understood and considered all relevant views.

6.58 Despite your best efforts, however, there may occasionally be disagreements which cannot be readily resolved.

For example, there may be a dispute as to whether the adult should be moved into residential care, with some of those with an interest believing that the adult's capital in the home should be preserved and that relatives can or should continue to care for the adult. There may be a dispute as to medical treatment, with some relatives considering that the adult should have a particular operation but others thinking that the adult's quality of life will not be sufficiently improved to justify the risk.

6.59 In seeking to persuade others of your point of view, you should direct those who disagree with you to your statutory responsibilities as guardian, and to the powers that the court decided, after careful consideration of all reports and representations, to confer. It will assist you if you can show that:

- you have applied the principles systematically;
- you have balanced one principle against another in the correct manner. For example you need to consider benefit to the adult as well as minimum intervention. If someone who disagrees with you takes minimum intervention as a starting point, he or she may be attaching insufficient weight to the need to benefit the adult;
- you have taken account of the past and present wishes and feelings of the adult so far as these can be ascertained;

- you need to take account of the views of the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, primary carer, named person and anyone else appearing to you to have an interest in the welfare of the adult or in the proposed intervention. But you do not need to accord undue weight to any one view. Nor do you need to follow the majority view where you have carried out your own assessment of the need for an intervention, and it does not agree with the majority. On the other hand, you should never be afraid to reconsider where new information or a new point of view is drawn to your attention.

6.60 If you are unable to persuade others to accept your judgement, you may wish to seek additional advice, for example from the MWC, from the local authority, from a solicitor, a medical practitioner or a voluntary body. If you can produce written advice that supports your decision, this may help in defending your actions. In particular, you should seek advice if the adult him or herself disagrees with a particular course of action which you are convinced is in the adult's best interests, for example a move to residential care. If you are an officer of a local authority, you should raise any intractable disagreement with your line manager who may decide to convene a case conference in order to discuss the matter.

6.61 Ultimately you may find that you simply have to insist. If you are confident in your judgement, do not back down. You would be letting the adult down if you gave in for the sake of peace; or stood down, leaving the adult with no-one to take care of his or her welfare.

6.62 If you still encounter difficulty you can advise those who disagree with you of their right to complain to the local authority. You can also direct those who disagree with you to section 3(3) of the Act which allows them to apply to the sheriff for directions. Alternatively you can exercise your own right to apply for directions under section 3(3).

DISAGREEMENTS ABOUT MEDICAL TREATMENT

- 6.63** Part 5 of the Act provides and qualifies a general authority under which a medical practitioner may give treatment to an adult. In Part 5 ‘medical treatment’ includes any procedure or treatment designed to safeguard or promote physical or mental health. It makes provision for the resolution of disputes between medical practitioners and welfare guardians with power in relation to the treatment in question (and between them and others having an interest) and for appeals by any person having an interest in the personal welfare of the adult to the courts in respect of decisions taken under this Part.
- 6.64** If you do not agree with the medical practitioner primarily responsible for the adult’s medical treatment, and the doctor does not accept your view, the doctor must request the MWC to provide a ‘nominated medical practitioner’, from a list held for this purpose, to give a further opinion as to the medical treatment proposed. The nominated medical practitioner must have regard to all the circumstances of the case and must consult you. The nominated medical practitioner must also consult another person nominated by you, if it is reasonable and practicable to do so. If after taking these steps the nominated medical practitioner certifies that in his or her opinion the proposed medical treatment should be given, then the medical practitioner primarily responsible may give the treatment, unless you or some other person with an interest in the adult’s welfare appeals to the Court of Session against this. The medical practitioner primarily responsible for the treatment also has a right of appeal to the Court of Session against the decision of the nominated medical practitioner.

CONSENT TO MEDICAL RESEARCH

- 6.65** Consultations prior to the Act established a need to clarify the law in the area of research. There was also general agreement about the need for greater understanding of the conditions which cause people to lose capacity and congenital conditions which may be associated with incapacity. Equally it was recognised that there was a need to protect people who were not capable of understanding research or of agreeing to participate. The Act seeks to strike a balance between research targeted at extending knowledge of the conditions which affect adults with incapacity and ensuring that sufficient protection is in place for adults who may be involved in research.

- 6.66** If you as guardian have powers to consent to the adult's participation in research, you may be asked to consent to this at some time. If this happens, it is essential that you are aware of the safeguards, that you feel free to ask questions about what is being proposed and that you know how to bring the adult's participation to a halt, if necessary.
- 6.67** Section 51 states that research is not permitted on adults incapable of giving consent if it could be carried out on adults who are capable of giving consent. The purpose of the research has to be to obtain knowledge about the causes, diagnosis, treatment and care of the adult's incapacity and/or to learn about the effects of the care and treatment being given to the adult for his or her incapacity. The following conditions are required:
- (a) the research is likely to produce real and direct benefit to the adult;
 - (b) the adult does not indicate unwillingness to participate in the research;
 - (c) the research has been approved by the Ethics Committee;
 - (d) the research entails no foreseeable risk, or only minimal foreseeable risk to the adult;
 - (e) the research imposes no discomfort, or only minimal discomfort, on the adult; and
 - (f) consent has been obtained from any guardian or welfare attorney who has power to consent to the adult's participation in research or, where there is no such guardian or welfare attorney, from the adult's nearest relative.
- 6.68** The Act provides that research may be carried out even where it is unlikely to produce real and direct benefit to the adult if it will contribute significantly to the scientific understanding of the adult's incapacity and benefit others with the same incapacity. The conditions (b) to (f) above have to be met.
- 6.69** The Ethics Committee to review research involving adults with incapacity was established by regulations (The Adults with Incapacity (Ethics Committee) (Scotland) Regulations 2002). These regulations set down some of the matters which the Ethics Committee must take into account when appraising the research. The Ethics Committee may examine such other matters as are relevant and appropriate to the applications submitted to them.

CONFLICT OF INTEREST AFFECTING YOU AS GUARDIAN

6.70 As welfare guardian, you may be someone close to the adult in another capacity such as relative, or carer. You may find that this occasionally creates a conflict of interest between your own personal interests and your fiduciary duty. Do not let this worry you unduly. The very person who is best suited to be welfare guardian is likely to be someone close to the adult and this situation will not be uncommon.

For example, relatives might argue that it would benefit the adult to spend Christmas at home, instead of in residential care, but you as welfare guardian might feel that this is too risky for the adult, as he or she might require nursing care that family members could not provide. Alternatively, relatives might press you not to take the adult on a particular outing or trip, such as to the wedding of a family member, but you might feel that you want to go, that you have to take the adult with you, and that the risk is acceptable.

6.71 In these as in all other circumstances you should observe the principles. Ask the adult's opinion and consult anyone else with an interest in the adult's welfare. If the step which is being contemplated has implications for property or financial affairs, then the continuing attorney, financial guardian or anyone else with powers to intervene in the adult's property or financial affairs should be consulted. If the adult can no longer express an opinion, but had been able to do so in the past, consider what he/she would have thought of the proposal.

For example, if the adult expressed views in the past about family Christmas, these should be taken into account. It might not have been something he or she particularly enjoyed. If the adult was close to the person getting married that could also be relevant. If the adult was not close to that person then maybe you should think again, and consider whether some other arrangement could be made such as respite care for the adult, to allow you to attend alone.

6.72 If you are in doubt about the proper course, or find that you are being challenged, there are various options open to you. The obvious first step would be to discuss the matter with your local authority supervisor. If you feel the need of a range of opinions, you could:

- ask someone from an independent advocacy project to support the adult in putting forward his/her views in discussing the matter with you;
- consult the MWC, where the adult's incapacity is due to mental disorder;
- seek advice from a solicitor if you are being challenged by someone else with an interest such as a relative;
- seek directions from the sheriff under section 3(3) of the Act.

WHAT TO DO IF YOUR POWERS ARE INSUFFICIENT

6.73 You may find that your powers are insufficient to carry out a particular intervention which is necessary. For example, the time may come to sell the adult's house so that he or she can move into residential care, but there may be no-one with powers to deal in the adult's heritable property.

6.74 In these circumstances you may need to consider using one of the other interventions under the Act or asking someone else to do so. For example you may not wish to start to exercise powers over property and financial affairs and therefore you may wish to ask a professional person to seek such powers if no-one else has them.

6.75 The options include:

- applying to the Public Guardian under Part 3 to withdraw funds from an account held by the adult to meet his or her day to day expenses. The Public Guardian (Scotland) can provide you with an application form and guidance notes on this procedure, and it is also covered by a code of practice available from the Scottish Government Justice Department and OPG;
- applying to the sheriff for an intervention order under Part 6 of the Act to empower you to take the necessary steps or give the necessary consent (see part 2 of this code);
- apply to become financial guardian to the adult.

POWER TO COMPEL CO-OPERATION BY THE ADULT

- 6.76** If the guardian is unable to persuade the adult to accept his/her judgement, he or she has recourse to the court. If a less formal way forward cannot be found welfare guardianship carries with it a right to apply to the sheriff under section 70 of the Act for an order compelling the adult to comply with the decisions of the guardian. The sheriff may, on cause shown, disapply the intimation requirement and corresponding right to object within a prescribed period. The reason for this is that in urgent cases a delay of the prescribed 21 day period can prove detrimental to the welfare of the adult concerned. In a case where the welfare guardian has powers to determine where the adult should live, a sheriff can grant a warrant to a constable to enter premises, apprehend the adult, and take him or her to such place as the guardian may direct. There is a prescribed form for making an application under section 70. It is available from your local sheriff court or at <http://www.scotland.gov.uk/topics/justice/civil/awi>.
- 6.77** It is anticipated that the section 70 procedure will be used only occasionally by a welfare guardian, for example to remove the adult from an unsuitable place to one where the guardian has decided he/she should live. It represents a potentially substantial encroachment on the personal autonomy of an adult who is refusing to give effect to a welfare guardian's decision. Before making an order or granting a warrant under section 70, the sheriff would have to be satisfied that the principles in the Act were being met. There would have to be a positive benefit to the adult and the order or warrant would have to be the only reasonable way of achieving that benefit. In dealing with a habitual absconder a new warrant would be needed for each incident.

WHAT IF THERE IS A COMPLAINT AGAINST YOU?

- 6.78** If someone has a complaint against you, and either does not put it to you or is not satisfied with your response, he or she has recourse to the local authority in the first instance. The local authority has a duty to receive and investigate all complaints regarding the exercise of functions relating to personal welfare of an adult made in relation to guardians.
- 6.79** The MWC also has an interest where the adult's incapacity is due to mental disorder, and the complainer can contact the Commission direct, although the Commission will only investigate a complaint if it is not satisfied with the outcome of a local authority investigation or the local authority has not carried out any or an insufficient investigation.

- 6.80** The local authority will contact you about any complaint received and ask you for your version of the facts. If you have applied the principles correctly, have taken advice, have kept relevant documents such as correspondence, have co-operated with supervision and have recorded your decisions and actions on a file as recommended above, you should have nothing to fear from such an investigation.
- 6.81** You will need to produce similar information should the MWC have cause to investigate or reinvestigate the complaint.

Possible court proceedings in the event of a complaint

- 6.82** A person who is dissatisfied with your actions as welfare guardian also has recourse to the sheriff. An application to the sheriff may be made by any person claiming an interest in the property, financial affairs or personal welfare of the adult. You can also apply to the sheriff for directions under section 3(3).
- 6.83** The sheriff may dismiss such an application from a person challenging your actions, or may give the applicant or yourself directions. Everything will depend on the case which is put to the sheriff and his or her view of what is required by the principles in the situation which has been set out.
- 6.84** In extreme cases the sheriff can revoke your powers or some of them.

COSTS OF ACTING AS A WELFARE GUARDIAN

- 6.85** If you are a guardian with powers over personal welfare only, you may be able to avoid any personal outlays by ensuring that the adult pays personally for everything that is necessary for his or her welfare. If the adult is not capable of doing so, there may be someone with powers over the adult's property and finances who can authorise expenditure from the adult's estate on his or her welfare needs and you will need to liaise regularly with that person.
- 6.86** If you are a guardian with powers over personal welfare only, and you do incur expenditure from your own resources, you will be entitled to reimbursement of your out of pocket expenses from the adult's estate. To claim reimbursement you will have to present an account to the Public Guardian, along with proofs of purchase. You should contact the Public Guardian as soon as you are appointed to make sure that you know how to deal with your out of pocket expenses.

- 6.87** A welfare guardian is not normally entitled to remuneration. However you may be able to make a case to the sheriff for remuneration when you are appointed. For example, if you are sacrificing employment opportunities in order to act as someone’s guardian, this could be a reason for awarding remuneration.
- 6.88** A local authority guardian is not entitled to any remuneration. The local authority may not charge an adult on guardianship for any goods or services that would be provided free of charge to a client who was not subject to guardianship.

Forfeiture of remuneration

- 6.89** Where a guardian is in breach of any duty of care, fiduciary duty or obligation imposed by the Act, the sheriff may, under section 69, order forfeiture of the guardian’s remuneration. However, section 82 provides that no liability shall be incurred by a guardian (or other proxy) for any breach of duty of care or fiduciary duty owed to the adult if the guardian has acted reasonably and in good faith and in accordance with the principles; or has failed to act, and that failure was reasonable and in good faith and in accordance with the principles.

SUPERVISION BY THE LOCAL AUTHORITY

- 6.90** The Act requires local authorities to supervise welfare guardians.

Purposes of supervision

- To provide advice, guidance and support to guardians.
- To assess the impact of any significant changes in circumstances on the adult’s welfare and how you are managing guardianship.
- To identify whether a guardianship order continues to be necessary at the end of the period for which it has been made and should be renewed.
- To confirm that the criteria for your suitability to be appointed as guardian at section 59 of the Act are still met. Supervision should be used to check, for example, that you are maintaining satisfactory personal contact with the adult, through visits, phone calls or other means appropriate to the adult’s circumstances.
- To identify if an application should be made to the sheriff for a joint or substitute guardian to be appointed.

- To identify if an application should be made to the sheriff for your powers to be varied, or for any ancillary order, for example imposing conditions or restrictions on the guardianship order, to be imposed or varied.

Directions to a guardian

- 6.91** The Act does not allow a local authority to issue a direction to a welfare guardian, as was possible in relation to guardians under the 1984 Act. Such a direction to a guardian can only be made by the sheriff under section 3(3) of the Act, on an application by anyone, including the adult, claiming an interest in the adult's affairs. This need not be made at the time of initial application for guardianship but could be made at a later date.

A local authority would be entitled to apply to the sheriff for such a direction if it considered that supervision was not sufficient to ensure that you were carrying out your functions in a satisfactory way; or if you were encountering significant obstacles such as conflicts of interest. However the purpose of supervision and direction is not to inhibit proper and independent exercise of your functions as guardian and you should appropriately advocate the adult's need for support and/or services from the local authority, even where this might put you in conflict at times with relevant departments of the local authority.

Supervision of local authority guardians (see Code of Practice for Local Authorities)

- 6.92** In many cases, the CSWO will be appointed welfare guardian. The Act does not exempt the local authority guardian from the requirements for supervision. If you are a social work officer exercising the day to day functions of guardianship, in a case where the CSWO has been appointed, your supervisor will be the senior officer to whom you normally report.

Supervision of non-local authority guardians

- 6.93** If you are an individual acting as guardian, you will be supervised by an officer of the local authority for the area in which the adult resides. That local authority may wish to use the good offices of your home authority (if different) to carry out certain specific tasks such as visiting you as guardian.

Supervision regulations

- 6.94** The Adults with Incapacity (Supervision of Welfare Guardians etc by Local Authorities) (Scotland) Regulations 2002 made under section 10(3) as amended by the Adults with Incapacity (Supervision of Welfare Guardians etc by Local Authorities) (Scotland) Amendment Regulations 2005 specify the form that supervision of welfare guardians should take. The following will normally be required.

Visiting

- 6.95** The local authority must arrange for every adult who is subject to welfare guardianship to be visited from time to time. The initial visit must take place within 3 months of the appointment and thereafter at intervals of not more than 6 months. If the adult's circumstances are such that it is not possible for the local authority to visit within this period, the authority has to visit at a time as close to the time the visit should have taken place as the adult's circumstances allow. Where the guardian is not the CSWO, there is a requirement for the guardian to be visited within 3 months of the appointment and thereafter at intervals of not more than 6 months. You can therefore expect that both the adult, and yourself, will be visited at least every 6 months after the initial visit; not necessarily together.
- 6.96** Specific purposes of visiting are to enable the local authority to discuss with you the adult's current circumstances, any concerns you might have, how the powers of guardianship are being used, whether it continues to be necessary and to inspect the records that welfare guardians are required to keep under the Act. No format is prescribed for records, but guidance has been given above on what would be good practice.
- 6.97** The local authority may arrange or contract with another body to carry out supervisory visits. As noted above, the local authority might ask another authority to visit on its behalf, for example where you do not live in the same local government area as the adult. The local authority must make it clear to you who is conducting supervisory visits on its behalf.
- 6.98** If appropriate, visits to the adult and the guardian may be combined, although the local authority will sometimes carry out separate visits, for example where there appears to be conflict between the guardian and the adult.

- 6.99** Visits will normally be made by appointment with you or the adult, as the case may be, but in certain circumstances, it might be appropriate for an unannounced visit to be made, for example to gain a view of the adult's living circumstances. This is a matter for each authority to determine, within its own procedures. In cases where there is regular social work contact as part of care management, visits may be linked to the normal review cycle.
- 6.100** The local authority supervisor will make a record of the visit and you should request a copy of this. This record will be the basis for future local authority action. You may wish to keep your own notes of anything discussed during a visit. If there is a dispute between yourself and the local authority supervisor it will be helpful if you have both recorded what happened at any visit.

In addition to the local authority supervision responsibilities, the MWC also has responsibility under the Act to exercise protective functions in respect of individuals subject to Intervention or Guardianship Order relating to personal welfare. The MWC scrutinises all Intervention and Guardianship applications and where not visiting directly corresponds with the adult and/or Guardian to explain its role and to ask that the guardian advise it on any change of circumstances or concerns they may have. Visiting the adult is at the discretion of the MWC. The MWC would also investigate any complaints relating to the exercise of functions relating to the personal welfare of the adult similar to those requirements of the local authority. The MWC expects that the local authority respond to complaints in the first instance.

Provision of information

- 6.101** The Regulations require non-local authority welfare guardians to provide certain reports and other information to the local authority. These are any report or specific piece of information about the personal welfare of the adult or the exercise by the guardian of their personal welfare functions, as the authority may from time to time reasonably require.

6.102 You are likely to be asked to report significant accidents or incidents affecting the adult. These might include, for example, accidents resulting in significant injury, incidents that could have resulted in serious injury, or episodes of challenging behaviour by the adult resulting in harm to him or herself or to others. Accidents to the adult's property or theft or loss should also be reported, as this may have an impact on the adult's welfare either material or psychological. 'Accidents and incidents' are not defined in the Regulations. It is envisaged that guidance will be given by each local authority to guardians on what reporting is required.

Consultation

6.103 The principles in section 1 must be observed by anyone exercising functions under the Act and these apply as much to supervision by the local authority as to the exercise by guardians of their functions. It would be good practice, and be in line with the principles for the local authority to consult the adult regularly about how you perform your functions. The local authority will of course be fully aware of whether there has been conflict involved either in your appointment or in the exercise of your functions and if the adult is not satisfied with you as guardian, will look below the surface of this. It may be that the nature of the adult's incapacity is the cause of the dissatisfaction rather than anything that you have decided or done. Your local authority supervisor will be checking that you have applied the principles properly and taking account of the adult's wishes and feelings is only one principle which must be balanced against the others.

6.104 The adult's nearest relative, primary carer (normally a family member or friend), named person, care manager or any other person whom the sheriff has directed to be consulted about the adult's personal welfare will also be given a regular opportunity to give their views about how you are exercising your functions. Again, your local authority supervisor will be aware of any past or present conflicts and will be checking to see that you have applied the principles properly – consultation with relevant others being only one principle which must be balanced against the others.

Chapter 7



RENEWAL, REPLACEMENT, TERMINATION AND TRANSFER OF GUARDIANSHIP

RENEWAL OF GUARDIANSHIP

- 7.1 The default period of guardianship is 3 years although the sheriff has discretion to extend this period (including an indefinite period) or reduce it. The Act provides for renewals of guardianship when the approved period is coming to an end.
- 7.2 Section 60 of the Act provides that at any time before the end of a period in respect of which a guardianship order has been made or renewed, an application may be made to the sheriff under this section by the guardian for the renewal of such order, and where such an application is made, the order shall continue to have effect until the application is determined.
- 7.3 A review of guardianship should take place before the expiry of the existing order as reports similar to those which were provided at the first application have to be prepared for the renewal application. Reports have to be based on the current position and time will be required for an up to date assessment. The Public Guardian will issue a reminder to all guardians three months before the expiry of the order that their appointments are approaching the end. At the same time as you receive such a letter, the local authority will be similarly informed.

- 7.4** The 3 months' notice given by the Public Guardian is a failsafe. Welfare guardians should be starting to think about renewal along with their local authority supervisors as part of the agenda for supervision during the last 6 months of the order. Financial guardians should consider renewal when they submit their accounts for the last accounting period of their current term.
- 7.5** You should therefore keep a note of the renewal date so that you can begin thinking about the renewal and whether you want to continue to act and if so, with the same powers and conditions. For example, you may decide that a joint guardian should be appointed to share the duties with you or that you want to step down and let someone else take over. A substitute guardian who was appointed at the same time as you would have to be reassessed for suitability just as you will yourself be if applying for renewal. The Act provides that the local authority shall apply for renewal of a guardianship order if this appears to be necessary and no-one else is doing so.
- 7.6** A renewal application in the form of a Minute must be accompanied by a medical report in prescribed form, of an examination and assessment carried out with regard to the adult's capacity not more than 30 days prior to the lodging of the renewal application form. If the incapacity is by reason of mental disorder, the report should come from a medical practitioner with experience in that field.
- 7.7** For renewals of welfare guardianships, the application would also be accompanied by a report provided by a mental health officer, or in cases where the lack of capacity is because of inability to communicate, by the CSWO. The report will give an opinion as to the appropriateness of continuing the guardianship, including the suitability of the guardian.
- 7.8** For renewals of financial appointments, the application would be accompanied by a report by the Public Guardian giving an opinion of the conduct of the guardianship to date and the continuing suitability of the guardian.
- 7.9** It will be possible for a sheriff to take a decision without a hearing; but if the sheriff is not satisfied by the information he/she can call for further reports or have a hearing.

- 7.10** In renewing the order, the sheriff can continue it for a period of 5 years or for such a period as seems suitable including an indefinite period. You can expect to get help and guidance as required when the time for renewal comes round and you can put forward your views on what should happen.
- 7.11** Legal Aid may be available on the same basis as for applications for guardianship and intervention orders (see paragraph 1.24).

TERMINATION OF GUARDIANSHIP

- 7.12** Under section 71 of the Act, guardians may be replaced, removed or have their powers recalled.

Replacement or removal of a guardian by the sheriff

- 7.13** Under section 71 of the Act, the sheriff, on an application made to him or her by an adult subject to guardianship or by any other person claiming an interest in the adult's property, financial affairs or personal welfare, may:
- (a) replace a guardian by an individual or office holder nominated in the application if he is satisfied, in relation to an individual that he or she is suitable for appointment;
 - (b) remove a guardian from office if satisfied:
 - (i) that there is a substitute guardian who is prepared to act as guardian; or
 - (ii) in a case where there are joint guardians, that the remaining guardian is or remaining guardians are prepared to continue to act; or
 - (c) recall a guardianship order or otherwise terminate a guardianship if satisfied:
 - (i) that the grounds for appointment of a guardian are no longer fulfilled; or
 - (ii) that the interests of the adult in his property, financial affairs or personal welfare can be satisfactorily safeguarded or promoted otherwise than by guardianship.

- 7.14** An adult or any other interested party can apply to the sheriff under this section if there is reason to make a change in respect of the guardian either because of life events or concerns about the functioning of the guardian. In most instances a new application will be required, apart from cases where joint guardians or substitute guardians were appointed in any previous applications.
- 7.15** The Act provides a range of different ways in which a change of guardian might happen and recognises that there will be a variety of circumstances bringing this about.

Replacement

- 7.16** Replacement is where a new application nominates another individual (who could be the CSWO) to be appointed. The new guardian has to meet the criteria set out in section 59 of the Act (see part 4 of this code). Replacement may be appropriate in situations where, for example, the guardian dies or moves to another part of the country. It can also be used if the local authority does not think the guardian is carrying out the duties in a satisfactory way or if the MWC or Public Guardian is dissatisfied.

Removal

- 7.17** A guardian may be removed by the sheriff where another guardian exists who is prepared to take over acting or to continue to act. This can only happen where there is either a substitute guardian or a joint guardian. Removing the powers of an existing guardian will usually happen because the guardian is no longer able or failing in the exercise of his or her powers.

Resignation

- 7.18** Resignation by a guardian is covered by a procedure set out in section 75 of the Act. To protect the adult from there being an interval of time when no guardian is acting, resignation cannot become effective until the appropriate notifications have been made and the appointment of another guardian is approved by the sheriff. Therefore if you decide to give up as guardian, you should notify the Public Guardian, the local authority and where appropriate the MWC (if you are a welfare guardian) giving as much notice as you can of your intention.
- 7.19** A joint guardian or a guardian where a substitute has been appointed, may resign with effect from notifying the above bodies provided the remaining joint guardian or substitute guardian is prepared to act.

- 7.20** In effect a guardian seeking to resign has to ensure that there is someone already approved to take over either by means of a previous application or a new one being submitted to the sheriff.
- 7.21** As might be expected, the death of the adult ends guardianship. The Act provides for guardians to continue to act until aware of the death, provided any action after death is done in good faith. It is a requirement to notify the Public Guardian of the adult's death. She will inform the local authority and MWC, as necessary.

What if you become unavailable to act?

- 7.22** If you are temporarily unable to act as guardian, e.g. because of hospitalisation or having to attend to matters abroad, and there is no joint or substitute guardian, you should consider whether there is someone suitable to apply to become an additional guardian. This would take the same length of time as the original application for guardianship. Alternatively, it is possible in terms of section 64(6) that you could leave instructions for safeguarding the adult's property, financial affairs or personal welfare with a solicitor or other agent to cover the period when you are unavailable personally to act. It is also possible that in order to expedite the appointment of an additional guardian, the local authority and medical practitioners providing reports would be prepared to shorten the statutory timescales normally allowed.
- 7.23** If you are a welfare guardian who will be temporarily unavailable you should discuss the matter with your local authority supervisor. If there is no-one else willing to act, the local authority could apply for interim welfare guardianship for the CSWO while the situation is being sorted out.
- 7.24** If you become unable to act as financial guardian you should inform the Public Guardian immediately.
- 7.25** You should also leave instructions with a colleague, relative, or the adult's relatives or carer as to what action to take if you yourself lose capacity owing to an accident or illness, during your term as guardian. No-one else can simply take over a guardian's powers without authority of the court, although the guardian can expressly delegate his functions to another person and this could cover any period during which the guardian was temporarily unavailable to act. In the event of the death of a guardian, his or her personal representatives should inform the Public Guardian.

RECALL OF GUARDIANSHIP

Identifying the need for recall of guardianship

- 7.26** The desirability of recalling a guardian's powers may be identified through day-to-day contact with the adult, or from regular supervision by the local authority or Public Guardian of a welfare guardian or financial guardian respectively. Alternatively, the need for change may be identified through complaints or investigation about the way that an individual guardian is carrying out his or her functions. You as guardian should be alert to, and should raise in your supervision meetings with the local authority OPG, the possibility that changes may be required, particularly where the adult's incapacity is not likely to be permanent. For example, a younger person with a learning disability may develop an ability to manage his or her own affairs over time.
- 7.27** The principles within the Act should be applied to the question of recall and care should be taken to ensure that those with an interest are informed of any decision to apply for recall.
- 7.28** As a matter of good practice, changes that may be required to guardianship should be sought at an early opportunity. However, it will be a matter of balance as to when this should be sought. You as guardian should not, for example, automatically wait until the next regular review to initiate action. It would be good practice to contact your local authority supervisor or the OPG should it become clear that a change is desirable.

Who can recall guardianship?

- 7.29** Both the sheriff and the Public Guardian have the power to recall financial guardianship. The sheriff, local authority and the MWC (only in cases where incapacity relates to mental disorder) may recall the powers of a welfare guardian. A local authority can recall a welfare guardian's powers where the CSWO is the guardian.

Who can apply for recall?

- 7.30** Anyone claiming an interest, including the adult, may apply for recall. The Public Guardian, the MWC and local authorities can also all consider recall at their own instance. Details of the process for recall by local authorities are provided in the code of practice for local authorities.

Deciding which body to apply to

- 7.31** It is likely to be simpler and quicker for the application to be made to the MWC or local authority (for recall of welfare powers) or the Public Guardian (for recall of financial powers) than to the courts. The local authority has a direct supervisory role and is more familiar with the adult and his/her circumstances and as such the application should go to them in the first place. The local authority should consult the MWC.
- 7.32** This might be appropriate if there are no other factors, such as opposition by those with an interest in the adult's affairs, that might suggest that recall should be considered by the sheriff. Only the sheriff, however, will be able to take an overview of all the adult's affairs and make a less intrusive order. The courts are, in practice, the correct forum to deal with controversial or contested applications. Recall decisions by the Public Guardian, the local authority and the MWC may be appealed to the sheriff.
- 7.33** Where recall of both financial and welfare powers are sought, separate applications could be made to the Public Guardian to recall financial powers and to the local authority or MWC to recall welfare powers. Alternatively, a single application to the sheriff could be made to recall both financial and welfare power.

MAKING AN APPLICATION FOR RECALL

- 7.34** An application to the sheriff will be in the form of a document called a minute. Guidance on preparation can be obtained from the Sheriff Clerk. Where non notification to the adult is proposed in relation to recall of welfare guardianship an application must be made to the sheriff, because only the sheriff has the power to dispense with notification in such cases. The Public Guardian has similar powers in relation to recall of financial guardianship.
- 7.35** The OPG has prepared guidance notes and an application form for applying to the Public Guardian for recall of financial guardianship.
- 7.36** The forms for applying to the local authority or the MWC for recall of guardianship are prescribed in the Adults with Incapacity (Recall of Guardians' Powers) (Scotland) Regulations 2002 as amended by the Adults with Incapacity (Recall of Guardians' Powers) (Scotland) Amendment Regulations 2008. The forms are available electronically at <http://www.scotland.gov.uk/topics/justice/civil/awi>.

Grounds for recall

- 7.37** Details of the grounds on which recall is sought must be given to indicate that either or both of the grounds at section 73(3) of the Act are met, namely that:
- that the grounds for appointment of a guardian are no longer fulfilled; or
 - that the interests of the adult in his personal welfare, property or financial affairs can be satisfactorily safeguarded or promoted otherwise than by guardianship.
- 7.38** If the application for recall is submitted on the grounds that the adult is no longer incapable in relation to the matters concerned, a report to that effect signed by a medical practitioner will be required to accompany the application. The form is prescribed in the Adults with Incapacity (Recall of Guardians' Powers) (Scotland) Regulations 2002 as amended by The Adults with Incapacity (Recall of Guardians' Powers) (Scotland) Amendment Regulations 2008 and is available electronically at <http://www.scotland.gov.uk/topics/justice/civil/awi>. In cases where an application for recall relates to financial and property matters, the Public Guardian has a set report form to be used by a medical practitioner. This is downloadable from the OPG website (www.publicguardian-scotland.gov.uk). Where recall relates to welfare matters the MWC has a set report form to be used by a medical practitioner, downloadable from the MWC website: www.mwscot.org.uk.
- 7.39** If the grounds for the application for recall are that the adult's interests can be satisfactorily safeguarded or promoted otherwise than by guardianship, the application will need to state the alternative means by which the adult's interests are to be protected. These may be less restrictive measures under the Act or alternatives such as appointeeship under social security regulations.

- 7.40** The application will need to confirm that consultation has taken account of the views of all those listed at section 1(4) of the Act. This includes in all cases the present and past wishes and feelings of the adult. The views of the nearest relative, primary carer, the adult's named person and any person whom the sheriff has directed to be consulted are required to be taken into account insofar as it is reasonable and practicable to do so. The application should confirm explicitly that this has been done. The application should, further, confirm that the views of any other person appearing to have an interest in the adult's welfare, that are made known, have been taken into account insofar as it is reasonable and practicable to do so.
- 7.41** You as guardian can be the one to make the application. You may also find that someone else applies. In particular, the adult is entitled to make an application in person whether or not he or she is capable in relation to the matters covered by the guardian's powers. Where the local authority, MWC or Public Guardian receives an application for recall, or intends to recall a guardian's powers at their own instigation, they have to notify the adult, his or her nearest relative, the primary carer, his or her named person and any person they consider has an interest in the recall. All those notified have 21 days to object to the proposed recall. Objections must be made in writing. If someone else makes the application, you will therefore receive notification of it and will need to decide whether you agree with it or want to oppose it and ask for your powers to be maintained or modified in some way.
- 7.42** If you object to recall, you will have to make this known to the local authority, MWC or Public Guardian.
- 7.43** If the local authority, MWC or Public Guardian proposes to reject a recall application, an intimation of this must be sent to the applicant and the adult, who may object within 21 days, and who have the right to have their objections heard before a final decision is made.
- 7.44** The local authority, MWC or Public Guardian may consider the objections and take a decision themselves, but must be able to give reasons for any such decision. The local authority, MWC or Public Guardian may, as an alternative to agreeing or refusing a recall, decide that the decision should be made instead by the sheriff, whose decision is final.

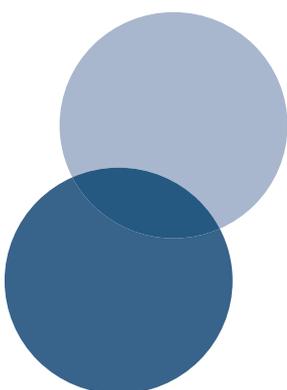
7.45 Remit to the sheriff is likely to be appropriate where differing views about the desirability of recall emerge during the local authority's consideration of the matter and the local authority considers that evidence should be heard before a decision is taken. A court setting would allow opposing views to be heard and the parties to arrange for legal representation if they wished to do so. This would give you, as guardian, a chance to explain your objections. Therefore, if someone has applied for recall, but you as guardian consider that the principles still point to guardianship, you should ask the body considering recall (if not the sheriff) to remit the case to the sheriff so that your objections can be heard in court. You may wish to be legally represented in such circumstances.

APPEAL AGAINST RECALL DECISIONS

7.46 An appeal against a decision to recall a guardian's powers may be made to the sheriff, as may an appeal about a decision by the local authority, MWC or Public Guardian to remit or not to remit the matter to the sheriff for the court to decide.

TRANSFER TO A DIFFERENT LOCAL AUTHORITY AREA (IN CASES WHERE THE LOCAL AUTHORITY IS THE WELFARE GUARDIAN)

7.47 Under section 76 of the Act, where an adult under local authority guardianship changes habitual residence, the chief social work officer must inform the chief social work officer of the receiving authority. The receiving authority then has 7 days to notify the Public Guardian, and in appropriate cases the MWC, of the transfer. Within a further 7 days the CSWO of the receiving authority must notify the adult (unless the sheriff has directed that intimation should not be given to the adult), the Public Guardian, and where appropriate the MWC of the name of the officer responsible for carrying out the functions and duties of guardian.



Chapter 8



TRANSITIONAL PROVISIONS AND INTERNATIONAL MATTERS

TRANSITIONAL PROVISIONS UNDER THE ACT FOR CURATORS BONIS AND TUTORS

- 8.1 Schedule 4 of the Act describes what happened on the ‘relevant date’ to people who held the offices of *curator bonis*, tutor dative, tutor-at-law.
- 8.2 The ‘relevant date’ means, for each provision of the Act, the date on which it comes into effect. Part 6, covering guardianship, came into effect on 1 April 2002. The provisions relevant to *curators bonis*, tutors dative, tutors-at-law, and Mental Health (Scotland) Act 1984 (the 1984 Act) guardians came into effect on 1 April 2002.
- 8.3 Paragraph 1 of Schedule 4 deals with what happened to *curators bonis* and tutors to adults on 1 April 2002. *Curators bonis* became financial guardians with powers over the whole of the adult’s property and financial affairs. Tutors-dative became guardians with the powers that they were granted by the court when they were appointed; these are generally welfare powers. Tutors-at-law became guardians with power to manage the property, financial affairs or personal welfare of the adult.

- 8.4** Anyone appointed as *curator bonis* to someone under the age of 16, who has been appointed on grounds other than purely the age of the child in question, will become a guardian with powers over property and financial affairs on the child's attaining the age of 16.
- 8.5** Under paragraph 6(3) of schedule 4, as amended by section 60(17) of the Adult Support and Protection (Scotland) Act 2007, the powers of former *curators bonis*, tutors-dative and tutors-at-law not renewed by the sheriff within 2 years from 5 October 2007 will have fallen. In the case of those who have become guardians as described in paragraph 8.4, an application for renewal must have been made within 2 years from 5 October 2007 or within 2 years of the child becoming 16, if that is a longer period.
- 8.6** Those who became guardians under schedule 4 are not required by the Act to have the orders conferring their powers registered by the Public Guardian. The Public Guardian will supervise those who have become guardians with financial powers under the Act. Local authorities will supervise those who have become guardians with welfare powers under the Act.
- 8.7** All *curators bonis*, and tutors holding office at 1 April 2002 should have received notification of their position under the 2000 Act, from either the local authority (in the case of tutors dative) or the Public Guardian (in the case of tutors at law and *curators bonis*).

FOREIGN APPOINTEES AND RELATIONSHIPS WITH THE LAW OF OTHER COUNTRIES

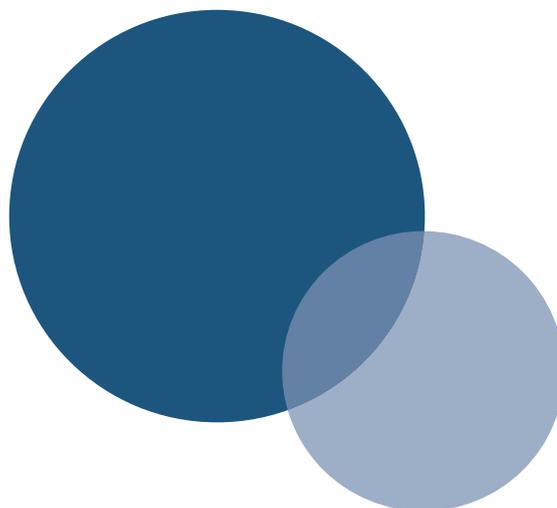
POSITION OF FOREIGN GUARDIANS UNDER THE ACT

- 8.8** Many of the provisions of the Act apply to guardians or those holding similar offices appointed under the law of another country, including that of England, Wales and Northern Ireland. Such appointees will not, however, be required to have their powers registered by the Public Guardian and their appointments will not therefore be notified to the local authority where the adult lives. The local authority will nevertheless have certain investigative and powers in relation to foreign appointees as they have in relation to guardians appointed under the Act. Routine supervision of foreign welfare guardians by the local authority is not required by the Act, but complaints may be investigated and if necessary a local authority could apply to the sheriff to order supervision or to displace the foreign guardian.
- 8.9** The relationships between the legal systems of Finland, France, Germany, Scotland, and Switzerland are governed by the Hague Convention on the International Protection of Adults of January 2000. The Convention came into force between those jurisdictions in 2009. In the future, it will also apply as regards other countries when they ratify it. (The Convention is not yet in force for England and Wales or Northern Ireland: it was ratified by the UK in 2003 but only in respect of Scotland.) The up-to-date position on ratification can be found on the Hague Conference website at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=71. The provisions of the Convention are incorporated into Scots law at Schedule 3 to the Act.
- 8.10** Schedule 3 to the Act also contains provision for the recognition of equivalent measures taken under the law of a country other than Scotland for the personal welfare or protection of property of an adult with incapacity. This is conditional on the jurisdiction of the authority of the other country being based on the adult's habitual residence there. Similarly in England and Wales the Mental Capacity Act 2005 provides that a protective measure taken in relation to an adult under the law of a country other than England and Wales is recognised there if it was taken on the ground that the adult is habitually resident in the other country. As a matter of practice, Scottish orders are generally recognised in Northern Ireland.

- 8.11 Where a guardian appointed under the law of another country requires advice on his or her authority in Scotland, or a guardian appointed in Scotland requires advice on his or her authority abroad, this should be sought from the Scottish Government's Justice Directorate, St Andrew's House, Regent Road, Edinburgh EH1 3DG.

TRANSFERS OF GUARDIANSHIP WITHIN THE UK

- 8.12 The Act removes, through repeals in schedule 6, the provisions at sections 77 and 80 of the 1984 Act for the removal to England and Wales or Northern Ireland of people subject to guardianship in Scotland, and for their guardianship in the new jurisdiction. This is because the powers of guardians in Scotland under the 2000 Act may comprise any of a whole range of financial and welfare powers, and thus would not necessarily match the standard powers conferred on guardians elsewhere in the UK. Guardianship would have to be considered afresh by the courts in the other UK country, where an adult moves from Scotland. However, while the Act does not provide for transfers of guardianship of adults moving to other UK countries from Scotland, it should be noted that, under section 67(3), 'a guardian having powers relating to the personal welfare of an adult may exercise these powers in relation to the adult whether or not the adult is in Scotland at the time of the exercise of the powers'.



Annex 1



A GUIDE TO COMMUNICATING WITH THE PERSON WITH IMPAIRED CAPACITY

Principle 3 means that you, as the attorney, must take account of the person's present and past feelings and wishes so far as possible. Some adults will be able to express their wishes and feelings clearly, even although they would not be capable of taking the action or decision which you are considering. For example, the adult may continue to have opinions about a particular item of household expenditure without being able to carry out the transaction personally.

In communicating with the adult the following points may be helpful:

- take time to explain to the adult what decision requires to be made and what issues are involved;
- use simple language;
- choose a time of day when the adult is alert and ready for a discussion;
- choose a quiet location where interruptions are unlikely;
- use any aids which might be helpful, such as pictures or videos;
- where there are language or speech difficulties, seek assessment and support from a speech and language therapist;
- use appropriate visual aids or sign language for those with hearing difficulties;
- ensure that any mechanical devices such as hearing aids, or voice synthesiser, are used properly to assist communication;

- in extreme cases of communication difficulties, seek advice from the adult's doctor about what kinds of specialised assistance might be available;
- maximise the help of others who know the adult and who are trusted by the adult, for example relatives, friends, GP, social worker, community worker, the adult's named person, befriender or member of the clergy to ascertain whether the adult has recently expressed views on the matter in question; or to help you to explain the matter to the adult and seek the adult's views; but be careful to ensure that they are helping to communicate the adult's views without imposing their own. (Their own views may also be important, but that is a separate matter.)

If English is not the adult's first language, engage an interpreter, preferably one who has interpreted for the particular individual before, in case of differences in dialect are significant.

If the person belongs to a particular ethnic or cultural group and would feel more secure communicating with a member of that group, identify someone from that group or who regularly works with that group with the necessary skills to communicate with the person.

- Use the services of an independent advocacy project which supplies volunteers or other staff to promote independently the rights, views and wishes of people who have difficulty in expressing these for themselves. For further information on advocacy; refer to 'Advocacy – a guide to good practice' (see further information at the end of this code);
- seek specialist help from a Speech and Language Therapist or specialist social worker, e.g. learning disability.
- if all efforts fail, be prepared to abandon the attempt and try at another time.

For further detailed information see 'Communication and Assessing Capacity. A guide for social work and health care staff' (Scottish Government). Carers and others involved with supporting the adult may also find this useful. It is a web-based publication only.

<http://www.scotland.gov.uk/Publications/2008/02/01151101/o>

Annex 2



APPLYING FOR AN INTERVENTION OR GUARDIANSHIP ORDER

- 1 The process for making an application for an intervention on guardianship order is the same. In this annex the term ‘order’ is used to refer to both types of order.
- 2 This annex sets out the process of making an application, the reports required to support the application and the time-scales for submitting (lodging) the application to the sheriff court. It also outlines what happens when your application has been lodged, what the sheriff may do at a hearing and what happens when your application is granted. A summary flow-chart is provided at the end of this annex. This shows the basic sequence of events. However, if objections to the application are made or if the sheriff decides to call for further reports or to make an interim order then the process will vary and is likely to take longer.

For family members/carers/friends

- 3 If you are considering making an application, you may find it helpful to obtain a copy of ‘Guardianship and Intervention Orders – making an application. A guide for carers’ from the Scottish Government or the OPG. This provides a step by step guide to making an application, either yourself, or through a solicitor.

- 4 You may also find it helpful to obtain a copy of the DVD ‘Making Decisions – Your Rights’ which explains in simple terms what guardianship is and what is involved. This is for use with an adult for whom guardianship or an intervention order is being proposed. A key principle of the Act is to gain the views and wishes of the adult (see Annex 1). It is important to involve the adult in your plans as much as possible because his/her views will be taken into account by the sheriff.

THE APPLICATION ‘FORM’

- 5 An application for an order (or for a variation of an order) is made by ‘summary application’ (unless it is the result of criminal proceedings). There is no standard form as such. A basic ‘style’ or template is provided for in legislation and is reproduced at the end of this annex. Examples of completed applications for guardian and intervention orders are also reproduced below. However, these will need to be adjusted to reflect the circumstances particular to your application.
- 6 You may find it useful to engage a solicitor to carry out the necessary legal steps although this is not essential (see guide for carers referred to above). In certain circumstances the expenses of a solicitor can be met by legal aid. Legal aid for Advice and Assistance (the first step to obtaining legal advice about an application) is means-tested based on the income and assets of the adult. If the application taken forward, Civil Legal Aid is available (without a means-test) where the application is for welfare powers or a mix of welfare and financial powers. Where there is no welfare element and the application is for financial powers only, there will be a means test based on the income and capital of the adult. (For further details see Scottish Government Fact Sheet on Adults with Incapacity and Legal Aid at: <http://www.scotland.gov.uk/topics/justice/civil/awi>.)

Applications for powers relating to medical treatment

- 7 A doctor’s authority to treat an adult under part 5 of the Act does not apply where you have relevant powers and the doctor is aware of this, except where it has not been reasonable and practicable for the doctor to obtain your consent. The authority to treat also does not apply where an application has been made for an order with powers relating to medical treatment and has not yet been determined and the doctor knows about this. If you are applying for powers relating to medical treatment you should therefore make sure that the doctor primarily responsible for the adult’s treatment knows of your application. (It is likely that this will be the case anyway because of the requirement for medical reports – see paragraph 11.)

Applications seeking the right to deal in heritable property

- 8 Where you are proposing to apply for a right to deal with, convey or manage any interest in heritable property (including selling a jointly owned house) which is recorded or is capable of being recorded in the General Register of Sasines or is registered or is capable of being registered in the Land Register of Scotland you may find that legal advice on framing the application would be helpful as property matters can be highly technical. Guidance is available from the Keeper's Customer Services Centres (see addresses on page) or at www.ros.gov.uk.
- 9 The application should specify each property affected by the order, in such terms as to enable it to be identified in the Register of Sasines or, as the case may be, the Land Register. If title to any given property has been registered in the Land Register of Scotland the only specification necessary will be to give the unique Title Number of the property (which appears on the Land Certificate) but it is likely to be helpful to everyone dealing with the application to give a postal address or similar as well as that number. If title to the property rests on deeds recorded in the Register of Sasines a formal conveyancing description (either a particular description or a description by reference) will be needed and again a postal address is likely to be helpful.

THE REPORTS REQUIRED TO SUPPORT THE APPLICATION

- 10 Various reports are required to support an application for an order. The format of these reports is prescribed in schedules to the Adults with Incapacity (Reports in Relation to Guardianship and Intervention Orders) (Scotland) Regulations 2002, as amended by the Adults with Incapacity (Scotland) Act (Reports in Relationship to Guardianship and Intervention Orders) (S) Amended Regulations 2008. If someone you are asking to prepare a report in support of your application does not already have or know how to obtain the necessary forms, you can refer them to the following website where the forms are available electronically – <http://www.scotland.gov.uk/topics/justice/civil/awi>. It is better to access the forms electronically because the size of the various sections to be completed can be adjusted to suit. If you have any difficulty with this, please contact the Scottish Government Justice Department (telephone: 0131 244 3581).

MEDICAL REPORTS ON CAPACITY - REQUIRED FOR ALL APPLICATIONS

- 11 All applications for an order need to be accompanied by two medical reports based on an assessment of the capacity of the adult in relation to the decision-making powers you are requesting.
- 12 In approaching a medical practitioner for reports, your starting point should usually be the adult's GP or hospital consultant.
- 13 In a case where incapacity is by reason of mental disorder, one of these reports must be completed by a relevant medical practitioner (this will usually be a doctor approved for the purposes of section 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ('the 2003 Act') as having qualifications and special experience in the diagnosis or treatment of mental disorder.
- 14 As a matter of good practice, the two doctors should examine the adult separately and should complete their reports independently of each other.
- 15 Medical reports accompanying the summary application should be based on an assessment of the individual carried out not more than 30 days prior to lodging the application with the following exception: a medical report will remain valid even when the medical examination of the adult has been carried out more than 30 days prior to the lodging of the application, provided the sheriff is satisfied that there has been no change in circumstances relevant to the report since the examination was carried out.
- 16 In the event that a medical practitioner encounters problems in gaining access to the adult for an assessment or interview, or the adult objects to a report being completed, this is not a total block to your application. The sheriff has powers to direct that the adult be assessed or interviewed and reports provided and could be asked to make such a direction.
- 17 Where the adult concerned does not live in Scotland, he/she may be examined by a medical practitioner in the country where he/she lives provided that the practitioner holds recognised qualifications, has special experience in relation to the treatment of mental disorders and, has consulted the Mental Welfare Commission for Scotland about the report.

Doctors are entitled to charge a fee for the report. If an application is eligible for legal aid then these fees will be included.

'SUITABILITY' REPORT - REQUIRED FOR ALL APPLICATIONS

- 18 All applications must be accompanied by a 'suitability report' containing an opinion on:
- the general appropriateness of the order sought, based on an interview and assessment of the adult; and
 - your suitability as the proposed guardian/intervener.
- 19 A report from a local authority social work or mental health officer is only required in respect of applications requesting welfare powers.

Applications involving welfare powers/welfare and financial powers

- 20 In applications for welfare powers and cases involving welfare issues: a report, in prescribed form is required from:
- the Mental Health Officer (MHO) where the adult's impaired capacity is caused by a mental disorder; or
 - the chief social work officer where incapacity results from an inability to communicate due to a physical condition.

The report, in prescribed form, must be based on an interview and assessment of the adult and nominee, carried out not more than 30 days before the lodging of the application.

Applications involving only property or financial matters:

- 21 Where the application relates only to the property or financial affairs of the adult, a report in prescribed form is required, based on an interview and assessment of the adult carried out not more than 30 days before the lodging of the application.

The person writing this report must have sufficient knowledge to comment both on the appropriateness of the order sought and the proposed guardian's suitability. This could be a relative or friend or it could be professional person such as an accountant, bank manager.

GUIDANCE ON COMPLETING THE 'SUITABILITY REPORT': FACTORS THE SHERIFF MUST TAKE INTO ACCOUNT

- 22 The report must contain the author's conclusions on the appropriateness of the order sought and how he or she has arrived at these conclusions. It should cover any conflicts of interest identified (see chapter 4 paragraph 53). The report should demonstrate that the author has applied the principles to the application.
- 23 Factors which the sheriff must take into account before appointing a guardian are set out at section 59(3) and (4) of the Act; these provide useful guidance as to what information should be contained in the report on the suitability of a person named in an application for a guardianship order. These factors are:
- that the person is aware of the adult's circumstances and condition and of the needs arising from such circumstances and condition;
 - that the person is aware of the functions of a guardian (this would include an understanding of, and an ability to apply, the principles);
 - accessibility of the person to the adult and to his primary carer;
 - the ability of the person to carry out the functions of a guardian;
 - any likely conflict of interest between the adult and the person;
 - any undue concentration of power which is likely to arise in the person over the adult;
 - any adverse effects which the appointment of the person would have on the interests of the adult;
 - such other matters as appear to the author to be appropriate.

NOTE: Conflict of interest and undue concentration of power are not to be taken to arise by reason only of the person being a close relative of, or a person residing with, the adult.

- 24 The report should as a matter of good practice be based on at least one interview with the person nominated if this is not the chief social work officer and it should focus on the aspects above. The views of the adult and others with an interest on the person's suitability must also be taken into account. Conflict of interest issues are discussed in chapters 2 and 4.

Access to the report on suitability

- 25 If you are the person nominated in the application, you will have a right of access to that part of the report which deals with your suitability to be a guardian or intervener.

WHAT HAPPENS ONCE THE APPLICATION IS LODGED?

- 26 Once the application is lodged, the sheriff will make an ‘order for intimation’ – this simply means that the sheriff requires all interested parties, including the adult, to be notified of the application and the date of the hearing. They will receive a copy of the application and the accompanying reports. This provides time for the adult, anyone with an interest in the welfare of the adult to object if they feel the: the adult does not lack capacity in relation to the powers request; that some of the powers requested are inappropriate, or that the applicant is unsuitable.

Under the Act, interested parties include:

- the adult;
 - the adult’s nearest relative;
 - the adult’s primary carer;
 - the adult’s named person (if there is one and if he/she is different from above);
 - any guardian, welfare attorney or continuing attorney of the adult who has relevant powers;
 - the Public Guardian;
 - the local authority, where welfare powers are being sought;
 - the Mental Welfare Commission, where welfare powers are being sought and the adult’s incapacity is by reason of mental disorder;
 - any other person directed by the Sheriff.
- 27 Where the applicant is legally represented, the solicitor will arrange to notify the above. Where the applicant is a lay person without legal representation, this service is carried out by the sheriff clerk.

Where relevant, reports recommending non-notification to the adult

- 28 The general rule is that the adult will be notified of your application. Under section 11(1) of the Act, the sheriff can direct that the adult shall not be notified of an application under the Act if he or she considers that such notification would be likely to pose a serious risk to the health of the adult. The court will only make such a finding on the basis of 2 medical reports. The medical practitioners who provide the reports of incapacity could also provide these 2 medical reports. However, this should not be done lightly. It is a very serious matter to seek to intervene in the affairs of another person without notification. This should only be considered if there will be a **serious risk** to the adult's health, and not simply because it is expected that the adult will take no interest or will be distressed or angry. It should certainly not be considered just because the adult might object to the order.

What may happen at the hearing

- 29 Arrangements for the hearing will depend to some extent on whether anyone with an interest wishes to oppose the granting of the application. Where this occurs, it may be necessary to continue the application for a further hearing to hear the evidence of witnesses. Where the application is not opposed, the applicant will need to attend court or be legally represented to answer any questions about the application. The adult can be separately legally represented. Anyone else with an interest in the application can also be heard either personally or through a solicitor. after which the sheriff will grant such order as he or she considers appropriate under the Act.
- 30 At the court hearing, the sheriff has a number of choices. He or she can:
- simply grant your application; or
 - request further reports, which could include an interview with or assessment of the adult by a safeguarder (usually a solicitor) appointed by the court; and/or
 - make an interim order, pending fuller consideration of the application; or grant the order subject to conditions or restrictions.
- 31 Generally, the fuller the reports before the sheriff and the more preparation you have done by way of applying the principles to your application, the less likely it is that there will be complications in court. Therefore, it is worth investing time in preparation as set out in the guidance above.

- 32** It is possible, however, in some circumstances, that others will not co-operate with your application. For example, there is no power in the Act to compel the adult to comply with an assessment of his or her capacity before you make application to the court. It may be necessary to lodge an application with imperfect reports, if, for example, access to the adult has been refused by the adult or a carer. The sheriff can then direct the adult to be assessed or interviewed under section 3(2)(b) and any person obstructing that requirement would be in contempt of court. (See also paragraph 30 about safeguarding the adult's interests in court.)
- 33** Where the application includes financial powers the sheriff may require caution. However the sheriff can dispense with caution or instruct the Public Guardian to accept an alternative form of security instead of caution, for example, a deposit.

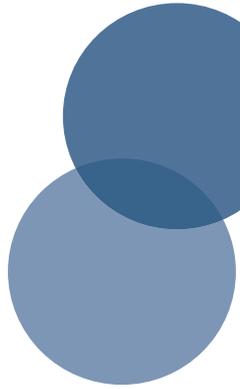
ONCE THE APPLICATION IS GRANTED

Registration and notification of orders

- 34** Under section 58(7) the sheriff clerk must send a copy of the order to the Public Guardian who must register it.
- 35** The Public Guardian must and notify the adult (unless the court has directed notification not to be given under section 11), the local authority and the MWC (where the adult's incapacity is a result of mental disorder) and the intervention order relates to the adult's welfare.
- 36** Once you have received a copy of the certificate from the Public Guardian you can take the decision or action authorised in the order, unless, in the case of a financial intervention order, you were required by the sheriff to find caution before acting. An amendment to the Act allows the sheriff to dispense with the requirement for caution and allow the Public Guardian to accept alternative forms of security (which, if required, you will have to provide before acting).

Orders relating to medical decision-making powers, notify the adult's doctor

- 37** As noted above, a doctor's authority to treat an adult under part 5 of the Act does not apply where you have relevant powers and the doctor is aware of this, except where it has not been reasonable and practicable for the doctor to obtain your consent. It is therefore very important if you have powers relating to medical treatment that you make sure that the doctor primarily responsible for the adult's treatment knows of your appointment and knows how to contact you.



Orders relating to heritable property

- 38** Where order relates to heritable property, you must immediately apply to the Keeper of the Registers of Scotland for recording of the interlocutor (court document) containing the order in the General Register of Sasines or, as the case may be, for registering of it in the Land Register of Scotland. You may find it helpful to ask a solicitor to do this on your behalf. Guidance is available from the Keeper's Customer Services Centres (see addresses in Annex 3) or at www.ros.gov.uk.
- 39** This is an important safeguard for third parties who may become involved in any transaction concerning the property. It also serves to protect the adult and the guardian from the consequences of fraudulent transactions. It would be good practice to inform any mortgage company which holds a loan over the relevant property of the appointment of a guardian.
- 40** An application for registration must contain:
- the name and address of the guardian;
 - a statement that the guardian or intervener has powers relating to each property specified in the order; and
 - a copy of the interlocutor (document stating the decision of the court).
- 41** If the Keeper has recorded the interests in the General Register of Sasines, he/she will send an endorsed interlocutor to the applicant. If the Keeper has registered the interests in the Land Register, he will send the applicant an updated Land Certificate if the applicant has submitted the Land Certificate. In exceptional cases where there is a good reason why the Land Certificate cannot be submitted the Keeper will update the title sheet for the interest and the applicant will need to request an office copy of the updated title sheet. The guardian must send the endorsed interlocutor or, as the case may be, the updated Land Certificate or an official copy thereof to the Public Guardian who shall enter the particulars in his register of guardians.

See summary flow chart for making an application, and sample summary applications on the following pages.

SUMMARY FLOW CHART: MAKING AN APPLICATION FOR AN ORDER

-  **Step 1** Consider what powers you need to benefit the adult – apply the principles. Informally notify the social work department where the adult lives of your intentions and seek their advice.
-  **Step 2** Visit the sheriff clerk at the adult’s local court for the summary application and guidance. Complete the application and make copies to send with your request for reports.
-  **Step 3** Notify the Chief Social Work Officer – allowing 21 days for the Mental Health Officer or social worker to carry out the ‘suitability’ assessment and write the report. At the same time request the two medical reports.
-  **Step 4** Submit all reports with application to sheriff clerk within 30 days of the assessments and interviews with the Adult.
-  **Step 5** The sheriff will set a date for the hearing within 28 days of receiving the summary application and accompanying reports and the sheriff clerk will send notification to all interested parties.
-  **Step 6** The hearing takes place and the sheriff decides whether to grant the application or require further reports, etc.
-  **Step 7** The sheriff grants the order – informs the Public Guardian who registers it and, in turn, informs relevant authorities and issues the order to the person appointed, subject to qualifications such as need for caution, etc.

SUMMARY APPLICATION - STYLE

Style

FORM 23

Rule 3.16.7(1)

SUMMARY APPLICATION UNDER THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

SHERIFFDOM OF *(insert name of sheriffdom)*

AT *(insert place of Sheriff Court)*

[A.B.] *(design and state capacity in which the application is made)*, Pursuer

The applicant craves the court *(state here the specific order(s) sought by reference to the provisions in the Adults with Incapacity (Scotland) Act 2000.*

STATEMENTS OF FACT

(State in numbered paragraphs the facts on which the application is made, including:

1. The designation of the adult concerned (if other than the applicant).
 - (a) *the adult's nearest relative;*
 - (b) *the adult's primary carer;*
 - (c) *any guardian, continuing attorney or welfare attorney of the adult;*
 - (d) *the adult's named person; and*
 - (e) *any other person who may have an interest in the application.*
2. *The adult's place of habitual residence and/or the location of the property which is the subject of the application.)*

(insert place and date) (signed)

[A.B.], Pursuer

or

[X.Y.], *(state designation and business address)*

Solicitor for the Pursuer

Note. This Form should not be used for appeals to the Sheriff. Appeals should be made in Form 24.

EXAMPLES OF SUMMARY APPLICATIONS

Example

SUMMARY APPLICATION UNDER THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

SHERIFFDOM OF Any area

AT Anytown

Mr Robert Smith, 3 Birch Avenue, Anytown, son of Mrs Ann Smith, Pursuer

I crave the court to grant an order under section 57 of the Adults with Incapacity (Scotland) Act 2000 appointing me as guardian with powers relating to the personal welfare and property and financial affairs of Mrs Ann Smith. In particular I seek the following powers:

Powers relating to personal welfare

- to decide where Mrs Smith should live
- to have access to confidential documents or information relating to Mrs Smith where she would have access to such documents or information on a personal basis
- to consent or withhold consent to medical treatment

Powers relating to property and financial affairs

- to have vested in me the right of Mrs Smith to deal with, convey or manage the heritable property at 2 Rowan Drive, Anytown
- to open, close and operate any account containing Mrs Smith's funds
- to claim and receive on behalf of Mrs Smith all pensions, benefits, allowances, services, financial contributions, repayments, rebates and the like to which Mrs Smith may be entitled: and to vary or appeal arrangements
- to deal with Mrs Smith's income tax
- to obtain and pay for any goods or services which are of benefit to Mrs Smith

STATEMENTS OF FACT

1. I seek appointment as guardian with the powers set out above in respect of the following adult:

Ann Smith
2 Rowan Drive
Anytown

2. I am Mrs Smith's nearest relative. Her primary carer is Anyshire Council. My sister has an interest in this application. Her details are:

Mrs Joan Wilson
6 Laburnum Terrace
Inverness

3. Mrs Smith is an eighty year old widow who lives on her own. She has emphysema and has suffered a series of strokes which have left her with difficulties in walking and caring for herself. She is also affected by the onset of dementia. Anyshire Council has been monitoring Mrs Smith's welfare for the past 5 years and a package of support for her in her home has been in place for that time. Mrs Smith is now frequently confused and disorientated and she regularly forgets to take the medicine she needs. In my view, her needs have become complex and unpredictable and they cannot be met if she continues to live alone. As a result of mental disorder, she lacks the capacity to decide where she should live and what care and medical treatment she should receive and she is unable to manage her finances. I have therefore decided to seek appointment as my mother's guardian.

4. My application is supported by the attached reports, as required by section 57(3) of the Act:

- report by Dr XX of an examination and assessment of Mrs Smith, carried out on
- report by Dr YY, who is a medical practitioner approved for the purpose of section 20 of the Mental Health (Scotland) Act 1984, of an examination and assessment of Mrs Smith, carried out on
- report by Mr Arthur Brown, Mental Health Officer, Anyshire Council based on an interview with and assessment of Mrs Smith on
Anytown (signed) Robert Smith Date
or Robert Smith's Solicitor

Example

SUMMARY APPLICATION UNDER THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

SHERIFFDOM OF Any area

AT Anytown

Mr James Wilson, Care Manager, Anyshire Council, Council Offices, Anytown,
Pursuer

I crave the court to grant an intervention order under section 53 of the Adults with Incapacity (Scotland) Act 2000 authorising Mr Robert Smith, 3 Birch Avenue, Anytown to take the following action in relation to the financial affairs of Mrs Ann Smith.

- to sell the heritable property belonging to Mrs Smith at 2 Rowan Drive, Anytown
- to invest the proceeds from the sale of this property

STATEMENTS OF FACT

1. I seek an intervention authorising Mr Robert Smith to take the action set out above in respect of the following adult:

Ann Smith
2 Rowan Drive
Anytown

2. Mr Smith is Mrs Smith's son and nearest relative. Her primary carer is Sunnyside Nursing Home, Anytown. Mrs Smith's daughter is her welfare guardian. Her details are:

Mrs Joan Wilson
6 Laburnum Terrace
Inverness

3. Mrs Smith is an eighty year old widow. She has emphysema and has suffered a series of strokes which have left her with difficulties in walking and caring for herself. A year ago she left her home at 2 Rowan Drive, Anytown, where she had been living alone, and entered Sunnyside Nursing Home where she has settled in quite well and appears content. It was not clear at that time whether she would be able to return home but she is now also affected by the onset of dementia and is frequently confused and disorientated. She regularly forgets to take the medicine she needs. It is clear from assessment by those involved in her care that she would not be able to return to her home, even with support and she now requires to sell her house to meet the cost of the care which she is now assessed as needing. She does not appreciate that she is now living in a nursing home, believing she is still at home. I have therefore decided to seek authorisation for Mr Smith to sell her house and invest the proceeds.
4. My application is supported by the attached reports, as required by section 57(3) of the Act:
 - report by Dr XX of an examination and assessment of Mrs Smith, carried out on
 - report by Dr YY, who is a medical practitioner approved for the purpose of section 20 of the Mental Health (Scotland) Act 1984, of an examination and assessment of Mrs Smith, carried out on
 - report by Mr William Scott, of Scott and Scott, Solicitors, High Street, Anytown based on an interview with and assessment of Mrs Smith on Anytown (signed) Fiona Jones
date Anyshire Council
Solicitor for the Pursuer

Annex 3



USEFUL ADDRESSES

Office of the Public Guardian (Scotland)
Hadrian House
Callendar Business Park
Callendar Road
Falkirk FK1 1XR

Enquiry line: 01324 678300

www.publicguardian-scotland.gov.uk

For information and advice about matters covered by the Act. The OPG's focus is primarily on financial matters. If they cannot assist directly with queries on other matters relating to adults with incapacity (e.g. welfare, health, care) they will point you to other agencies who will be able to help. The OPG does not provide legal advice. All OPG publications, including forms and guidance notes can be downloaded. Hard copies are available on request.

Mental Welfare Commission for Scotland

Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE

0131 313 8777

www.mwcscot.org.uk

Helpline: 0800 389 6809

The Commission provides advice on welfare matters in relation to AWI and free good practice guides – see website for further information.

Scottish Government

Justice Directorate
Area 2W
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Tel: 0131 244 3581

<http://www.scotland.gov.uk/topics/justice/civil/awi>

Adults with Incapacity Act Codes of Practice and other publications are listed on, and can be downloaded from, the website. Information about obtaining hard copies of these documents is available on the website or by calling 0131 244 3581.

Local Authority

To contact your local authority on matters relating to welfare/personal care issues and the Act you should ask for the social work department or community services department at the local council offices in the area where the adult lives. The address is in the phone book.

Sheriff Courts

The address and telephone number of the local sheriff court where the adult lives will be in the telephone directory. You can also find details of the local sheriff court by accessing the Scottish Courts website www.scotcourts.gov.uk/

Department for Work and Pensions

There is a free Benefit Enquiry Line for People with Disabilities on 0800 88 2200 (textphone users 0800 24 33 55). From the local authority you can also get details of the local welfare rights office that will give you advice and help with benefits. You will find useful information and guidance for disabled people and carers on the Department for Work and Pensions website – www.dwp.gov.uk

Care Commission
Headquarters
Compass House
11 Riverside Drive
Dundee DD1 4NY

01382 207100

www.carecommission.com

The Care Commission is an independent body which regulates care services in Scotland. It inspects and investigates complaints in relation to care homes; short break/respite care services; housing support; adult placement schemes; support services; care at home; nursing agencies; and hospice care. There are national care standards for all these services.

Law Society of Scotland
26 Drumsheugh Gardens
Edinburgh
EH3 7YR

0131 226 7411

Client Relations Helpline: 0845 113 0018

www.lawscot.org.uk

The Law Society is the governing body for solicitors. It provides information to the public on where to find and what to expect from solicitors.

Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh EH3 7SW

0131 226 7061

Legal Aid Helpline: 0845 122 8686

www.slab.org.uk

Provides advice and information on entitlement to legal aid for applications in relation to the Adults with Incapacity Act; and a list of solicitors registered for legal aid work.

Citizens Advice Bureau – you will find the address of your nearest CAB in your phone book or at www.cas.org.uk

Keeper of the Registers of Scotland

Edinburgh Customer Service Centre

Erskine House
68 Queen Street
Edinburgh
EH2 4NF

Tel. 0845 607 0161

Glasgow Customer Service Centre

9 George Square
Glasgow
G2 1DY

Tel. 0845 607 0164

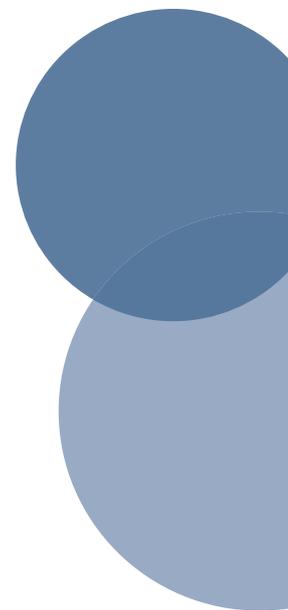
Scottish Independent Advocacy Alliance

Melrose House
69a George Street
Edinburgh
EH2 2JG

0131 260 5380

www.siaa.org.uk

This website will provide a link to the Independent Advocacy Service Directory for Scotland.



Alzheimer Scotland – Action on Dementia

22 Drumsheugh Gardens
Edinburgh EH3 7RN

Office: 0131 243 1453

Freephone 24hr Dementia Helpline 0808 808 3000

www.alzscot.org

Provides a free guide for carers and people with dementia in Scotland: ‘Dementia: Money and Legal Matters’. The website also provides information about the different kinds of powers of attorney and how to set them up. You can call the Dementia Helpline to arrange for a copy to be sent to you.

ENABLE

2nd Floor
146 Argyle Street
Glasgow G2 8BL

0141 226 4541

www.enable.org.uk

Supports people with learning disabilities of all ages by campaigning, providing information, legal advice, training and other services.

Capability Scotland – Advice Service

11 Ellersly Road
Edinburgh EH12 6HY

0131 313 5510

www.capability-scotland.org.uk

Provides advice and information and local services for people with a range of disabilities, their families and carers.

Scottish Association for Mental Health

Cumrae House
15 Carlton Court
GLASGOW G5 9JP

Tel: 0141 568 7000

www.samh.org.uk

Provides information, legal advice and support to people with mental health issues.

SENSE Scotland
 43 Middlesex Street
 Kinning Park
 Glasgow G41 1EE
 0141 429 0294
www.sensescotland.org.uk

Works with children and adults who have communication support needs because of deafblindness, sensory impairment, learning and physical disabilities.

PAMIS
 Head Office
 Springfield House
 15/16 Springfield
 University of Dundee
 Dundee DD1 4JE
 01382 385 154
www.dundee.ac.uk/pamis

PAMIS works with people with profound and multiple learning disabilities, their family carers and professionals who support them.

Headway Scotland
 Helpline: 0808 800 2244
www.headway.org.uk

Headway provides: support and help to people affected by brain injury through a network of local groups and branches; information and advice; carer support; and a range of services (which vary from area to area).

Chest, Heart and Stroke Scotland (CHSS)
 Third Floor
 Rosebery House
 9 Haymarket Terrace
 Edinburgh EH12 5EZ
 Adviceline 0845 077 6000
www.chss.org.uk
 e-mail adviceline@chss.org.uk

CHSS aims to improve the quality of life for people affected by chest, heart and stroke illness through medical research, advice and information and support in the community.



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This document is also available on the Scottish Government website:
www.scotland.gov.uk

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