



# Adult Support and Protection (Scotland) Act 2007

2007 asp 10

## PART 2

### ADULTS WITH INCAPACITY

#### 60 Guardianship orders

(1) In section 57 (guardianship orders) of the 2000 Act—

- (a) in subsection (3)(a), for “an approved” substitute “a relevant”,
- (b) after subsection (3), insert—

“(3A) Subsection (3B) applies where a report lodged under subsection (3) (a) relates to an examination and assessment carried out more than 30 days before the lodging of the application.

(3B) Where this subsection applies, the sheriff may, despite subsection (3) (a), continue to consider the application if satisfied that there has been no change in circumstances since the examination and assessment was carried out which may be relevant to matters set out in the report.”,

- (c) in subsection (6)(b), for the words from “period” to “appointment” substitute “effective period”,
- (d) after subsection (6) insert—

“(6A) The “effective period”, for the purposes of subsection (6), means—  
(a) the period of 3 months beginning with the date of appointment; or  
(b) such longer period (not exceeding 6 months) beginning with that date as the sheriff may specify in the order.

(6B) In subsection (3)(a), “relevant medical practitioner” means—

- (a) an approved medical practitioner;
- (b) where the adult concerned is not present in Scotland, a person who—

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- (i) holds qualifications recognised in the place where the adult is present and has special experience in relation to the diagnosis and treatment of mental disorder which correspond to the qualifications and experience needed to be an approved medical practitioner; and
  - (ii) has consulted the Mental Welfare Commission for Scotland about the report concerned; or
  - (c) any other type of individual described (by reference to skills, qualifications, experience or otherwise) by regulations made by the Scottish Ministers.
- (6C) The Scottish Ministers shall consult the Mental Welfare Commission before making regulations under subsection (6B)(c).”,
- (e) in subsection (7), for “(3)(a)” substitute “(6B)”.
- (2) In section 58 (disposal of application for guardianship) of the 2000 Act—
- (a) in subsection (6)—
    - (i) for the words from “shall” to the end of paragraph (b) substitute “may”,
    - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
  - (b) in subsection (7)(b), after “caution” insert “or given other security”.
- (3) In section 60 (renewal of guardianship)—
- (a) for subsection (3) substitute—
    - “(3) There must be lodged in court along with an application under this section—
    - (a) at least one report, in the prescribed form, of an examination and assessment of the adult carried out by a medical practitioner not more than 30 days before the lodging of the application;
    - (b) where the application relates to the adult’s personal welfare, a report, in the prescribed form, from the mental health officer (but where it is in jeopardy only because of the adult’s inability to communicate, from the chief social work officer), containing the officer’s opinion as to—
      - (i) the general appropriateness of continuing the guardianship, based on an interview and assessment of the adult carried out not more than 30 days before the lodging of the application; and
      - (ii) the suitability of the applicant to continue to be the adult’s guardian; and
    - (c) where the application relates to the adult’s property or financial affairs, a report from the Public Guardian, in the prescribed form, containing the Public Guardian’s opinion as to—
      - (i) the applicant’s conduct as the adult’s guardian; and
      - (ii) the suitability of the applicant to continue to be the adult’s guardian.

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- (3A) In a case where the incapacity is by reason of mental disorder—
- (a) where a single report is lodged under subsection (3)(a), the related examination and assessment must be carried out by a relevant medical practitioner;
  - (b) where 2 or more reports are so lodged, at least one of the related examinations and assessments must be carried out by a relevant medical practitioner.  
“Relevant medical practitioner” has the same meaning in this subsection as it has in section 57(3)(a) (see definition in section 57(6B)).”
- (b) after subsection (4) insert—
- “(4A) A sheriff may determine an application made under this section without hearing the parties.”.
- (4) In section 61(3) (application for registration of guardianship order) of the 2000 Act, after “caution” insert “or giving other security”.
- (5) In section 62(5)(b) (duty to issue certificate of additional guardian’s appointment) of the 2000 Act, after “caution” insert “or given other security”.
- (6) In section 63 (substitute guardian) of the 2000 Act—
- (a) in subsection (5)—
    - (i) for the words from “shall” to the end of paragraph (b) substitute “may”,
    - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
  - (b) in subsection (9)(b), after “caution” insert “or given other security”.
- (7) In section 64(2)(b) (medical treatment to which a guardian cannot consent), for “mentioned in section 48(1) or (2)” substitute “in relation to which the authority conferred by section 47(2) does not apply by virtue of regulations made under section 48(2)”.
- (8) In section 70 (non-compliance with guardian’s decisions)—
- (a) in subsection (1), the words “or by any other person”, “or other person” and “or any person named in the order” are repealed,
  - (b) after subsection (4) insert—  
“(4A) The sheriff may, on cause shown, disapply or modify the application of—
    - (a) subsection (3); and
    - (b) subsection (4) in so far as it requires the sheriff to hear objections.”.
- (9) In section 71 (replacement etc. of guardian) of the 2000 Act—
- (a) in subsection (2)—
    - (i) for the words from “shall” to the end of paragraph (b) substitute “may”,
    - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
  - (b) in subsection (3)(b)—

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- (i) in sub-paragraph (i), after “caution” insert “or given other security”,
  - (ii) in sub-paragraph (ii), after “caution” insert “or given other security”.
- (10) In section 72(1) (discharge of guardian with financial powers), after paragraph (a) insert—
- “(aa) the expiry of such a guardianship order;”.
- (11) In section 73 (recall of guardian’s powers) of the 2000 Act—
- (a) in subsection (3), the words from “(other” to “guardian)” are repealed,
  - (b) after subsection (3) insert—
    - “(3A) The Mental Welfare Commission may recall the powers of a guardian under subsection (3) only if those powers were granted in a case where the adult’s incapacity is by reason of, or reasons which include, mental disorder.”,
  - (c) after subsection (10) insert—
    - “(11) Section 73A modifies the application of this section in relation to the recall by a local authority of guardianship powers held by their chief social work officer.”.
- (12) After section 73 of the 2000 Act insert—

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

- (1) This section applies where—
    - (a) a local authority’s chief social work officer is appointed as a guardian; and
    - (b) either—
      - (i) the local authority wish to recall their chief social work officer’s guardianship powers at their own instance; or
      - (ii) another person (including the adult himself) applies to the local authority for such a recall.
  - (2) Where this section applies—
    - (a) the local authority shall, for the purposes of section 73(5), treat the Public Guardian and the Mental Welfare Commission as persons whom they consider to have an interest in the recall of the guardian’s powers; and
    - (b) if the Public Guardian, the Mental Welfare Commission or any other person to whom intimation is given under section 73(5) objects to the recall of the guardian’s powers, the local authority—
      - (i) shall not recall the guardian’s powers; but
      - (ii) shall instead remit the matter for determination by the sheriff under section 73(8).”.
- (13) In section 74 (variation of guardianship) of the 2000 Act—
- (a) in subsection (2)—
    - (i) for the words from “shall” to the end of paragraph (b) substitute “may”,
    - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,

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(b) in subsection (5)(c), after “caution” insert “or other security”.

(14) In section 75(3)(b) (duty to issue certificate of substitute guardian’s appointment) of the 2000 Act, after “caution” insert “or given other security”.

(15) After section 75 insert—

#### **“75A Death of guardian**

The personal representatives of a guardian who dies shall, if aware of the existence of the guardianship, notify the Public Guardian who shall—

- (a) notify—
  - (i) the adult;
  - (ii) the local authority; and
  - (iii) in a case where the adult’s incapacity is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult’s personal welfare or factors including it, the Mental Welfare Commission;
- (b) enter prescribed particulars in the register maintained under section 6(2)(b)(iv); and
- (c) issue a new certificate of appointment—
  - (i) to any surviving joint guardian;
  - (ii) where the Public Guardian is satisfied that any substitute guardian appointed in respect of the dead guardian is willing to act and has found caution or given other security if so required, to the substitute guardian.”.

(16) After section 79 insert—

#### *“Guardianship orders: children*

#### **79A Guardianship orders: children**

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

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

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

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(b) in any other case, to the period of 2 years from the date on which section 60(17) (which amends this paragraph) of the Adult Support and Protection (Scotland) Act 2007 (asp 10) came into force.”,

(b) after sub-paragraph (3) insert—

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

(a) where the person does not apply for renewal of guardianship within the 2 year period set by sub-paragraph (3), on the expiry of that period;

(b) where—

(i) the person applies for such a renewal within that period; and

(ii) the sheriff refuses the application, on the date of refusal;

(c) where—

(i) the person applies for such a renewal within that period; and

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

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

(3C) Where—

(a) a person (“G”) who was a curator bonis, tutor dative or tutor-at-law to an adult becomes the adult’s guardian by virtue of this schedule; and

(b) another person is appointed under section 62 as an additional guardian to the adult before G’s appointment as guardian has been renewed in accordance with the provisions of this Act,

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

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

(a) is a guardian to an adult by virtue of this schedule;

(b) was a curator bonis to that adult; and

(c) has not applied for renewal of guardianship.

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

(a) is a guardian to an adult residing within the local authority’s area by virtue of this schedule;

- (b) was a tutor dative or tutor-in-law to that adult; and
- (c) has not applied for renewal of guardianship.”.