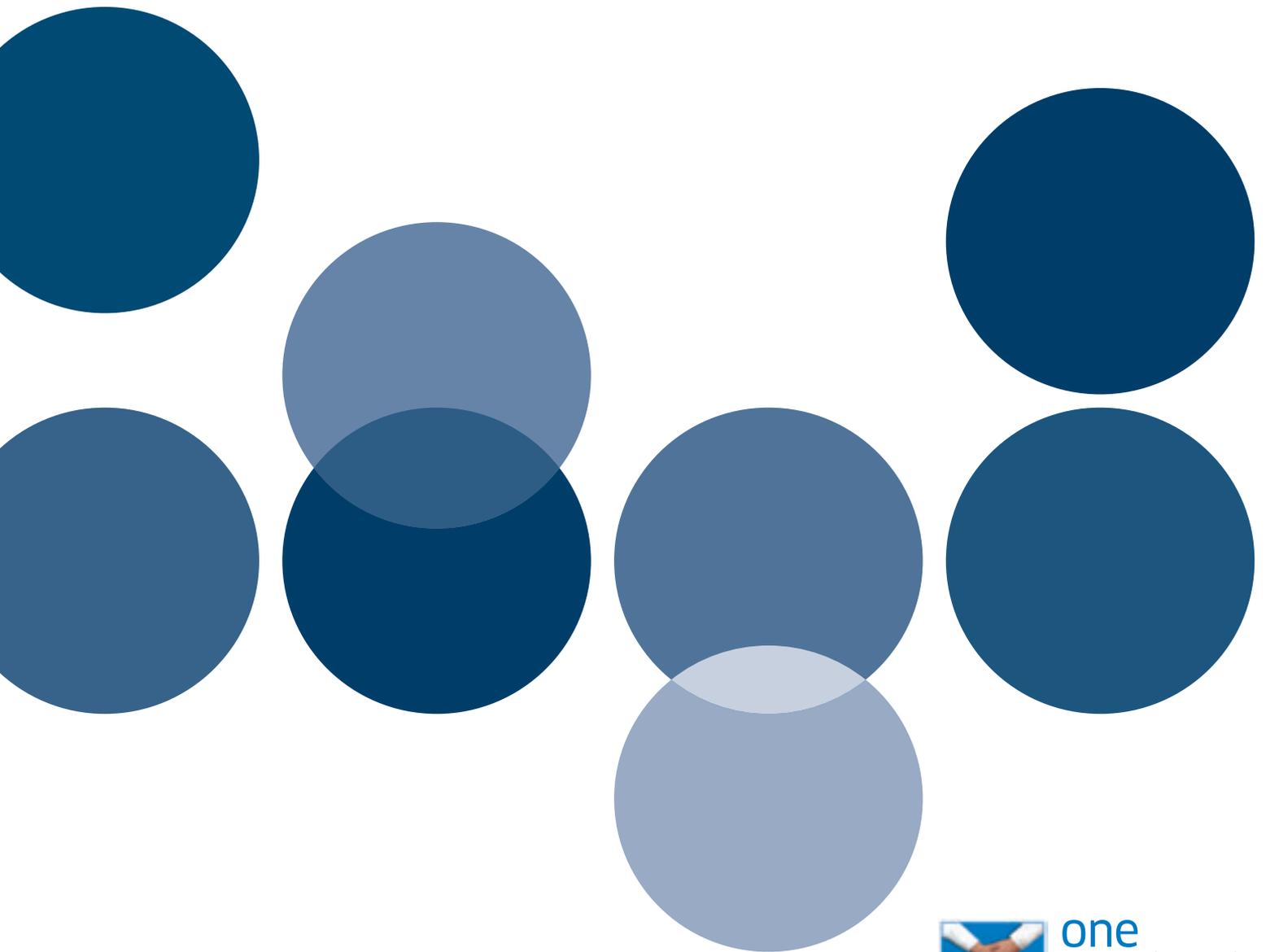


ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000

Guardianship and Intervention Orders - making an application

A Guide for Carers



one
scotland
SCOTTISH GOVERNMENT

ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000

Guardianship and Intervention Orders - making an application

A Guide for Carers



Acknowledgments

This booklet has been informed by responses to a survey of lay welfare guardians, carried out in November 2005. I am grateful to all those who shared their experiences of the application process and advised me about the information and assistance that would have helped at the time. Most carers wanted simple, but full, information about what was involved in making an application. This included having a better knowledge of the court process and understanding of the roles of the different officers and agencies involved. Many reported a lack of information about costs or legal aid provisions and did not know where to turn for help. Some guardians offered further help and it is to these kind people I turned to with a request to read and comment on the final draft. Their time and effort is very much appreciated, in particular thanks go to Marion Sievewright and Dr Iain White also to Stuart Fowler and colleagues at the Office of the Public Guardian.

Jan Killeen
AWI National Practice Co-ordinator (2005-2007)

© Crown copyright 2010

ISBN: 978-0-7559-5640-1

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

Produced for the Scottish Government by APS Group Scotland
DPPAS10180 (06/10)

Published by the Scottish Government, April 2008

Reprinted by the Scottish Government, June 2010

The text pages of this document are printed on recycled paper and are 100% recyclable

Contents

1	About this guide	1
2	About the Adults with Incapacity Act (Scotland) Act 2000	3
	• Who the Act can help	3
	• Making decisions	4
	• What does incapacity mean?	5
	• Summary of provisions	6
	• Principles	7
3	About guardianship and intervention orders	8
	• What are guardianship and intervention orders?	8
	• Who can apply for an order?	9
	• When you might consider the need for guardianship	10
	• Guardianship order – Financial powers	11
	– Welfare powers	11
	• Intervention order – Financial	11
	– Welfare	12
4	What powers should I apply for?	13
	• Applying the principles	13
	• Anticipate the powers you are likely to need	14
	• Financial guardianship powers	15
	• Welfare guardianship powers	16
	• Making the right application!	17
	• Who to contact for further advice	17
5	A step-by-step guide to applying for an order	19
	• About the application process	19
	• Making an application yourself – steps to take	20
	• Flowchart: Making an application for an order	25
6	You've been appointed - what to do next	26
	• Informing and involving others	26
	• Contact with supervisory bodies	27

Appendices

Appendix 1: Reports needed to support an application for an order	28
Appendix 2: Legal Provisions governing guardianship orders	32
• Caution	32
• Direction waiving requirement for management plan	32
• Can the adult enter into transactions without the permission of the financial guardian?	32
• Liability and protection for third parties acting in good faith	33
• Special provisions where guardianship relates to heritable property	33
Appendix 3: Examples of summary application forms	34
Appendix 4: Costs associated with applying for an order	40
Appendix 5: Useful contacts and resources	42
Appendix 6: Frequently Asked Questions	47
Planner	51

Chapter 1

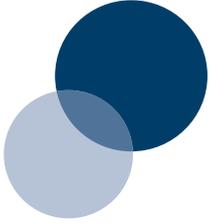


ABOUT THIS GUIDE

This guide is for carers who are concerned that the person they care for is unable to take action or make some or all decisions in relation to their finances, personal welfare or health, due to a mental disability or severe communications difficulties, such as a stroke. It provides information on:

- how the Adults with Incapacity (Scotland) Act 2000 can help;
- the purpose of guardianship and intervention orders;
- considerations to make before taking forward an application for a guardianship or intervention order;
- deciding what powers to apply for;
- how to make an application;
- procedures and costs;
- what to do next when you have been appointed;
- frequently asked questions (FAQs).

The process of making an application and being appointed guardian or intervener can seem daunting. We hope this pack will help to guide you smoothly through that process.



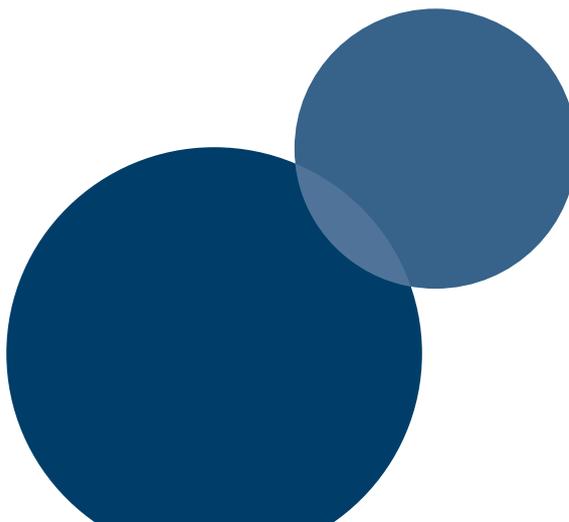
Terms used in this guide

In this guide the term ‘carer’ refers to a partner, spouse, family member or friend who cares, in an unpaid capacity, for an adult who lacks the ability to make some or all decisions for themselves. When the text refers to ‘you’ this means you, the reader, as the would-be guardian or intervener. The term ‘adult’ refers to the person (aged 16 and over) being considered for a guardianship or intervention order. The Adults with Incapacity (Scotland) Act is abbreviated to ‘AWI’ or ‘the Act’.

Please note that the information in this guide does not constitute legal advice.

If you have any comments on this guide or suggestions as to how it can be improved, please contact us: Tel. 0131 244 3581, or e-mail: adultsincapacity@scotland.gov.uk or write to:

Scottish Government
Justice Directorate
Civil Law Division
Area 2W, St Andrew’s House
Regent Road
Edinburgh EH1 3DG



Chapter 2



ABOUT THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

Who the Act can help

The Act aims to help people (aged 16 and over) who lack capacity to make some or all decisions for themselves. It enables carers or others to have legal powers to make welfare, health care and financial decisions on their behalf.

An inability to make decisions in our lives can occur for a range of reasons. Disabilities such as dementia, brain injury or severe mental illness may limit our capacity to understand and appreciate what is involved in decision-making. People with a physical condition, such as a stroke or severe hearing impairment, may lack the capacity to communicate their decisions and need someone else to act for them. Being born with a learning disability may limit a person's ability to act or make some or all decisions for themselves, depending on the severity of the condition.

The Act also provides protection for individuals with impaired capacity who may be at risk of harm.

Making decisions

In common law, we all, as adults, have a right to make our own decisions. Others must assume that we have capacity to act and make decisions unless there is evidence otherwise. No one should be regarded as lacking capacity just because they make unwise, unusual decisions, or because they have a particular diagnosis, illness or condition.

Before the Act was introduced, capacity was ‘all or nothing’ – a person either had full capacity to make decisions or none at all. Someone deemed ‘incapable’ had few rights and the legal means available to carers were also limited, complicated and expensive.

The Act recognises that:

- capacity is ‘decision-specific’ – that someone may be capable of making certain types of decisions but not others and that this may depend on the complexity of decision to be made;
- a person’s capacity may remain stable, improve, fluctuate or deteriorate.

Examples:

- the skills of some people with a learning disability may develop so that they are able to make decisions and act for themselves. For others, their abilities may decline over time (for example, some people with a learning disability may develop dementia in their middle years). People born with profound and complex learning disabilities may lack the ability to make any sort of informed decision throughout their lives.
- People with dementia have full capacity in the early stages, but capacity is gradually lost as the illness progresses. The rate of change and its effects will be different for each person. Someone may lose the ability to manage money but continue to be able to make health care decisions for much longer.
- People who have a severe and chronic mental illness may be able to make decisions some of the time but not when their illness reoccurs. In these circumstances someone may need to be given authority to make decisions for the person just during those times.
- People who have suffered a severe head injury may need someone to make most decisions for them following the accident, but may gradually recover and regain the ability to make all decisions for themselves.

What does incapacity mean?

In an everyday context, mental capacity means the ability to make decisions or take actions affecting daily life – when to get up, what to wear, what to eat, whether to go to the doctor when feeling ill, etc. In a legal context, it refers to a person's ability to do something, including making a decision, which may have legal consequences for the person themselves or for other people – such as:

- making a contract with someone;
- buying and selling things;
- deciding about medical treatment;
- managing money.

When does a person lack legal capacity?

The law says an adult lacks legal capacity to make a particular decision when there is evidence that he or she is unable to:

- understand the information relevant to the decision; or
- make a decision based on the information given; or
- act on the decision; or
- communicate the decision; or
- retain the memory of the decision.

A person is not to be treated as unable to make decisions unless all practical steps have been taken to assist the person to communicate. How information is presented can help or hinder someone to understand and make an informed decision.

Examples:

A tenancy agreement can be written in highly legalistic language, hard for any of us to understand. But some housing associations providing accommodation for people with a learning disability have found that by simplifying the wording and using visual ways to communicate, they have helped individuals to understand the agreement and give informed consent.

Someone with dementia may be able to give informed consent to a decision but may be unable to recall the decision due to short-term memory loss. In cases such as this the person should be supported with memory aids such as notes, pictures or a tape recording of previous discussions. You may find it helpful to access the Guide to Communication and Assessing Capacity. It is a web based publication only and can be downloaded from the Adults with Incapacity website at <http://www.scotland.gov.uk/Publications/2008/02/01151101/0>

Summary of provisions for making financial and welfare decisions

The Act provides a range of ways to allow others to act or make decisions for an adult who lacks the ability to do so for themselves in relation to their financial affairs, health and personal welfare. These provisions include:

- joint (either or survivor) bank account – an arrangement that can be put in place with the bank or building society whilst someone still has capacity to give informed consent;
- financial and welfare powers of attorney – an arrangement that can be put in place whilst someone still has capacity to give informed consent;
- access to funds – a simple way of managing the day to day funds of someone who lacks capacity to do so – by applying to the Office of the Public Guardian (Scotland) (OPG);
- financial and welfare guardianship and intervention orders – details provided in this booklet;
- authority for doctors and other healthcare professionals to carry out medical treatment and research;
- the management of residents funds by care home managers (where there is no family member or friend available to do so).

These provisions can be tailored to meet the needs of the individual. For example, a person may only require Access to Funds for the management of their finances, but may need welfare guardianship to authorise a major change in care arrangements.

Further details of these provisions may be obtained from the Scottish Government and Office of the Public Guardian (see Appendix 5). The Act says that its provisions should only be used when necessary and if there is no other way for the adult to gain the benefit or protection needed. The principles provided in the Act (see below) are designed to help you decide what you need to do.

Can a carer make decisions without using the Act?

Carers can make all sorts of practical everyday decisions to support the person they care for. The principles provide a good checklist to help you keep the person as involved and independent as possible. These principles also apply to someone with powers of attorney. If you don't have power of attorney and the person is unable to manage their money, sign a legal contract or give informed consent to a major welfare decision, it will be necessary to consider whether you need to use the provisions of the Act.

It is strongly recommended that you approach the local authority area social services office (where the person lives) for advice and possibly an assessment of the adult's needs under the Social Work (Scotland) 1968 Act. It's best to do this at an early stage as it will help identify what sort of application/s you may need to make and identify issues or problems which could arise later in the application process.

Adults with Incapacity (Scotland) Act 2000

Principles

All decisions made on behalf of a person with impaired capacity must:

- benefit the adult
- restrict the adult's freedom as little as possible while still achieving the desired benefit
- take account of the adult's past and present wishes (providing every assistance to aid communication as appropriate to the needs of the individual)
- take account (as far as reasonable and practicable) of the views of others with an interest in the welfare of the adult
- encourage the adult to use existing skills and, where possible, develop new skills.

Chapter 3



ABOUT GUARDIANSHIP AND INTERVENTION ORDERS

What are guardianship and intervention orders?

Guardianship and intervention orders provide legal authority for someone to make decisions and act on behalf of a person with impaired capacity, in order to safeguard and promote their interests. The powers granted under an order may relate to the person's money, property, personal welfare and health.

An intervention order is appropriate where there is a need for a 'one-off' decision or action. A guardianship order gives authority to act and make certain decisions over the long term. 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 (see Appendix 1), is made to the sheriff court. The sheriff decides if the adult needs a guardian and if the person who wishes to be the guardian is suitable. Once granted, the order is registered with the Office of the Public Guardian (Scotland) and can then be put into operation.

Who can apply for an order?

Anyone with an interest in the adult, normally a family member, but possibly a friend, can apply to the sheriff court to become a welfare and/or financial guardian or intervener. Usually the person who wishes to act for the adult makes the application and nominates themselves.

Only one person is allowed to be nominated to be an intervener, but more than one person can apply to have joint guardianship. Joint guardianship is often advisable as it enables tasks to be shared, and provides cover should one person become temporarily unavailable. Some families find it helpful to have one person dealing with welfare matters and the other with financial affairs. Alternatively, a substitute guardian may be nominated at the time of making the application. This would be to ensure continuity in the event of the guardian being unable to continue for any reason. (It is also possible to apply for someone else to become a joint or substitute guardian later on.)

The sheriff will normally only appoint relatives of the adult as joint guardians, i.e. their parents, spouse, partner, children or siblings. However, the sheriff can appoint a non-relative as a joint guardian if this is the best solution in the circumstances, but you would need to make a special case.

It is possible for someone else, such as the local authority, to make the application to the court and nominate the person who wishes to be the guardian or intervener.

For example:
For example, you might want to be a joint guardian with personal welfare powers, while financial guardianship is exercised by a professional person.

For example:
if the local authority has assessed the needs of the adult and considers guardianship necessary, there will be a discussion with you, the carer, about how the application might be taken forward. Everyone may agree that you are the best person to act as guardian – however if you find it too daunting to make the application yourself, the local authority could make the application and nominate you. The local authority would only do so if they felt it was appropriate.

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 to do so. Where welfare powers are needed the Chief Social Work Officer is appointed (with authority delegated to a health or social care worker) but in respect of financial powers, the local authority will usually nominate a solicitor.

The number of guardianship applications made each year has grown to over 1,500 (2009-10). In 2008-09, around 55% of appointments were for people with dementia, 31% for people with a learning disability, 4% for people with an acquired brain injury and 4% for people with a mental illness (plus a small percentage for people with other conditions). For more statistics, visit the websites of the Office of the Public Guardian and the Mental Welfare Commission.

When you might consider the need for guardianship

- You may have become aware that the person can no longer act or make decisions to safeguard or manage aspects of their financial affairs, property or personal welfare.
- You are aware that the adult has complex and or significant care needs but that he/she is unable to seek help or give informed consent to services. In addition, there may be strong conflicts within the family or with the adult as to how these needs should be met.
- You are the parents of a young person with a learning disability who is over the age of 16 or is about to reach the age of 16 and is unable to make decisions about e.g. future accommodation or health care.
- You are the parents of a young person with complex and multiple learning disabilities who will, throughout the whole of their lives, need someone to make all significant decisions for them.
- You already have powers in relation to the adult for example, as an attorney, but the scope of your powers is not enough to allow you to take certain actions or decisions on their behalf.
- You have concerns about the ability of someone already appointed (such as an attorney) to take the necessary action or decision, and you are considering if you or someone else should be appointed as guardian with new powers.

For example:
the adult may have appointed a financial attorney at a time when he or she had modest means. The adult'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 the responsibility of selling the house and investing the proceeds for the adult's benefit.

Guardianship – powers that can be applied for

An application for guardianship must specify the ‘powers’ that you want as these, if approved by the sheriff, will be stated on the guardianship order. The term ‘power’ is used to describe the area or areas of decision-making for which you need authority. The Act allows wide flexibility, to enable ‘powers’ requested to be tailored to meet the needs of the adult. Only powers that are needed now and in the foreseeable future should be requested. An application for an order may be for financial powers, welfare powers or for both.

The Act makes general provision for the following powers to be specified in an order.

Financial powers

- power to manage the property or financial affairs of the adult, or the parts of them specified in the order;
- power to authorise the adult to carry out some transactions or categories of transactions as the guardian may specify (this is in line with the principle that incapacity is not ‘all or nothing’ and the adult may be able to deal with certain areas of decision-making).

Welfare powers

- power to deal with all aspects of the personal welfare of the adult, or with such aspects as may be specified in the order.

A guardian is allowed to act as the adult’s legal representative in relation to any matter within the scope of the powers granted in the guardianship order (unless the sheriff directs otherwise).

When might you consider the need for an intervention order?

This may be appropriate where you only need to carry out a specific action or make a ‘one-off’ decision on behalf of the adult.

Financial intervention orders

A financial intervention order could be suitable in the following circumstances:

- 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;
- opening, operating or closing an account held by the adult;

- dealing with the adult's income tax;
- selling moveable property held by the adult to obtain necessary income, e.g. jewellery, paintings, antiques, subject to consideration of any bequests;
- winding up the adult's business affairs;
- a transaction to buy or sell property;
- acquisition or sale of the adult's home (dwelling house – special provisions apply – see page 50).

Welfare intervention orders

A welfare intervention order could be suitable in the following circumstances:

- you have become aware of a specific need which the adult cannot meet by making a decision personally;
- you already have powers in relation to the adult, for example, as an attorney or guardian but the scope of your powers does not extend to taking the action or making the decision in question;
- where the person is unable to give consent to significant medical, dental or other treatments, or operations.

A guardian or intervener cannot have powers to:

- consent to marriage on behalf of an adult or to make a will;
- consent to specific treatments regulated under the Adults with Incapacity Act; or consent on behalf of the adult to certain medical treatments covered under the Mental Health (Care and Treatment) Act 2003;
- place an adult in a hospital for the treatment of mental disorder against his or her will. If the adult resists treatment for mental disorder then an application will need to be made by a mental health officer for an order under the Mental Health (Care and Treatment) (Scotland) Act 2003;
- sell property without the Public Guardian's permission in principle and with regard to cost.

Other statutes or rules of law may preclude a guardian or intervener from exercising certain powers. If you are in doubt as to what powers you can exercise, you should seek legal advice.

Whatever your circumstances, if you decide that the person you care for will benefit from an order, do seek further advice. See chapter 5 for the steps you need to take if you wish to apply for an order.

Chapter 4



WHAT POWERS SHOULD I APPLY FOR?

First, think about the powers you may need in relation to the person's circumstances, and the type of order that will be most appropriate to help them. This may already be very clear from your knowledge of the person and/or from a formal assessment of the person's needs by health and social workers. However, if you are unsure, you may wish to seek advice (see page 18). A number of carers have found that applying the principles of the Act have helped to put them on the right track. Your application will need to show that you have taken account of the principles and only applied for the powers needed.

Applying the principles

- The type of order sought should **benefit** the adult and there should be no other reasonable way of achieving that benefit for them. In the application you must be able to show that alternatives have been considered and give reasons for rejecting them.
- The type of order sought should be the **least restrictive option** in relation to the freedom of the adult, and in relation to its purpose.

For example:
For example, if guardianship is sought to move an adult into residential care, you should be able to show that other options have been considered and why they have been rejected, i.e. the risks of keeping the person at home are too great, even with more support.

- Account must be taken of the **adult's past and present wishes and feelings**. It's important to help the person to express their views as far as possible. As their carer you will be familiar with the person's wishes and feelings and the extent of their ability to respond. If the person has lost capacity to consent, for example, due to a head injury, dementia or a stroke and it's hard to get their views, you may wish to check with others who knew the person when they were well or seek expert advice on how best to aid communication.

In the application you will need to say what steps you have taken to find out (as far as possible) what the person's past and present wishes and feelings are about the decisions you are needing to make for them. If the adult disagrees with your proposals (whether or not they understand) they have a right to challenge any aspect of the application, as will others with an interest in the person's welfare.

- Account must be taken of the **views of others concerned with the welfare of the person**, in so far as it is reasonable and practicable to do so. This includes the adult's nearest relative, named person and primary carer; any attorney; anyone else the sheriff has directed should be consulted; and any other person having an interest in the adult.

You may not need to exercise the powers that you want all of the time, for example, where the capacity of the adult fluctuates, or where there is a progressive improvement and the adult is able to take over making certain decisions for him/herself. The important point is to foresee the powers that may be required to meet the adult's needs but without taking more control over the life of the person than you need to.

Anticipate the powers that you are likely to need

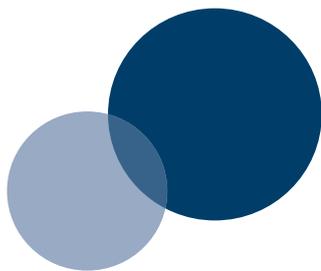
First, consider carefully whether you need welfare powers or financial powers (including property) or both types. The following section focuses on guardianship as the majority of adults for whom an order is appropriate need someone to act and make certain decisions for them on a long-term basis.

* Please note that the following lists provide examples of specific powers that might be included. In any particular case, some powers may be inappropriate and others may need to be added.

Financial guardianship powers

You should consider what current and foreseeable **property and financial affairs** may need to be managed for the adult. These could include powers to:

- open, close and operate any account containing the adult's funds;
- obtain and pay for any goods or services which are of benefit to the adult;
- 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;
- deal with the adult's income tax;
- pay all 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;
- act in the interests of the adult in any legal case involving a claim for their property or money;
- have access to relevant confidential information to which the adult would have been entitled to have access;
- have vested in you any right of the adult to deal with, convey or manage heritable property (land or buildings);
- make gifts to specific people of a specific value, consistent with the adults past and present wishes;
- have powers over property and financial affairs and shall, subject to certain restrictions, be entitled to use the capital and income of the adult's estate to purchase assets, services or accommodation to improve the quality of the person's life.



Welfare guardianship powers

You should consider the current and foreseeable welfare decisions which may need to be taken on behalf of the person you care for. These could include power to:

- decide where the person should live;
- have access to personal information concerning the person, held by any body or organisation, such as medical records or personal files held by social work services;
- consent to medical treatment, dentistry, etc. (except where specifically disallowed by AWI);¹
- consent to the adult's participation in research, in accordance with safeguards set out in Part 5 of the Act;
- take any legal action on behalf of the adult involving his or her personal welfare;
- make decisions on the social, leisure and cultural activities for the adult;
- arrange for the adult to undertake work, education or training;
- take the adult on holiday or authorise someone else to do so.

It would be helpful to specify in the application the period of time you might need these powers and the reasons why. For example, parents applying for guardianship for a young person with profound and multiple learning disabilities or carers of someone with advanced dementia – where the condition is not going to change – could request the powers to be enduring throughout the person's life-time. The carer of an adult with a mental health problem may request powers for a shorter period than the three-year norm. However, the period for the appointment is at the discretion of the sheriff.

Welfare guardians with medical decision-making powers

If you wish to have power to make medical and other health care decisions which the adult is unable to make for themselves, then you **must specify** this in your application and let the adult's GP and consultant (if there is one) know about this. (Doctors are authorised to give emergency treatment in life-threatening situations without consent from the guardian.)

¹ 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.

Making the right application!

- If you include welfare matters in an application that is only for financial powers or vice-versa, the sheriff will reject it.
- 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 an intervention order is all you needed to sell a house, but because the proceeds of the sale must be used to benefit the adult on a continuing basis, a guardianship order would be necessary to manage the funds. This would mean starting the whole process again with a new application, requiring the same reports as before, with all the stress to yourself, the person and inconvenience to others involved.
- However, if you apply for guardianship, and the sheriff decides that an intervention order will be adequate, he/she is able to grant the intervention order without your having to make a new application.
- It is advisable to be specific about the powers you request as this will remove any uncertainty about what is really needed. For example, it will help to counter any doubts by banks or other bodies about what you have authority to do.

Who to contact for further advice

On making the application

If you think you need to apply for an order with welfare powers it is advisable to consult the social work department in the area where the adult lives. This can be helpful because the local authority:

- has a duty to assess need and arrange services under the Social Work (Scotland) Act 1968. Once an assessment or review has been carried out, the local authority might advise, in certain circumstances, that an order under AWI is not necessary to meet the needs of the person you care for;
- will be required to prepare a report on the appropriateness of the application and suitability of yourself as applicant for an order relating to personal welfare, and the more notice they have the better.

You could also seek advice from the Office of the Public Guardian (Scotland) (on financial matters), Mental Welfare Commission (on welfare matters), the Citizens Advice Bureau or other specialist voluntary organisations, or solicitor (see Appendix 5).

Dealing with conflicts of interest

If you think that making the application may give rise to a conflict of interests it is best to seek independent advice. For example:

- there may be strong disagreements with other family members, or with health and social care professionals, or with the adult about the best way to meet the adult's needs;
- you might want to apply for financial guardianship powers but at the same time stand to inherit property or money under the adult's will. It is quite reasonable and proper for the guardian to sometimes take action which would benefit both him or herself and the adult (e.g. a home improvement).

If you are not sure how to deal with conflicts of interest or who to contact there are a number of options you can follow, these would include:

- consulting the Office of the Public Guardian (Scotland) where money or property matters are concerned;
- consulting the Mental Welfare Commission where welfare matters if the incapacity of the adult is caused by mental disorder;
- consulting the local authority mental health officer or social work officer, or the person's social worker if there is one;
- discussing the issues with the mental health officer or social work officer who will be preparing the report on your application. They will need to comment on any possible conflict of interest;
- consulting an independent advocacy service – some services have advocates to support carers and some have advocates to support the adult (this free service is available in some areas, it does not constitute legal representation);
- engaging an independent solicitor to represent the interests of the adult (see page 19);
- asking the sheriff, at the time of making the application, to make special orders to help manage any potential ongoing conflicts.

Chapter 5



A STEP-BY-STEP GUIDE TO APPLYING FOR AN ORDER

About the application process

This chapter sets out the process of applying for an order and the reports required to support the application. You may wish to engage a solicitor to carry out the necessary legal steps. This is particularly advisable if your application is for powers that are quite complex, or where your application is likely to give rise to objections. However, it is not essential to use a solicitor and you can make the application yourself – this chapter tells you how. Another option, which has been used successfully by some carers, has been to collaborate with the solicitor by carrying out most of the ‘leg work’ themselves, i.e. gathering reports, with the solicitor lodging the application and representing the applicant at the hearing.

Using a solicitor

Before engaging a solicitor, you should ask whether legal aid is available.

You may be eligible to receive initial help from a solicitor using the type of legal aid known as Advice and Assistance. Your own means are not taken into account, but your solicitor will decide on eligibility by looking at the means of the adult. You may require to pay a contribution towards your solicitor’s bill.

If you then wish to seek an order from the court, you may be eligible for civil legal aid. Your solicitor can help you apply to the Scottish Legal Aid Board (SLAB) for civil legal aid. The Board looks at the merits of the case, and the means of the adult. Where the adult’s assets are above the eligibility level, and this is because they mainly constitute compensation to meet current and future care costs, SLAB is able to take this into account.

Since August 2006, there has been no means test applied by the Board in cases relating to either welfare powers only, or a combination of welfare and financial powers.

SLAB has a list of solicitors' firms which are registered to provide civil legal assistance. You can also contact the Board to obtain more information about legal aid. (See Useful Contacts, Appendix 5.)

If you are not eligible for legal aid, you should ask your solicitor for an estimate of the fees you will have to pay. Fees can vary, possibly around £2000 but may be higher, depending on whether your application is likely to be contested. Where the application to the court is for financial powers only, you can ask the court to order your bill to be paid from the adult's estate.

Making the application yourself

If you make the application yourself there will be various fees to pay for the medical certificates, lodging the application, etc. again, these can be met out of the adult's estate if you apply for them to be covered by the order (see Appendix 4). You won't however, be able to apply for legal aid, as this is intended only to meet the costs of a solicitor.

The process for making an application for an intervention order and guardianship are very much the same in terms of the application to be made to the sheriff court, the reports required and fees. The time it takes will depend on how straight forward the application is.

Making an application yourself - steps to take

Step 1: Obtaining and completing the summary application form

The application you need to complete and submit to the sheriff court is called a 'Summary Application'. There is no standard form as such. A basic 'style' or template to be followed is provided for in legislation and is re-produced at Appendix 3. Examples of completed applications for guardianship and intervention orders are also re-produced at Appendix 3 for your assistance. However, these will need to be adjusted to reflect the circumstances particular to your application. Your local Citizens Advice Bureau or voluntary organisation (see Appendix 5) may be able to help.

Your completed application should be lodged with the adult's local sheriff clerk who will be able to advise you on the steps you can expect as your case progresses through the court process. However, please note that the sheriff clerk cannot provide you with legal advice or assist you in drafting your application.

The address of the relevant sheriff clerk can be found in the telephone book, or the Scottish Court Service website at www.scotcourts.gov.uk.

Before completing the application form, think very carefully about the powers you are requesting and why they are needed. You will need to justify these in terms of the Principles (see chapter 4 page 13).

**Step 2:
Obtaining reports
required to support
your application**

When the summary application form is completed and ‘lodged’ with (received by) the sheriff court, it must be accompanied by three reports to support your application (two medical and one ‘suitability’ report). **The exact reports you need, and who has to write them, will depend on the type of application you are making – whether it is for a financial order, welfare or both (see details below), and whether it is for an adult with mental incapacity or severe communications difficulties due to a physical condition. The reports have to be submitted on specific forms.**

If the person 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 at: <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. If there is any difficulty with this, please contact the Scottish Government, Civil and International Justice Directorate (telephone: 0131 244 3581).

Reports needed to accompany an application

(See Appendix 1 for full details)

- 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.
- All applications have to 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;
 - your suitability as the proposed guardian.

Requesting and submitting reports within deadlines

- In the case of all reports, the interview or examination of the adult must have taken place not more than **30 days** before the application is lodged with the sheriff court. In certain circumstances, sheriffs have discretion to accept medical reports which are more than 30 days old.
- Under the Act, you are required to give the local authority **21 days** to prepare a report on an application for an order relating to personal welfare.

Each person providing a report will need to have a copy of the completed summary application before they can begin. You will need to send them a photocopy with your request and deadline dates. You need to ensure that they are able to deliver their reports within the necessary time-frame. Otherwise you will have to start again and make a new application with all that entails – including potential stress for you, the adult, as well as increased costs and delays.

Notifying other interested parties (legal term 'intimate')

**Step 3:
Lodging the
application with the
sheriff and what
happens next**

When the summary application form and accompanying reports are completed they have to be 'lodged' with the sheriff, that is given to the sheriff clerk who will lodge the papers. It is advisable to hand these in to the sheriff clerk or send by next-day delivery or other form of registered mail.

The application form includes a space for you to put the contact details of family members and others with an interest in the welfare of the adult, who need to know about the application. The sheriff will then make an order for these 'interested parties' including the adult, to be officially notified of the application.

If you intend to take the application forward yourself, the sheriff clerk will notify all interested parties for you. If you have a solicitor, it will be his/her responsibility to notify the relevant people. They will be sent: a copy of your summary application; accompanying reports and the date of the hearing.

Notification provides the opportunity for anyone who wishes, to oppose the application. The following people will normally be notified:

- the adult;
- the adult's nearest relative;
- the adult's primary carer;
- the adult's named person (where there is one);

- any guardian, welfare attorney or continuing attorney of the adult with 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.

In certain rare circumstances, the sheriff can direct that the adult should not be notified of the application or the outcome of the hearing if it was felt this might pose a serious risk to the health of the adult. The court will only allow this on the basis of two medical reports. (For further information see Appendix 6, Q3.)

Step 4: Attending the hearing

Where does the hearing take place?

The sheriff may hold the hearing in chambers – his/her office – or in the courtroom. The courtroom can be daunting but don’t be put off! If there are quite a lot of people attending it is more likely to be held in a courtroom. The hearing is normally held in private.

Who should attend?

If you are making the application yourself, you, the applicant, should attend the hearing to answer any questions from the sheriff. However, it is not necessary to attend if you have engaged a solicitor to represent you. The adult can also attend and have another person to support them. This could be, for example, a relative, friend, or someone from an independent advocacy. The adult may have their own legal representative if they want to make any objections. However, it is not always appropriate for the person to attend the hearing, especially where he/she is unable to understand any of the proceedings or would find it too distressing or confusing. Anyone else with an interest in the application can also be heard either personally or through a solicitor.

What happens if someone opposes the application?

Where someone with an interest, or the adult, wishes to oppose the granting of the application, more than one hearing may be needed to hear the evidence of witnesses. Sometimes an interim order is granted to enable action to be taken for a temporary arrangement to be made. If you think that your application may be opposed it is advisable to seek legal advice.

What a sheriff may do at the hearing

The sheriff has to reach a decision about the application on the basis of the reports he/she has received and representations made (if any) at the hearing. He/she can:

- grant the order as requested; or grant the order subject to conditions or restrictions;
- decide how long the guardianship order will last. It will normally be for three years and subject to review. However the sheriff has discretion to make it for a shorter period or ongoing depending on individual circumstances;
- request further reports, which could include an interview with and/or further assessment of the adult, and possibly returning to those previously interviewed, or interviews with others with an interest in the adult's welfare. This usually happens where the information provided is inadequate or does not fully support the application, or where there are conflicts about what will be of most benefit for the adult. The sheriff may appoint a 'safeguarder' (normally a lawyer) to carry out the interviews and report back to the court. The sheriff will then reach a decision on the basis of all the information available;
- make an interim order, pending fuller consideration of the application. An interim order means the sheriff will appoint someone to act on a temporary basis, for up to three months (sometimes more than one interim order is needed where the case is complex).

Registration and notification of an order

Step 5:
The sheriff grants the order - what next?

The sheriff clerk will send a copy of the 'interlocutor' (the decision of the court) to the Public Guardian who will register it and issue you with the order/ certificate of authorisation. The Public Guardian must notify the adult (unless the court has directed not to do so) and the local authority.

However, in relation to a financial order, if you have been required to find Caution (a type of insurance), the Public Guardian will not issue a certificate until satisfied that you have got this (see Appendix 2).

The Public Guardian must also notify the Mental Welfare Commission where the adult's incapacity is due to mental disorder and the guardianship order relates to personal welfare.

For further details

- Scottish Government: Code of Practice for Persons Authorised under Intervention Orders and Guardianship; Code of Practice for Local Authorities Exercising Functions under the Act.

Codes of Practice for the Act, and leaflets are available from the Scottish Government website. Information about obtaining hard copies is available on the website or by calling 0131 244 3581. The Office of the Public Guardian (Scotland) provides information booklets and forms (free) plus on-line information about all the financial management options available under the Act (see Appendix 5).

Flowchart: 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. In certain circumstances, sheriffs have discretion to accept medical reports which are more than 30 days old.

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.

Chapter 6



YOU'VE BEEN APPOINTED – WHAT TO DO NEXT

Informing and involving others

After the hearing, and while you are waiting to receive your certificate, it is a good idea to make a list of everyone who needs to know about the powers you have been granted and to write to them, setting out what these powers are, and providing them with a contact address. For example:

- **Financial powers** – notify the bank, building society and any other financial institutions you may be dealing with. It's advisable to make an appointment to discuss arrangements that need to be put in place. They will need to scan the original order into their files before you can operate the account.
- **Medical decision-making powers** – If you are granted medical decision-making powers then the doctor or other health care professional responsible for treating the adult, must seek your consent to treatment. The only exception is when it has not been 'reasonable or practicable' for the doctor to contact you, for example, because you have not left full contact details – day time and night-time, changes during holiday periods, etc. Therefore it is important to contact the doctors who have responsibility for the care of the adult and send them a copy of the order with your main contact addresses – mail, telephone and e-mail and notify them of any changes immediately. It will also be helpful to do the same with any other health care professionals the adult has regular contact with.
- **Welfare decisions** – contact the care manager/social worker and any care providers involved with supporting the adult, and let them know what powers have been granted. You will be able to delegate certain powers, e.g. to support workers to make day-to-day decisions. They will need to know when they should refer back to you. It is best to put this in writing and request a meeting to discuss arrangements. This can avoid misunderstandings.

The adult, family members and others

As soon as you receive your certificate, you should arrange to meet other family members and anyone else with a close interest in the adult's welfare, in order to discuss what happens next. You should involve the person as far as possible and discuss with everyone how you plan to go about what you need to do. You will need to ask for their views and suggestions (*remember the principles – to take account of the views of the adult and the views of others with an interest*).

Contact with supervisory bodies

Financial guardianship: as part of the ongoing supervisory duty of the Office of the Public Guardian (Scotland), a case officer will be in contact to discuss financial management planning and accounting requirements with you and will offer support and advice. In addition the OPG has powers to investigate if anyone raises a complaint about the way you are operating the guardianship (further details from the OPG).

Welfare guardianship: where the adult has a mental disorder, the Mental Welfare Commission will write to you, and the person on guardianship, to offer advice. In some situations the Commission may arrange a visit. The Commission can investigate complaints when requested by the local authority or others.

The local authority: has a duty to visit you and the person on guardianship within three months of your appointment and to make another visit within the first year. After that the local authority has a duty to visit at least twice a year. The visit is usually carried out by a Mental Health Officer. The purpose of the visit is to check that the guardianship is going well and to offer assistance. If anyone makes a complaint against the way you are operating as guardian then the local authority has a duty to investigate. The local authority can also involve the Mental Welfare Commission in an investigation.

Appendix 1



REPORTS NEEDED TO SUPPORT AN APPLICATION FOR AN ORDER

1 Medical Reports - needed for all applications

- from the adult's general practitioner (or other doctor) who will need to carry out an examination and assessment of the adult in relation to the specific areas of decision-making for which you are seeking powers;
- the other medical report, in the case where incapacity is caused by mental disorder, **has to be from a relevant medical practitioner who has been approved under section 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003** (as having special experience and qualifications in the diagnosis and treatment of mental disorder). If the person has a specialist consultant, they may be qualified to do this, so you should ask them first. If they are not able to do so then you can ask the Medical Director (at the NHS Board local to the adult) for a list of Approved Medical Practitioners.

The two doctors should examine the adult separately and complete their reports independently of each other. These have to be submitted on a prescribed form which the doctors will obtain.

Where an adult lives outwith Scotland and lacks capacity because of a mental disorder, a suitably qualified local practitioner will be able to visit and prepare the second report after discussion with an officer or Commissioner from the Mental Welfare Commission for Scotland.

2 'Suitability' Report - needed for all applications

a) Where the report is to support an application for welfare powers

The local authority has a duty to provide the suitability report for all applications for welfare powers. However, the officer responsible for doing this will depend on whether the application relates to an adult with mental disorder or an adult with severe communications problems caused by a physical condition.

- *Where the adult lacks capacity as a consequence of mental disability*
– a report from a **Mental Health Officer** is required.
- *Where the adult lacks capacity as a consequence of inability to communicate due to a physical condition*
– a report from the **Chief Social Work Officer** is required. This will be delegated to a social work officer who does not need to be a specialist in mental health.

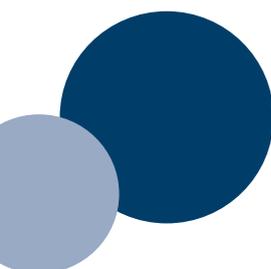
As soon as you have decided to go ahead with the application, you should write to the Chief Social Work Officer at the local authority, with notice that you will be requesting a suitability report and asking for a contact person with whom you should discuss the timing. Under the Act, you are required to give the MHO (Mental Health Officer) or chief social work officer **21 days** to prepare a report on an application for a guardianship order or Intervention Order relating to personal welfare (see more on time-table below).

b) Where the report is to support an application for financial powers only

In this case a report is required in prescribed form, based:

- on an interview and assessment of the adult **by a person who has sufficient knowledge to make such a report on the appropriateness of the order sought and the suitability of the proposed guardian.**

You could engage the services of an accountant to write the report, or ask a relative or friend, so long as the person has the appropriate skills, and knowledge of the circumstances. The person you ask to write the report may need some background to the Act. You could invite them to read the section below on 'content of suitability reports' and 'factors the sheriff must take into account' and/or to read the Code of Practice on Intervention Orders and Guardianship – Parts 1 and 6 obtainable from the Scottish Government (see Appendix 5).



3 Timing for reports

- In the case of all reports, the interview or examination of the adult must have taken place not more than **30 days** before the application is lodged with the sheriff court.
- In certain circumstances, sheriffs have discretion to accept medical reports which are more than 30 days old.
- Under the Act, you are required to give the local authority **21 days** to prepare a report on an application for an order relating to personal welfare.
- For welfare order applications, notify the local authority social work department and medical practitioners in advance to ensure they set the time aside. This will minimise the risk of any of the reports being out of date by the time you are in a position to lodge the application. If they are out of date then they will have to be carried out again. The mental health or social work officer would prefer to see the medical reports or be in contact with the doctors before completing their report.

You should also notify the person who is to provide a report in the case of an application relating solely to financial or property matters.

To note – Where any one report is submitted to the sheriff, is more than 30 days old and is not accepted, it may render all the reports invalid. This means the whole process of interviews and assessments will have to be carried out again.

4 Content of the 'suitability' report

It is helpful for you, the applicant, to understand why you may be asked personal questions by the MHO or other professional responsible for carrying out the assessment of your suitability and completing the report. Sometimes this can feel like an unnecessary intrusion into your privacy, but the aim is to provide adequate information for the sheriff to make his/her decisions.

Where the application is for welfare powers, the mental health or social work officer will also interview the adult, to obtain, as far as possible, their views. The officer will also take account of the views of others with an interest in the adult.

The report must contain the social worker's conclusions on the suitability of the applicant and the appropriateness of the order applied for, and how these were reached. It should also cover any conflicts of interest identified.

The content of the report should also take into account the factors which the sheriff must consider before appointing a guardian. 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 general principles];
- accessibility of the person to the adult and to his/her 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 be appropriate.

Generally, the fuller the reports received by the sheriff, and the more preparation you have done by way of applying the general 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.

5 What can happen if the adult or others refuse to co-operate?

It is possible, however, in some circumstances that the adult or other people 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 and any person obstructing that requirement would be in contempt of court.

Appendix 2



LEGAL PROVISIONS GOVERNING FINANCIAL INTERVENTION ORDERS AND GUARDIANSHIP

- **Caution**

The sheriff may require a financial guardian or intervener to find ‘caution’. This is an insurance bond to safeguard the adult from any loss that may be caused by the actions of the person authorised under the order. The sheriff can use his/her discretion to dispense with caution in certain circumstances.

- **Direction waiving requirement for management plan**

The Financial Guardian is required to prepare a financial management plan and to provide accounts as requested by the Office of the Public Guardian. The Public Guardian can decide on the level of reporting required. However, at the hearing, you can ask the sheriff to make a direction waiving the requirement for a management plan to be submitted to the Public Guardian. But you can only do this if you think there are good reasons for claiming that to do so would be burdensome in relation to the size of the estate. But remember, if the estate does not involve property or investments then **Access to Funds** may be the most appropriate way to manage the adult’s funds (see page 5).

- **Can the adult enter into transactions without the permission of the financial guardian?**

The adult cannot legally enter into any transaction which is within the scope of the guardian’s powers, unless the guardian has authorised the person to do so. The fifth principle – that the adult should be encouraged to maintain their skills, encourages this.

For example: the adult could be allowed to withdraw a set amount of money from the bank each week. It might include enabling the adult to pay certain bills. The guardian will need to inform a third party, such as the bank or company, that the adult has been authorised to make the transaction.

Where the guardian does not have powers over particular sorts of transaction (as specified in the guardianship order) the adult's capacity to make transactions is not affected.

- **Liability and protection for third parties acting in good faith**

Goods and services bought and sold by a third party from a guardian will be regarded as acting in good faith, if it is found that there was some irregularity in the appointment of the guardian. Similar protection is also extended to a third party acquiring in good faith and for value a title to any interest in heritable property.

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.

- **Special provisions where guardianship relates to heritable property**

The Act makes special provision in relation to a guardianship order which gives the guardian any rights the adult had 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.

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** or at www.ros.gov.uk, tel: 0845 607 0161.

Appendix 3



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; and*
 - (d) 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.

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, Anytown²
- 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

² 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.

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, Anytown³
- 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 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.

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

Appendix 4



COSTS ASSOCIATED WITH APPLYING FOR AN ORDER

1. Legal Fees (see page 16). If you have been granted civil legal aid, the Scottish Legal Aid Board will meet your solicitor's reasonable costs in applying to the court for an order. If you chose to take the application forward yourself, you will not be entitled to legal aid. Only lawyers can claim legal aid fees. For further information about legal aid, contact the Scottish Legal Aid Board, or your local citizen's advice bureau.

2. Fees payable to the OPG (subject to review)

Registration of a guardianship order £70

Approval of guardian's management plan and inventory

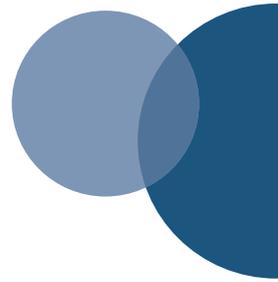
Estate value (excluding heritable property)

Up to £30,000	£45
£30,001 to £50,000	£200
£50,001 to £100,000	£400
£100,001 to £500,000	£665
£500,001 and over	£1,000

Audit of Accounts

Estate value (excluding heritable property)

Up to £30,000	£65
£30,001 to £50,000	£165
£50,001 to £100,000	£465
£100,001 to £250,000	£600
£250,001 to £750,000	£800
£750,001 to £2,000,000	£1,600
£2,000,001 and over	£2,335



You can check these fees and other associated costs at the OPG website: www.publicguardian-scotland.gov.uk/whatwedo/fees.asp or by contacting the OPG.

3. Doctors fees

Doctors are allowed to charge a fee and set the fee level for assessing the adult's capacity and producing a report for the court. It is always advisable to check if there will be a fee and what it is likely to be. Consultants are also allowed to charge and set their own fees.

4. Court fees (subject to review)

For lodging the summary application – £60.00

Additional fees for further steps in procedure may be required. You will need to check with the appropriate sheriff clerks office.

5. Other costs

The sheriff may decide it is in the best interests of the adult to appoint a **safeguarder** to gather further information before reaching a decision on the application for an order. This is usually a lawyer and there will be a fee to pay. The sheriff has the discretion to attribute this to the adult or to the applicant.

The sheriff may require you to find caution (a kind of insurance bond, which is paid for from the estate of the adult) see page 32.

6. Reimbursement and remuneration of guardian once appointed

The **financial guardian** may recover from the estate of the adult expenses he or she incurs in doing anything directed or authorised under the order. Remuneration and the amount of outlays to be authorised are fixed by the Public Guardian and may be appealed to the sheriff.

A **welfare guardian** can only receive remuneration in special circumstances and on **request made to the sheriff at the hearing**. For example, if you are sacrificing employment opportunities in order to act as someone's guardian, this could be a reason for awarding remuneration.

For **financial intervention orders**, an intervener may recover from the adult's funds any expenses incurred whilst carrying out duties under the order.

Appendix 5



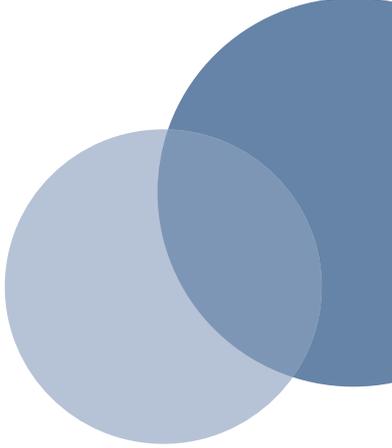
USEFUL ADDRESSES AND PUBLICATIONS

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
Helpline: 0800 389 6809
www.mwscot.org.uk

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
Civil Law Division
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
http://www.lawscot.org.uk/Public_Information/

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. The Law Society's Client Relations Office has a legal responsibility to handle complaints against Scottish solicitors. To discuss a complaint, or if you need more information, contact the Client Relations Helpline.

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

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

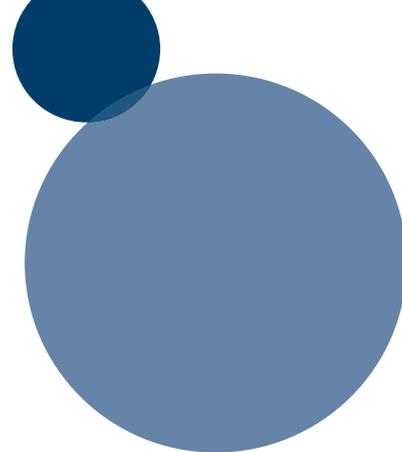
Supports people with learning disabilities of all ages by campaigning, providing information, legal advice, training and other services.

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
 Cumbrae 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
Tel. 0131 537 9481
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)
65 North Castle Street
Edinburgh EH2 3LT
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 stoke illness through medical research, advice and information and support in the community.

Appendix 6



FREQUENTLY ASKED QUESTIONS

1. Who is entitled to a needs assessment under the Social Work (Scotland) Act 1968?

This will include people who:

- may require permanent admission to care homes or other long-term care settings;
- are being discharged from hospital or other care settings after a period of long-term care;
- are being discharged following a major operation or serious illness requiring acute hospital care;
- are living at home and are at high physical risk;
- are living at home and there are considerable concerns about the need for care and protection;
- appear to lack capacity to make day-to-day or more serious financial decisions.

2. As a carer, do I have any rights?

Yes, if you are providing a regular and substantial amount of care to the person you care for then you will be entitled to an assessment of your own needs, to enable you to continue providing care. You can request a 'carer's assessment' at the same time as you request an assessment for the person you care for.

3. What happens when someone is assessed under AWI?

If the local authority considers that the person you care for has complex or significant care needs and may lack the ability to give informed consent to services needed, a case conference or review will be arranged. The meeting will consider any risks to his/her safety, ability to give informed consent, and whether any legal authority is needed to take forward decisions on behalf of the adult. This is usually organised by a community care manager. The review should involve the adult as far as possible, carers and other professionals.

The Scottish Executive has provided local authorities with advice about using AWI in such circumstances. A formal intervention, such as guardianship, may not be necessary to authorise the decisions to be taken.⁴ If an application for guardianship or intervention order is to be made then the person will need to have a formal assessment of their capacity to make the decision/s in question.

4. What happens if the adult refuses to co-operate with arrangements for an assessment?

If the mental health officer and/or doctors encounter problems in gaining access to the adult for an assessment or interview, or if 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 and interviewed.

5. Can I see the report on my suitability to be a guardian/ intervener?

Yes – if you are the person nominated in the application, you will have a right to see the report. If there have been conflicts of interest to consider, the MHO or social work officer may 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.

⁴ Scottish Executive: Letters to Chief Social Work Officers 'Interventions under the Adults with Incapacity (Scotland) Act 2000', 30 July 2004 and 29 September 2005.

6. What do I do if I think that the person I am seeking guardianship for should not be notified about the application?

The general rule is that the adult will be notified of your application. However the sheriff can direct that the adult shall not be notified if he or she considers that the notification might pose a serious risk to the health of the adult. The court will only allow this on the basis of two medical reports. Information cannot be withheld from the adult 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 as they have a right to do so.

7. What are the roles and responsibilities of joint guardians?

Joint guardians are jointly and severally liable (that means together and individually) responsible for each other's actions with respect to decisions made as guardians. This means both have a responsibility to make sure that the other does not act outwith their powers or misuse them. There is an obligation on joint guardians to consult each other on decisions to be made, unless there is a prior agreement on some aspect, or where consultation is impracticable in the circumstances.

8. What happens if I am unable to continue to act as guardian?

Short term – if you are temporarily unable to act, e.g. because of hospitalisation you can expressly delegate functions to another person and this could cover any period necessary. If there is no one to do this and no joint or substitute guardian, you will need to discuss the situation with the local authority. What happens will depend on individual circumstances, but the local authority could apply for interim welfare guardianship for the chief social work officer until you are ready to continue.

Permanently – you should leave instructions with a relative or colleague as to what action to take if you yourself lose capacity owing to an accident or illness, during your term of guardianship. No one else can simply take over the guardian's powers without authority of the court. Your instruction may include contacting the local authority to seek their advice about what should happen. You are allowed to apply to appoint a joint or substitute guardian after your original application, but reports will be needed on his/her suitability.

Substitute guardians may be appointed to take on the duties of the guardian if he or she is unable to continue, either temporarily or on a permanent basis. An application for the appointment of a substitute guardian may be made at the same time as, or separately after the original application.

9. What special provisions apply where an intervention order covers purchase or sale of the person's house?

The Act makes special provision in relation to an intervention order which directs the purchase of accommodation for, or the sale of any accommodation used as a dwelling house by the adult, for example, to sell the house where the adult is to move into residential care; or acquire a specially adapted house for the adult. In all such cases the consent of the Public Guardian is needed.

10. What happens if the person I care for gains capacity to make their own decisions or if their property and welfare can be satisfactorily safeguarded without guardianship?

Seek the advice of the local authority or Mental Welfare Commission. You can apply for the guardianship order to be removed – 'recalled'. The procedure for recalling guardianship powers is detailed in the Part 6 Code of Practice.

Planner

Contacts	Address/ telephone no.	Date notified	Reply/report received	Deadline/ other comment
Doctor (GP)				
Doctor (Specialist)				
Chief Social Work Officer				
Social worker				
Mental Health Officer				

Planner

Contacts	Address/ telephone no.	Date notified	Reply/report received	Deadline/ other comment
Finance Report Person				
Sheriff Court/ Clerk/Sheriff				
OPG				
MWC				
Other				



© Crown copyright 2010

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

APS Group Scotland
DPPAS10180 (06/10)

ISBN 978-0-7559-5640-1



9 780755 956401