

Adults with Incapacity (Scotland) Bill

[AS INTRODUCED]

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Adults with Incapacity (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision as to the property, financial affairs and personal welfare of adults who are incapable by reason of mental disorder or inability to communicate; and for connected purposes.

PART 1

GENERAL

5

1 General principles and fundamental definitions

- 10 (1) The principles set out in subsections (2) to (4) shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act, including any order made in or for the purpose of any proceedings under this Act for or in connection with an adult.
- (2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.
- 15 (3) Where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.
- (4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of—
- 20 (a) the present and past wishes and feelings of the adult so far as they can be ascertained;
- (b) the views of the nearest relative and the primary carer of the adult in so far as it is reasonable and practicable to do so;
- (c) the views of—
- 25 (i) any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention ; and
- (ii) any person whom the sheriff has directed to be consulted,
- in so far as it is reasonable and practicable to do so; and

- (d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so.
- 5 (5) Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act or under any order of the sheriff in relation to an adult shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills.
- 10 (6) For the purposes of this Act, and unless the context otherwise requires—
- “incapable” means incapable of—
- (a) acting; or
- (b) making decisions; or
- (c) communicating decisions; or
- 15 (d) understanding decisions; or
- (e) retaining the memory of decisions,
- as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or
- 20 mechanical aid (whether of an interpretative nature or otherwise);
- “incapable adult” and “incapacity” shall be construed accordingly; and
- “adult” means a person who has attained the age of 16 years.
- (7) In subsection (4)(c)(i) any reference to—
- 25 (a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;
- 30 (b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity;
- 35 (c) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.

Judicial proceedings

2 Applications and other proceedings and appeals

- 40 (1) This section shall apply for the purposes of any application which may be made to and any other proceedings before the sheriff under this Act.
- (2) An application to the sheriff under this Act shall be made by summary application.

(3) Subject to subsection (4), the sheriff having jurisdiction to dispose of an application or other proceedings under this Act shall be the sheriff in whose sheriffdom—

(a) the adult who is the subject of the application or proceedings is habitually resident at the date the application is made or the proceedings are commenced; or

(b) any property or establishment which is the subject of the application or proceedings is situated.

(4) Notwithstanding that any other court has jurisdiction to entertain an application under this Act or, in the case of a court outwith Scotland, to entertain an application for an order having corresponding effect to an order under this Act, the sheriff shall have jurisdiction to entertain such an application if—

(a) the adult who is the subject of the application is present in the sheriffdom on the date of the application; and

(b) the sheriff considers that it is necessary, in the interests of that adult, to make such an order immediately.

(5) Without prejudice to subsection (3), where the adult who is the subject of the application or proceedings ceases to be habitually resident in the sheriffdom mentioned in that subsection, the sheriff of that sheriffdom shall, if he has made an intervention order or a guardianship order in relation to the adult, nevertheless continue to have jurisdiction to dispose of any application or other proceedings relating to that order if—

(a) no other court has jurisdiction; or

(b) another court has jurisdiction but it would be unreasonable to expect the applicant to invoke that jurisdiction; or

(c) another court has jurisdiction but has declined to exercise it.

(6) Unless otherwise expressly provided for, any decision of the sheriff at first instance in any application to, or in any other proceedings before, him under this Act may be appealed to the sheriff principal. and the decision upon such appeal of the sheriff principal may be appealed, with the leave of the sheriff principal, to the Court of Session.

(7) Rules made under section 32 of the Sheriff Courts (Scotland) Act 1971 (c.58) may make provision as to the evidence which the sheriff shall take into account when deciding whether to give a direction under section 9(1).

3 Powers of sheriff

(1) In an application or any other proceedings under this Act, the sheriff may make such consequential or ancillary order, provision or direction as he considers appropriate.

(2) Without prejudice to the generality of subsection (1) or to any other powers conferred by this Act, the sheriff may—

(a) make any order granted by him subject to such conditions and restrictions as appear to him to be appropriate;

(b) order that any reports relating to the person who is the subject of the application or proceedings be lodged with the court or that the person be assessed or interviewed and that a report of such assessment or interview be lodged;

(c) make such further inquiry or call for such further information as appears to him to be appropriate;

(d) make such interim order as appears to him to be appropriate pending the disposal of the application or proceedings.

(3) On an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult, the sheriff may give such directions to any person exercising—

(a) functions conferred by this Act; or

(b) functions of a like nature conferred by the law of any country,

as to the exercise of those functions and the taking of decisions or action in relation to the adult as appear to him to be appropriate.

(4) In an application or any other proceedings under this Act, the sheriff—

(a) shall consider whether it is necessary to appoint a person for the purpose of safeguarding the interests of the person who is the subject of the application or proceedings; and

(b) without prejudice to any existing power to appoint a person to represent the interests of the person who is the subject of the application or proceedings may, if he thinks fit, appoint a person to act for the purpose specified in paragraph (a).

(5) Safeguarding the interests of a person shall, for the purposes of subsection (4), include conveying his views so far as they are ascertainable to the sheriff; but if the sheriff considers that it is inappropriate that a person appointed to safeguard the interests of another under this section should also convey that other's views to the sheriff, the sheriff may appoint another person for that latter purpose only.

(6) The sheriff may, on an application by—

(a) the person authorised under the order; or

(b) the adult; or

(c) where no person has been so authorised, any person claiming an interest in the property, financial affairs or personal welfare of the adult,

make an order varying the terms of an order granted under subsection (2)(a).

The Public Guardian

4 The Public Guardian and his functions

(1) The Accountant of Court shall be the Public Guardian.

(2) The Public Guardian shall have the following general functions under this Act—

(a) to supervise any guardian or any person who is authorised under an intervention order in the exercise of his functions relating to the property or financial affairs of the adult;

(b) to establish, maintain and make available during normal office hours for inspection by members of the public on payment of the prescribed fee, separate registers of—

(i) all documents relating to continuing powers of attorney governed by the law of Scotland;

(ii) all documents relating to welfare powers of attorney governed by the law of Scotland;

- (iii) all authorisations to intromit with funds under Part 3;
- (iv) all documents relating to guardianship orders under Part 6;
- (v) all documents relating to intervention orders under Part 6,

in which he shall enter any matter which he is required to enter under this Act and any other matter of which he becomes aware relating to the existence or scope of the power, authorisation or order as the case may be;

- (c) to receive and investigate any complaints regarding the exercise of functions relating to the property or financial affairs of an adult made—
 - (i) in relation to continuing attorneys;
 - (ii) concerning intromissions with funds under Part 3;
 - (iii) in relation to guardians or persons appointed to carry out intervention orders;
- (d) to investigate any circumstances made known to him in which the property or financial affairs of an adult seem to him to be at risk, where the adult is habitually resident, or the property is situated, in Scotland;
- (e) to provide, when requested to do so, a guardian, a continuing attorney, a withdrawer or a person authorised to act under an intervention order with information and advice about the performance of functions relating to property or financial affairs under this Act;
- (f) to consult the Mental Welfare Commission and any local authority on cases or matters relating to the exercise of functions under this Act in which there is, or appears to be, a common interest.

(3) In subsection (2)(c) any reference to—

- (a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;
- (b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the grantor's property or financial affairs and having continuing effect notwithstanding the grantor's incapacity,

and the power conferred by that paragraph shall, in relation to such a guardian or continuing attorney, be exercisable only where the adult is habitually resident, or the property in question is situated, in Scotland.

5 The Public Guardian: further provision

(1) The Scottish Ministers may prescribe—

- (a) the form and content of the registers to be established and maintained under section 4(2)(b) and the manner and medium in which they are to be established and maintained;
- (b) the form and content of any certificate which the Public Guardian is empowered to issue under this Act;

- (c) the forms and procedure for the purposes of any application required or permitted to be made under this Act to the Public Guardian in relation to any matter.
- (2) The Public Guardian may charge the prescribed fee for anything done by him in connection with any of his functions under this Act and he shall not be obliged to act until such fee is paid.
- (3) Any certificate which the Public Guardian issues under this Act shall, for the purposes of any proceedings, be conclusive evidence of the matters contained in it.

Expenses in court proceedings

6 Expenses in court proceedings

Where in any court proceedings (other than, in the case of a local authority, an application under section 61(3)) the Public Guardian, Mental Welfare Commission or local authority is a party for the purpose of—

- (a) protecting the interests of an adult; or
(b) representing the public interest,

the court may make an award of expenses against the adult's estate or against any person whose actings have resulted in the proceedings.

The Mental Welfare Commission

7 Functions of the Mental Welfare Commission

- (1) Without prejudice to their functions under the 1984 Act, the Mental Welfare Commission shall have the following general functions under this Act in relation to any adult to whom this Act applies by reason of, or by reasons which include, mental disorder—
- (a) to exercise protective functions in respect of the adult if the adult is the subject of an intervention or guardianship order, in so far as the order relates to the personal welfare of the adult;
- (b) to visit the adult as often as they think appropriate and bring to the attention of the Health Board for the area in which the adult resides, or the local authority, or any other body any matter relating to the personal welfare of the adult which they consider ought to be brought to their attention;
- (c) to consult the Public Guardian and any local authority on cases or matters relating to the exercise of functions under this Act in which there is, or appears to be, a common interest;
- (d) to receive and investigate any complaints relating to the exercise of functions relating to the personal welfare of the adult made—
- (i) in relation to welfare attorneys;
- (ii) in relation to guardians or persons appointed to carry out intervention orders;
- (e) to investigate any circumstances made known to them in which the personal welfare of the adult seems to them to be at risk, where the adult is habitually resident or, where his personal welfare is immediately at risk, is present in Scotland;

(f) to investigate any circumstances made known to them in which the property of the adult may, by reason of the mental disorder of the adult, be exposed to a risk of loss or damage;

5 (g) to provide a guardian, welfare attorney or person authorised to act under an intervention order, when requested to do so, with information and advice in connection with the performance of his functions in relation to personal welfare under this Act.

10 (2) A guardian or welfare attorney of such an adult or a person authorised by an intervention order in relation to such an adult or the local authority shall afford the Mental Welfare Commission all facilities necessary to enable them to carry out their functions in respect of the adult.

(3) In subsection (1)(d) any reference to—

15 (a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;

20 (b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity,

and the power conferred by that paragraph shall, in relation to such a guardian or person, be exercisable only where the adult is habitually resident or, where his personal welfare is immediately at risk, is present in Scotland.

Local authorities

25 **8 Functions of local authorities**

(1) A local authority shall have the following general functions under this Act—

(a) to supervise a guardian appointed with functions relating to the personal welfare of an adult in the exercise of those functions;

30 (b) to consult the Public Guardian and the Mental Welfare Commission on cases or matters in which there is, or appears to be, a common interest;

(c) to receive and investigate any complaints relating to the exercise of functions relating to the personal welfare of an adult made—

(i) in relation to welfare attorneys;

35 (ii) in relation to guardians or persons appointed to carry out intervention orders;

(d) to investigate any circumstances made known to them in which the personal welfare of an adult seems to them to be at risk, where the adult is habitually resident or, where his personal welfare is immediately at risk, is present in Scotland;

40 (e) to provide a guardian, welfare attorney or person authorised to act under an intervention order, when requested to do so, with information and advice in connection with the performance of his functions in relation to personal welfare under this Act.

- (2) The Scottish Ministers may make provision by regulations as regards the supervision by local authorities of the performance of their functions—
- (a) by guardians, in relation to the personal welfare of adults under this Act;
 - (b) where the supervision has been ordered by the sheriff—
 - (i) by persons appointed to carry out intervention orders;
 - (ii) by welfare attorneys.
- (3) In subsection (1)(c) any reference to—
- (a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;
 - (b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity,

and the power conferred by that paragraph shall in relation to such a guardian or person be exercisable only where the adult is habitually resident or, where his personal welfare is immediately at risk, is present in Scotland.

Intimation

9 Intimation not required in certain circumstances

- (1) Where, apart from this subsection, intimation of any application or other proceedings under this Act, or notification of any interlocutor relating to such application or other proceedings, would be given to an adult and the sheriff considers that the intimation or notification would be likely to pose a serious risk to the health of the adult the sheriff may direct that such intimation or notification shall not be given.
- (2) Where, apart from this subsection and subsection (1), any intimation or notification to him under this Act would be given by the Public Guardian to an adult and the Public Guardian considers that the intimation would be likely to pose a serious risk to the health of the adult the Public Guardian shall not give the intimation.

Investigations

10 Investigations

- (1) In consequence of any investigation carried out under—
- (a) section 4(2)(c) or (d) by the Public Guardian;
 - (b) section 7(1)(d) or (e) by the Mental Welfare Commission; or
 - (c) section 8(1)(c) or (d) by a local authority,

the Public Guardian, Mental Welfare Commission or local authority, as the case may be, may take such steps, including the making of an application to the sheriff, as seem to him or them to be necessary to safeguard the property, financial affairs or personal welfare, as the case may be, of the adult.

- (2) For the purposes of any investigation mentioned in subsection (1), the Public Guardian, Mental Welfare Commission and local authority shall provide each other with such information and assistance as may be necessary to facilitate the investigation.

Codes of practice

5 **11 Codes of practice**

- (1) The Scottish Ministers shall prepare, or cause to be prepared for their approval, and from time to time revise, or cause to be revised for their approval, codes of practice containing guidance as to the exercise by—

(a) local authorities and their chief social work officers and mental health officers;

10 (b) continuing and welfare attorneys;

(c) persons acting under intervention orders;

(d) guardians;

(e) withdrawers;

(f) managers of authorised establishments;

15 (g) supervisory bodies;

(h) persons authorised to carry out medical treatment or research under Part 5,

of their functions under this Act and as to such other matters arising out of or connected with this Act as the Scottish Ministers consider appropriate.

- 20 (2) Before preparing or approving any code of practice under this Act or making or approving any alteration in it the Scottish Ministers shall consult such bodies as appear to them to be concerned.

- (3) The Scottish Ministers shall lay copies of any such code and of any alteration in it before the Parliament.

- 25 (4) The Scottish Ministers shall publish every code of practice made under this Act as for the time being in force.

Appeal against decision as to incapacity

12 Appeal against decision as to incapacity

30 A decision taken for the purposes of this Act, other than by the sheriff, as to the incapacity of an adult may be appealed to the sheriff or, where the decision was taken by the sheriff, to the sheriff principal and thence, with the leave of the sheriff principal, to the Court of Session.

PART 2

CONTINUING POWERS OF ATTORNEY AND WELFARE POWERS OF ATTORNEY

13 Creation of continuing power of attorney

- 5 (1) Where an individual grants a power of attorney relating to his property or financial affairs in accordance with the following provisions of this section that power of attorney shall, notwithstanding any rule of law, continue to have effect in the event of the granter's becoming incapable of making, incapable of communicating, incapable of understanding or incapable of retaining the memory of, decisions about the matter to which the power of attorney relates.
- 10 (2) In this Act a power of attorney granted under subsection (1) is referred to as a "continuing power of attorney" and a person on whom such power is conferred is referred to as a "continuing attorney".
- (3) A continuing power of attorney shall be valid only if it is expressed in a written document which—
- 15 (a) is subscribed by the granter;
- (b) incorporates a statement which clearly expresses the granter's intention that the power be a continuing power;
- (c) incorporates a certificate in the prescribed form by a solicitor or by a member of another prescribed class that—
- 20 (i) he has interviewed the granter immediately before the granter subscribed the document;
- (ii) he is satisfied, either because of his own knowledge of the granter or because he has consulted other persons (whom he names in the certificate) who have knowledge of the granter, that at the time the continuing power of attorney is granted the granter understands its nature and extent;
- 25 (iii) he has no reason to believe that the granter is acting under undue influence or that any other factor vitiates the granting of the power.

14 Creation and exercise of welfare power of attorney

- 30 (1) An individual may grant a power of attorney relating to his personal welfare in accordance with the following provisions of this section.
- (2) In this Act a power of attorney granted under this section is referred to as a "welfare power of attorney" and an individual on whom such power is conferred is referred to as a "welfare attorney".
- (3) A welfare power of attorney shall be valid only if it is expressed in a written document which—
- 35 (a) is subscribed by the granter;
- (b) incorporates a statement which clearly expresses the granter's intention that the power be a welfare power to which this section applies;
- (c) incorporates a certificate in the prescribed form by a solicitor or by a member of another prescribed class that—
- 40 (i) he has interviewed the granter immediately before the granter subscribed the document;

- (ii) he is satisfied, either because of his own knowledge of the granter or because he has consulted other persons (whom he names in the certificate) who have knowledge of the granter, that at the time the welfare power of attorney is granted the granter understands its nature and extent;
- (iii) he has no reason to believe that the granter is acting under undue influence or that any other factor vitiates the granting of the power.

(4) A welfare power of attorney—

(a) may be granted only to an individual (which does not include a person acting in his capacity as an officer of a local authority or other body established by or under an enactment); and

(b) shall not be exercisable unless—

(i) the granter is incapable of making or is incapable of communicating decisions about the matter to which the welfare power of attorney relates; or

(ii) the welfare attorney reasonably believes that sub-paragraph (i) applies.

(5) A welfare attorney may not place the granter in a hospital for the treatment of mental disorder against his will.

(6) A welfare power of attorney shall not come to an end in the event of the bankruptcy of the granter or the welfare attorney.

(7) Any reference to a welfare attorney—

(a) in relation to subsection (4)(b) in a case where the granter is habitually resident in Scotland; and

(b) in subsection (5),

shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.

15 Attorney not obliged to act in certain circumstances

A continuing or welfare attorney shall not be obliged to do anything which would otherwise be within the powers of the attorney if doing it would, in relation to its value or utility, be unduly burdensome or expensive.

16 Power of attorney not granted in accordance with this Act

A power of attorney granted after the commencement of this Act which is not granted in accordance with section 13 or 14 shall have no effect during any period when the granter is incapable of making, incapable of communicating, incapable of understanding or incapable of retaining the memory of, decisions about the matter to which the power of attorney relates.

17 Registration of continuing or welfare power of attorney

(1) A continuing or welfare attorney shall have no authority to act until the document conferring the power of attorney has been registered under this section.

- (2) For the purposes of registration, the document conferring the power of attorney shall be sent to the Public Guardian who, if he is satisfied that a person appointed to act is prepared to act, shall—
- (a) enter particulars of it in the register maintained by him under section 4(2)(b)(i) or (ii) as the case may be;
 - (b) send a copy of it with a certificate of registration to the sender;
 - (c) if it confers a welfare power of attorney, send a copy of it to the Mental Welfare Commission.
- (3) The document conferring a continuing or welfare power of attorney may contain a condition that the Public Guardian shall not register it under this section until the occurrence of a specified event and in that case the Public Guardian shall not register it until he is satisfied that the specified event has occurred.
- (4) A copy of a document conferring a continuing or welfare power of attorney authenticated by the Public Guardian shall be accepted for all purposes as sufficient evidence of the contents of the original and of any matter relating thereto appearing in the copy.
- (5) The Public Guardian shall—
- (a) on the registration of a document conferring a continuing or welfare power of attorney, send a copy of it to the granter; and
 - (b) where the document conferring the continuing or welfare power of attorney so requires, send a copy of it to not more than two specified individuals or holders of specified offices or positions.
- (6) It shall be a sufficient compliance with subsection (5) for the Public Guardian to send the copy by ordinary post to the individual at the address given in the document or, where this has changed, to the individual's last known address.
- (7) A decision of the Public Guardian under subsection (2) as to whether or not a person is prepared to act or under subsection (3) as to whether or not the specified event has occurred may be appealed to the sheriff, whose decision shall be final.

18 Powers of the sheriff

- (1) An application for an order under subsection (2) may be made to the sheriff by any person claiming an interest in the property, financial affairs or personal welfare of the granter of a continuing or welfare power of attorney .
- (2) Where, on an application being made under subsection (1), the sheriff is satisfied that the granter is incapable of making, incapable of communicating, incapable of understanding or incapable of retaining the memory of, decisions about, or is incapable of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare insofar as the power of attorney relates to them, and that it is necessary to safeguard or promote these interests, he may make an order—
- (a) ordaining that the continuing attorney shall be subject to the supervision of the Public Guardian to such extent as may be specified in the order;
 - (b) ordaining the continuing attorney to submit accounts in respect of any period specified in the order for audit to the Public Guardian;
 - (c) ordaining that the welfare attorney shall be subject to the supervision of the local authority to such extent as may be specified in the order;

(d) ordaining the welfare attorney to give a report to him as to the manner in which the welfare attorney has exercised his powers during any period specified in the order;

(e) revoking—

(i) any of the powers granted by the continuing or welfare power of attorney; or

(ii) the appointment of an attorney.

(3) Where the sheriff makes an order under this section the sheriff clerk shall send a copy of the interlocutor containing the order to the Public Guardian who shall—

(a) enter prescribed particulars in the register maintained by him under section 4(2)(b)(i) or (ii) as the case may be;

(b) notify—

(i) the granter;

(ii) the continuing or welfare attorney;

(iii) where it is the welfare attorney who is notified, the local authority and (in a case where the incapacity of the granter is by reason of, or reasons which include mental disorder) also the Mental Welfare Commission;

(iv) where the sheriff makes an order under subsection (2)(c), the local authority.

(4) A decision of the sheriff under subsection (2)(c) or (2)(d) shall be final.

(5) In this section any reference to—

(a) a continuing power of attorney shall include a reference to a power (however expressed) under a contract, grant or appointment governed by the law of any country, relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity;

(b) a welfare power of attorney shall include a reference to a power (however expressed) under a contract, grant or appointment governed by the law of any country, relating to the granter's personal welfare and having effect during the granter's incapacity,

and “continuing attorney” and “welfare attorney” shall be construed accordingly.

19 Records

A continuing or welfare attorney shall keep records of the exercise of his powers.

20 Notification of change of address etc.

After a document conferring a continuing or welfare power of attorney has been registered under section 17, the attorney shall notify the Public Guardian—

(a) of any change in his address;

(b) of any change in the address of the granter of the power of attorney; or

(c) of the death of the granter of the power of attorney,

and the Public Guardian shall enter prescribed particulars in the register maintained by him under section 4(2)(b)(i) or (ii) as the case may be.

21 Resignation of continuing or welfare attorney

- (1) A continuing or welfare attorney who wishes to resign after the document conferring the power of attorney has been registered under section 17 shall give notice in writing of his intention to do so to—
- 5 (a) the granter of the power of attorney;
- (b) the Public Guardian;
- (c) any guardian or, where there is no guardian, the granter's primary carer;
- (d) the local authority, where they are supervising the welfare attorney.
- (2) Subject to subsection (4), the resignation shall not have effect until the expiry of a period of 28 days commencing with the date of receipt by the Public Guardian of the notice given under subsection (1); and on its becoming effective the Public Guardian shall enter prescribed particulars in the register maintained by him under section 4(2)(b)(i) or (ii) as the case may be.
- 10
- (3) Where the resignation is of a welfare attorney, the Public Guardian shall notify the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder) the Mental Welfare Commission.
- 15
- (4) The resignation of a joint attorney, or an attorney in respect of whom the granter has appointed a substitute attorney, shall take effect on the receipt by the Public Guardian of notice under subsection (1)(b) if evidence that—
- 20 (a) the remaining joint attorney is willing to continue to act; or
- (b) the substitute attorney is willing to act,
- accompanies the notice.

22 Termination of continuing or welfare power of attorney

- (1) If the granter and the continuing or welfare attorney are married to each other the power of attorney shall, unless the document conferring it provides otherwise, come to an end upon the granting of—
- 25 (a) a decree of separation to either party;
- (b) a decree of divorce to either party;
- (c) declarator of nullity of the marriage.
- (2) The authority of a continuing or welfare attorney in relation to any matter shall come to an end on the appointment of a guardian with powers relating to that matter.
- 30
- (3) In subsection (2) any reference to—
- (a) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity;
- 35
- (b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.
- 40

- (4) No liability shall be incurred by any person who acts in good faith in ignorance of—
- (a) the coming to an end of a power of attorney under subsection (1); or
 - (b) the appointment of a guardian as mentioned in subsection (2).

23 Determination of applicable law

5 Subject to the provisions of sections 14(4)(b) and (5) and to any order of the sheriff
under section 18 addressed to an attorney to whom section 18 applies by virtue of
subsection (5) thereof, any question as to the scope or effect, during any period when the
granter is incapable of making, incapable of communicating, incapable of understanding
or incapable of retaining the memory of, any decision about the matter to which it
10 relates, of a power of attorney (or power of a like nature) relating to his personal welfare
or moveable or immovable property shall be determined by the proper law of the
contract, grant or appointment under which the power is conferred.

PART 3

ACCOUNTS AND FUNDS

24 Authority to intromit with funds

- 15 (1) Subject to section 33, an individual (which does not include a person acting in his
capacity as an officer of a local authority or other body established by or under an
enactment) may apply to the Public Guardian for authority under this Part to intromit
with funds held by a person or organisation (the “fundholder”) on behalf of an adult
20 habitually resident in Scotland who is—
- (a) incapable of making, incapable of communicating, incapable of understanding or
incapable of retaining the memory of, decisions about the funds; or
 - (b) incapable of safeguarding his interests in the funds,
- and is the sole holder of an account in his name.
- 25 (2) An application for authority under this section shall be made in respect of a specified
account with the fundholder and shall not be made if there is an existing authority to
intromit under this Part.

25 Application for authority to intromit

- (1) An application form for authority to intromit with funds shall—
- 30 (a) state the purposes of the proposed intromission, setting out the specific sums
relating to each purpose;
- (b) be signed by the applicant;
- (c) be countersigned by a member of such class of persons as is prescribed, who shall
declare in the form that—
- 35 (i) he knows the applicant and has known him for at least 2 years prior to the
date of the application;
- (ii) he knows the adult;
- (iii) he is not—
- (A) a relative of or co-habitee with the applicant or the adult; or

- (B) a director or employee of the fundholder; or
- (C) a solicitor acting on behalf of the adult or any other person mentioned in this sub-paragraph in relation to any matter under this Act; or
- (D) the medical practitioner who has issued the certificate under sub-paragraph (f);

- (iv) he believes the information contained in the document to be true; and
- (v) he believes the applicant to be a fit and proper person to intromit with the funds;

(d) contain the names and addresses of the nearest relative and primary carer of the adult, if known;

(e) identify the account with the fundholder in relation to which the authority is sought;

(f) be accompanied by a certificate in prescribed form from a medical practitioner that the adult is—

- (i) incapable of making, incapable of communicating, incapable of understanding, or incapable of retaining the memory of, decisions about; or
- (ii) not capable, by reason of mental disorder or of inability to communicate because of physical disability of safeguarding his interests in,

the funds;

(g) identify the account to which funds are to be transferred under section 28(1) (the “designated account”).

(2) The applicant shall, not later than 14 days after the form has been countersigned as mentioned in subsection (1)(c), send the completed form to the Public Guardian.

(3) On receipt of a properly completed form sent timeously to him under subsection (2), the Public Guardian shall intimate the application to the adult, his nearest relative, his primary carer and any person who the Public Guardian considers has an interest in the application and advise them of the prescribed period within which they may object to the granting of the application; and he shall not grant the application without affording to any objector an opportunity of being heard.

(4) Having heard any objections as mentioned in subsection (3), the Public Guardian may grant the application and where he does so he shall—

- (a) register the name of the withdrawer in the register maintained by him under section 4(2)(b)(iii); and
- (b) issue a certificate of authority to the withdrawer.

(5) A certificate of authority issued under subsection (4) shall instruct—

- (a) the fundholder that the account held in the name of the adult; and
- (b) the withdrawer that the designated account

must not be overdrawn; and if either account is withdrawn, the fundholder of that account shall have a right of relief against the withdrawer.

(6) A certificate of authority issued under subsection (4) shall instruct the fundholder of the account held in the name of the adult that no operations shall be carried out on the account other than those carried out in accordance with the certificate by the person authorised under this section.

5 (7) Where the Public Guardian proposes to refuse the application he shall intimate his decision to the applicant and advise him of the prescribed period within which he may object to the refusal; and he shall not refuse the application without affording to the applicant, if he objects, an opportunity of being heard.

10 (8) The Public Guardian may at his own instance or at the instance of the applicant or of any person who objects to the granting of the application remit the application for determination by the sheriff, whose decision shall be final.

(9) A decision of the Public Guardian—

(a) to grant an application under subsection (4) or to refuse an application; or

(b) to refuse to remit an application to the sheriff under subsection (8) above,

15 may be appealed to the sheriff, whose decision shall be final.

(10) A decision of a medical practitioner under subsection (1)(f) as to the incapacity of the adult as mentioned in sub-paragraph (i) or (ii) of that subsection may be appealed to the sheriff by any person having an interest in the property or financial affairs of the adult.

20 (11) In this Act an individual in respect of whom a form is registered under subsection (4) is referred to as a “withdrawer”.

26 Notification of change of address

After the name of a withdrawer has been registered under section 25 the withdrawer shall notify the Public Guardian—

(a) of any change in his address; and

25 (b) of any change in the address of the adult,

and the Public Guardian shall enter prescribed particulars in the register maintained by him under section 4(2)(b)(iii).

27 Purposes of intromissions with funds

(1) The purposes of intromissions with funds may include any or all of the following—

30 (a) the payment of central and local government taxes for which the adult is responsible;

(b) the provisions of sustenance, accommodation, fuel, clothing and related goods and services for the adult;

(c) the provision of other services provided for the purposes of looking after the adult;

35 (d) the settlement of debts owed by or incurred in respect of the adult, including any prescribed fees charged by the Public Guardian in connection with the application to intromit.

(2) The Public Guardian may, in any case, authorise payment for the provision of items other than those mentioned in subsection (1).

- (3) Subject to subsection (4), any funds used by the withdrawer shall be applied only for the benefit of the adult.
- (4) Where the withdrawer lives with the adult, he may, to the extent authorised by the certificate, apply any funds withdrawn towards household expenses.

5 **28 Withdrawal and use of funds**

- (1) On presentation to it of the certificate issued under section 25(4)(b), the fundholder of the account held in the name of the adult specified in the form shall make arrangements to transfer to the designated account such sums as the Public Guardian shall authorise.
- 10 (2) The fundholder of an account held by an adult shall be liable to the adult for any funds removed from the account under this section at any time when it was aware that the withdrawer's authority had been terminated or suspended by the Public Guardian under section 30(3), but, on meeting such liability, the fundholder of the designated account shall have a right of relief against the withdrawer.
- 15 (3) If the withdrawer uses any funds under this section in contravention of section 27, or after having received intimation of the suspension or termination of his registration under section 30, he shall be liable to repay the funds so used, with interest thereon at the rate fixed by Act of Sederunt as applicable to a decree of the sheriff, to the account of the adult.
- 20 (4) The Public Guardian may authorise a method of payment other than a method mentioned in subsection (1).
- (5) A decision of the Public Guardian not to authorise—
 - (a) a method of payment other than a method mentioned in subsection (1); or
 - (b) a payment under subsection (4)may be appealed to the sheriff, whose decision shall be final.

25 **29 Records and inquiries**

- (1) The Scottish Ministers may by regulations provide that a withdrawer shall keep a record of his intromissions with the funds and that the Public Guardian may at any time require a withdrawer to produce such record for the Public Guardian's inspection.
- (2) The Public Guardian may—
 - 30 (a) make inquiries from time to time as to the manner in which a withdrawer has exercised his functions under this Part; and
 - (b) ask the withdrawer to produce any records which he has relating to his intromissions.
- (3) The Public Guardian may require a fundholder of an account in the name of an adult or of a designated account to make its records of the account available for inspection by the Public Guardian.
- 35 (4) A fundholder complying with a requirement under subsection (3) may charge a reasonable fee for doing so and may recover that fee from the account concerned.

30 Duration and termination of registration

5 (1) Subject to the following provisions of this section, the authority of a withdrawer to withdraw funds under section 25 shall be valid for a period of 3 years commencing with the date of issue of the certificate by the Public Guardian under subsection (4)(b) of that section.

(2) The Public Guardian may reduce or extend the period of validity mentioned in subsection (1); and an extension may be without limit of time.

(3) The Public Guardian may suspend or terminate the authority of a withdrawer and shall forthwith intimate such suspension or termination to—

10 (a) the withdrawer;

(b) the fundholder of the designated account.

and such suspension or termination shall have the effect of suspending or, as the case may be, terminating all operations on that account.

15 (4) The Public Guardian may on terminating the authority of the withdrawer grant the withdrawer interim authority to continue to intromit with the funds of the adult for a period not exceeding 4 weeks from the date of the termination; and paragraphs (a) and (b) of section 25 shall apply in the case of a grant of interim authority under this subsection as they apply to the grant of an application under that section.

20 (5) Subsections (1) and (2) are without prejudice to the right of the withdrawer to make subsequent applications under the said section 25 after the end of a valid period of authority to withdraw or, as the case may be, a suspension or termination of the authority.

25 (6) A decision of the Public Guardian to reduce or extend a period of validity mentioned in subsection (1) or to suspend or terminate the authority of a withdrawer under subsection (3) may be appealed to the sheriff, whose decision shall be final; and the suspension or termination shall remain in force until the appeal is determined.

(7) The authority of a withdrawer to withdraw funds under section 25 shall come to an end—

30 (a) on the appointment of a guardian with powers relating to the funds or account in question; or

(b) on the granting of an intervention order relating to the funds or account in question; or

(c) on a continuing attorney's acquiring authority to act in relation to the funds or account in question,

35 but no liability shall be incurred by any person who acts in good faith under this Part in ignorance of the coming to an end of a withdrawer's authority under this subsection.

(8) In subsection (7) any reference to—

40 (a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;

(b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity.

31 Joint accounts

Where an individual who along with one or more others is the holder of a joint account of a fundholder becomes incapable of making, incapable of communicating, incapable of understanding, or incapable of retaining the memory of decisions about, or of safeguarding his interests in, the funds in the account, any other joint account holder may continue to operate the account unless—

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

32 Transfer of funds

(1) The Public Guardian may, on an application made at the same time as, or at any time after, an application for authority to intromit with funds held in a specified account by a fundholder, authorise the transfer of funds from that account to another specified account or specified branch.

(2) In subsection (1), “specified” means specified in the application to transfer funds and in the authorisation of that transfer; and the account to which funds are transferred may be specified as to kind of account.

(3) A decision of the Public Guardian under subsection (1) may be appealed to the sheriff, whose decision shall be final.

33 Disapplication of Part 3

(1) This Part shall not apply in the case of an adult in relation to whom—

(a) there is a guardian or continuing attorney with powers relating to the funds or account in question; or

(b) an intervention order has been granted relating to the funds or account in question, but no liability shall be incurred by any person who acts in good faith under this Part in ignorance of any such appointment or grant.

(2) In this section any reference to—

(a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;

(b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity.

PART 4

MANAGEMENT OF RESIDENTS' FINANCES

34 Application of Part 4

- 5 (1) This Part applies to the management of the matters set out in section 37 relating to any resident of any of the following establishments—
- (a) a hospital or other premises mentioned in section 10(3)(a) of the Nursing Homes Registration (Scotland) Act 1938 (c.73) (“the 1938 Act”);
 - (b) a nursing home registered under the 1938 Act;
 - 10 (c) a hospital or similar institution which, but for section 6 of that Act, would require to be registered under the 1938 Act;
 - (d) a grant-aided or independent school registered under section 62 of the Social Work (Scotland) Act 1968 (c.49) (“the 1968 Act”);
 - (e) a residential or other establishment registered under that section;
 - 15 (f) an establishment in respect of which there is registration under section 62 or 63 of the 1968 Act;
 - (g) an establishment in relation to which, but for the exception provided by subsection (1A)(1) of that section, there would require to be registration under section 61 of the 1968 Act;
 - 20 (h) a private hospital registered under Part IV of the Mental Health (Scotland) Act 1984 (c.36) (“the 1984 Act”);
 - (i) a State hospital;
 - (j) a hospital managed by a National Health Service trust established under section 12A of the 1978 Act,

if the managers of the establishment have power to manage residents' affairs.

- 25 (2) In this Part establishments mentioned in paragraph (b), (d), (e) or (g) of subsection (1) are referred to as “registered establishments”, all other establishments mentioned in subsection (1) are referred to as “unregistered establishments”, and registered and unregistered establishments together are referred to as “authorised establishments”.
- 30 (3) The Scottish Ministers may by regulations amend the list of authorised establishments set out in subsection (1).
- (4) In this Part, “the managers” has the meaning set out in Schedule 1; and “resident” in relation to an authorised establishment means an adult whose main residence for the time being is the authorised establishment or who is liable to be detained there under the 1984 Act.
- 35 (5) Schedule 1 shall have effect.

35 Residents whose affairs may be managed

- (1) The managers of an authorised establishment shall be entitled to manage on behalf of any resident in the establishment in relation to whom a certificate has been issued under subsection (2) any of the matters set out in section 37.
- 40 (2) The managers of an authorised establishment shall cause to be examined by a medical practitioner any resident in the establishment who they believe may be—

(a) incapable of making, incapable of communicating, incapable of understanding, or incapable of retaining the memory of, decisions as to; or

(b) not capable, by means of mental disorder or of inability to communicate because of physical disability of safeguarding his interest in,

5 any of the resident's affairs referred to in section 37; and if the medical practitioner finds that the resident is so incapable he shall issue a certificate in prescribed form to that effect.

(3) Subject to subsection (8), the managers of the authorised establishment shall intimate their intention of requiring an examination under subsection (2) to the resident and to the
10 resident's nearest relative.

(4) The managers of the authorised establishment shall—

(a) send a copy of the certificate to the supervisory body, who shall notify the resident's nearest relative;

(b) notify the supervisory body that they intend to manage the resident's affairs.

15 (5) In considering whether to issue a certificate under this section, the medical practitioner shall take into account any assistance available or likely to be available to the resident to manage his affairs.

(6) The medical practitioner who certifies under this section shall not—

20 (a) be related to the resident or to any of the managers of the authorised establishment;

(b) have any direct or indirect financial interest in the authorised establishment.

(7) A certificate—

(a) shall be reviewed on any change of circumstances of the resident bearing on the resident's incapacity; and

25 (b) shall expire 3 years after it was issued.

(8) If the supervisory body considers that intimation to the resident under subsection (3) would be likely to pose a serious risk to the health of the resident it need not make the intimation.

30 (9) The supervisory body shall not reach a decision under subsection (8) the effect of which is that intimation need not be given except upon the advice (given in prescribed form) of a medical practitioner on the question whether intimation would be detrimental to the resident's health.

35 (10) The managers of the authorised establishment shall secure that the advice given by the medical practitioner for the purposes of subsection (9) is received by the supervisory body within 14 days of the medical examination upon which the advice was based.

(11) The medical practitioner who advises under subsection (9) shall be one who is not disqualified from certifying under this section.

36 Power to manage residents' affairs

40 (1) The managers of an authorised establishment may apply to the supervisory body for authority to manage residents' affairs.

- (2) The supervisory body shall not grant such authority unless it is satisfied that the authorised establishment maintains financial procedures and controls adequate to safeguard the residents' affairs.
- (3) Where the supervisory body is satisfied after such inquiry as it considers necessary that it is appropriate to do so, it may authorise the authorised establishment to manage residents' affairs.
- (4) Authorisation under subsection (3) shall be given in writing.

37 Matters which may be managed

- (1) The matters which may be managed under this Part by the managers of an authorised establishment are—
- (a) claiming, receiving, holding and spending any pension, benefit, allowance or other payment except one paid under the Social Security Contributions and Benefits Act 1992 (c.4);
 - (b) claiming, receiving, holding and spending any money to which a resident is entitled;
 - (c) holding and spending any money brought by the resident into the establishment;
 - (d) holding any other moveable property to which the resident is entitled;
 - (e) disposing of such moveable property,
- and in this Part these matters, or any of them, are referred to as residents' affairs; and cognate expressions shall be construed accordingly.
- (2) In managing these matters, the managers of an authorised establishment shall—
- (a) act only for the benefit of the resident; and
 - (b) have regard to the sentimental value that any item might have for the resident, or would have but for the resident's incapacity.
- (3) The managers of an authorised establishment shall not, without the consent of the supervisory body, dispose of any item with a value greater than that which is prescribed for the purposes of this subsection.
- (4) For the purpose of this section, "manage" denotes no greater responsibility than complying with the duties set out in this section.

38 Supervisory bodies

- (1) A supervisory body for the purposes of this Part is—
- (a) in relation to a registered establishment, the person or body with whom the establishment is required to register;
 - (b) in relation to an authorised establishment mentioned in paragraphs (a), (c) or (i) of section 34(1), the Health Board for the area in which the authorised establishment is situated;
 - (c) in relation to a State hospital, the Health Board for the area in which the State hospital is situated;

(d) in relation to an authorised establishment mentioned in paragraph (f) of that section, the local authority of the area in which the authorised establishment is situated;

(e) in relation to an authorised establishment mentioned in paragraph (j) of that section, such person or body as may be prescribed,

and any reference in this Part to an authorised establishment in relation to a supervisory body is a reference to an authorised establishment for which the supervisory body is responsible.

(2) A supervisory body shall from time to time make inquiry as to the manner in which the managers of an authorised establishment are carrying out the management of residents' affairs and in particular the manner in which they are carrying out their functions under section 39.

(3) A supervisory authority shall investigate any complaint received as to the manner in which the managers of an authorised establishment are managing residents' affairs.

39 Duties and functions of managers of approved establishment

(1) The managers of an authorised establishment shall, in relation to residents whose affairs they are managing under section 37—

(a) claim, receive and hold any pension, benefit, allowance or other payment to which the resident is entitled except one paid under the Social Security Contributions and Benefits Act 1992 (c.4);

(b) keep the funds of residents separate from the funds of the establishment;

(c) comply with any requirements for the supervisory body as respects keeping the funds of residents separate or distinguishable from each other;

(d) ensure that where, at any time, the total amount of funds held on behalf of any resident exceeds such sum as may from time to time be prescribed they shall be placed so as to earn interest;

(e) keep proper records of all transactions made in relation to the funds held by them in respect of each resident for whose benefit the funds are held and managed and, in particular, ensure that details of the balance and any interest due to each resident can be ascertained at any time;

(f) produce such records when requested to do so by the resident, his nearest relative or the supervisory body;

(g) spend money only on items or services which are of benefit to the resident on whose behalf the funds are held;

(h) not spend money on items or services which are provided by the establishment to or for such resident as part of its normal service;

(i) make proper provision for indemnifying residents against any loss attributable to—

(i) any act or omission on the part of the managers of the establishment in exercising the powers conferred by this Part or of others for whom the managers are responsible or attributable to any expenditure in breach of paragraph (g);

(ii) any breach of duty, misuse of funds or failure to act reasonably and in good faith on the part of the managers;

(2) Where any loss arises to a resident's funds and this loss is attributable to any breach of duty or any misuse of funds on the part of the managers, they shall be liable to the resident's estate for the amount of the loss.

(3) The supervisory body of an establishment may in relation to an individual resident permit the managers of the establishment to hold funds of a greater amount than that prescribed by the regulations.

40 Authorisation of named manager to withdraw from resident's account

(1) The supervisory body of an authorised establishment may issue a certificate of authority under this section in relation to any resident named in the certificate.

(2) A certificate of authority shall be signed by the officer of the supervisory body authorised by the body to do so and shall—

(a) specify accounts or other funds of the resident;

(b) specify by name a manager of the authorised establishment (the "authorised manager").

(3) The authorised manager may make withdrawals from such account or source of funds of the named resident as is specified in certificate of authority and the fundholder may make payments accordingly.

41 Where resident leaves or moves to another authorised establishment

(1) Where a person ceases, for whatever reason, to be a resident of an authorised establishment, the managers shall prepare a statement of the resident's affairs as at the time when the person ceased to be a resident there.

(2) The managers of an authorised establishment shall, however, continue to manage the affairs of a person who has ceased to be a resident there until such arrangements as are necessary for managing the resident's affairs elsewhere have been made.

(3) Where a person ceases to be a resident of an authorised establishment, the managers shall take such steps as are necessary to transfer the former resident's affairs to the establishment or authority which or person (who may be the former resident) who is to be responsible for these affairs.

(4) In the case where the person who ceases to be resident in an authorised establishment has ceased to be so resident by reason of a move to another such establishment, the period for which the managers of the first such establishment shall continue to manage the former resident's affairs shall not exceed 3 months and in any other case it shall not exceed 6 months.

(5) Where a person has ceased to be a resident of an authorised establishment, the managers shall, within 14 days of that event, so inform the supervisory authority and, where the person has ceased to be a resident of the establishment otherwise than by a move—

(a) to another such establishment; or

(b) into the care of a local authority,

the managers shall, within that period, also so inform the local authority of the area in which they expect the person to reside.

42 Withdrawal of right to manage

- 5 (1) Where it appears to a supervisory body that the managers of an authorised establishment are no longer operating as such or have failed to comply with any requirement of this Part or that, for any other reason, it is no longer appropriate that they should continue to manage residents' affairs it may revoke—
- (a) the registration, in the case of a registered establishment registered under section 61(1A) of the Social Work (Scotland) Act 1968 (c.49) for the purposes only of this Part;
 - (b) the power to manage, in the case of any other authorised establishment.
- 10 (2) Where a registration or a power to manage has been revoked under this section, the supervisory body shall within a period of fourteen days from such revocation take over management of the residents' affairs and, where they do so, comply with the requirements imposed by and under this Part upon the managers of an authorised establishment.
- 15 (3) The supervisory body shall, within the period of three months after taking over management of residents' affairs under subsection (2), cause that management to be transferred to another authorised establishment.
- (4) A decision of a supervisory body to revoke—
- (a) the registration of a registered establishment, under subsection (2)(a); or
 - (b) a power to manage, under subsection (2)(b),
- 20 may be appealed to the sheriff, whose decision shall be final.

43 Disapplication of Part 4

- (1) This Part shall not apply to any of the matters which may be managed under section 37 if—
- 25 (a) there is a guardian, continuing attorney, or other person with powers relating to that matter; or
- (b) an intervention order has been granted relating to that matter,
- but no liability shall be incurred by any person who acts in good faith under this Part in ignorance of any guardian, continuing attorney, other person or intervention order.
- 30 (2) In this section any reference to—
- (a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;
 - (b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity.
- 35

PART 5

MEDICAL TREATMENT, CARE AND RESEARCH

Authority

44 Authority of persons responsible for medical treatment

- 5 (1) Where any person who is responsible for the medical treatment of an adult is of the opinion, and has, in accordance with subsection (3) certified that he is of the opinion that the adult is incapable of making, incapable of communicating, incapable of understanding or incapable of retaining the memory of, a decision about the medical treatment in question then, without prejudice to any authority conferred by any other enactment or rule of law and subject to sections 46 and 47 and to the following provisions of this section, that person and any other person who is authorised to carry out medical treatment of the adult shall have, during the period specified in the certificate under this subsection, authority to do what is reasonable in the circumstances to safeguard or promote the physical or mental health of that adult.
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- 15 (2) In subsection (1), “medical treatment” includes—
- (a) surgical, medical, nursing, optical or dental procedure or treatment;
 - (b) ventilation, nutrition and hydration by artificial means;
 - (c) any other procedure or treatment designed to safeguard or promote physical or mental health.
- 20 (3) A certificate for the purposes of subsection (1) shall specify the period during which the authority referred to in subsection (1) subsists being whichever of the following the person certifying considers most appropriate to the condition or circumstances of the adult—
- (a) a period not exceeding one month from the date of the examination upon which the certificate is based;
 - (b) such shorter period from that date as may be specified; or
 - (c) a period not exceeding one month from that date or such shorter period as the person certifying may substitute for that period in the event of a change of the adult’s condition or circumstances
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- 30 and otherwise shall be in prescribed form.
- (4) The authority conferred by subsection (1) shall not authorise—
- (a) the use of force or detention, unless it is immediately necessary and only for so long as is necessary in the circumstances;
 - (b) action which would be inconsistent with any decision by a competent court.
- 35 (5) The authority conferred by subsection (1) shall not authorise medical treatment prescribed in regulations made under section 45.
- (6) Subject to subsection (7), where any question as to the authority of any person to provide medical treatment in pursuance of subsection (1)—
- (a) is the subject of proceedings in any court (other than for the purposes of any application to the sheriff made under regulations made under section 45; and
 - (b) has not been determined,
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medical treatment authorised by subsection (1) may be given where it is necessary, in the opinion of the person giving the medical treatment, for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition.

- 5 (7) Nothing in subsection (6) shall authorise the provision of any medical treatment where an interdict has been granted and continues to have effect prohibiting the provision of such medical treatment.

45 Exceptions to authority to treat

- 10 (1) The authority conferred by section 44(1) does not extend to the giving of any of the forms of treatment to which sections 97 and 98 of the 1984 Act apply to a patient to whom Part X of that Act applies (which sections and Part authorise certain treatments for mental disorder for certain patients detained under that Act).
- 15 (2) The Scottish Ministers may by regulations specify medical treatment, or a class or classes of medical treatment, in relation to which the authority conferred by section 44(1) shall not apply and make provision about the medical treatment, or a class or classes of medical treatment, in relation to which that authority does apply.
- (3) Regulations made under subsection (2) may provide for the circumstances in which the specified medical treatment or specified class or classes of medical treatment may be carried out.

46 Medical treatment where there is an application for intervention or guardianship order

- 20 (1) Section 44(1) shall not apply if, to the knowledge of the person responsible for the medical treatment of the adult, an application for an intervention order or a guardianship order with power in relation to any medical treatment referred to in that subsection has been made to the sheriff and has not been determined.
- 25 (2) Until the application has been finally determined, the person responsible for the medical treatment of the adult or any other person authorised under section 44 may do what is necessary in his opinion for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition.
- 30 (3) Nothing in subsection (2) shall authorise the provision of any medical treatment where an interdict has been granted and continues to have effect prohibiting the provision of such medical treatment.

47 Medical treatment where guardian or welfare attorney refuses consent

- (1) Section 44(1) shall not apply in the case of an adult in respect of whom—
- 35 (a) there is appointed a guardian or a welfare attorney; or
- (b) a person is authorised by an intervention order,

with power in relation to any medical treatment referred to in that subsection if, to the knowledge of the person responsible for the medical treatment of the adult, the guardian, welfare attorney or person authorised to intervene has refused consent to the medical treatment.

- 5 (2) The person responsible for, or any other person authorised under section 44 in relation to the medical treatment of an adult in respect of whom a guardian or welfare attorney has been appointed or a person has been authorised to intervene, as mentioned in subsection (1), may, if the guardian, welfare attorney or person authorised to intervene has refused consent to medical treatment, apply to the Court of Session for authority to carry out the medical treatment proposed.
- 10 (3) In this section any reference to—
- (a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;
 - (b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.
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48 Authority for research

- 20 (1) No surgical, medical, nursing, dental or psychological research shall be carried out on any adult who is incapable of making, incapable of communicating, incapable of understanding, or incapable of retaining the memory of, a decision about participation in the research unless the circumstances mentioned in subsection (2) are satisfied.
- (2) The circumstances referred to in subsection (1) are that—
- (a) the purpose of the research is to obtain knowledge of—
 - (i) the causes, diagnosis, treatment or care of the adult's incapacity; or
 - (ii) the effect of any treatment or care given during his incapacity to the adult which relates to that incapacity; and
 - (b) the conditions mentioned in subsection (3) are fulfilled.
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- (3) The conditions are—
- (a) the research is likely to produce real and direct benefit to the adult; and
 - (b) the adult does not indicate unwillingness to participate in the research; and
 - (c) the research has been approved by the Ethics Committee; and
 - (d) the research entails no foreseeable risk, or only a minimal foreseeable risk, to the adult; and
 - (e) the research imposes no discomfort, or only minimal discomfort, on the adult; and
 - (f) consent has been obtained from any guardian or welfare attorney who has power to consent to the adult's participation in research or, where there is no such guardian or welfare attorney, from the adult's nearest relative.
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- 35 (4) In granting approval under subsection (3)(c), the Ethics Committee may impose such conditions as it sees fit.

- (5) The Ethics Committee shall be constituted by regulations made by the Scottish Ministers and such regulations may make provision as to the composition of, appointments to and procedures of the Ethics Committee and may make such provision for the payment of such remuneration, expenses and superannuation as the Scottish Ministers may determine.
- (6) In this section any reference to—
- (a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;
- (b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.

PART 6

INTERVENTION ORDERS AND GUARDIANSHIP ORDERS

Intervention orders

49 Intervention orders

- (1) The sheriff may, on an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult, if he is satisfied that the adult is incapable of taking the action, or is incapable of making, incapable of communicating, incapable of understanding, or incapable of retaining the memory of, the decision about his property, financial affairs or personal welfare to which the application relates, make an order (in this Act referred to as an “intervention order”).
- (2) Where it appears to the local authority that—
- (a) the adult is incapable as mentioned in subsection (1); and
- (b) no application has been made or is likely to be made for an order under this section in relation to the decision to which the application under this subsection relates; and
- (c) an intervention order is necessary for the protection of the property, financial affairs or personal welfare of the incapable adult,
- they shall apply under this section for an order.
- (3) Section 51(3) and (4) shall apply to an application under this section and, for this purpose, for the reference to the individual or office holder nominated for appointment as guardian there shall be substituted a reference to a person nominated in such application.
- (4) An intervention order may—
- (a) direct the taking of any action specified in the order;
- (b) authorise the person nominated in the application, to take such action or make such decision in relation to the property, financial affairs or personal welfare of the adult as is specified in the order;

- (5) Where an intervention order directs the acquisition or disposal of an interest in heritable property, the consent of the Public Guardian as respects the consideration shall be required before the property is acquired or, as the case may be, disposed of.
- (6) In making an intervention order the sheriff may, and in the case of an intervention order relating to property or financial affairs shall, require the person authorised under the order to find caution.
- (7) The sheriff may, on an application by—
- (a) the person authorised under the intervention order; or
 - (b) the adult; or
 - (c) any person claiming an interest in the property, financial affairs or personal welfare of the adult,
- make an order varying the terms of, or recalling, the intervention order or any other order made for the purposes of the intervention order.
- (8) Anything done under an intervention order shall have the same effect as if done by the adult when he had the capacity to do so.
- (9) Where an intervention order is made, the sheriff clerk shall forthwith send a copy of the interlocutor containing the order to the Public Guardian who shall—
- (a) enter in the register maintained by him under section 4(2)(b)(v) such particulars of the order as may be prescribed; and
 - (b) notify the adult, the local authority and, where appropriate, the Mental Welfare Commission.
- (10) A person authorised by an intervention order may recover from the estate of the adult the amount of such reasonable outlays as he incurs in doing anything directed or authorised by the order.
- (11) Sections 58(2) and 70 shall apply to an intervention order as they apply to a guardianship order and, for this purpose, for any reference to—
- (a) a guardianship order there shall be substituted a reference to an intervention order; and
 - (b) a guardian there shall be substituted a reference to the person authorised to intervene.

50 Notification of change of address

After particulars relating to an intervention order are entered in the register under section 49 the person authorised under the intervention order shall notify the Public Guardian—

- (a) of any change in his address; and
- (b) of any change in the address of the adult,

and the Public Guardian shall enter prescribed particulars in the register maintained by him under section 4(2)(b)(v) and notify the local authority and (in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder and the intervention order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission

*Guardianship orders***51 Application for guardianship order**

- 5 (1) An application may be made under this section by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult to the sheriff for an order appointing an individual or office holder as guardian in relation to the adult's property, financial affairs or personal welfare.
- 10 (2) Where it appears to the local authority that—
- (a) the conditions mentioned in section 52(1)(a) and (b) apply to the adult; and
 - (b) no application has been made or is likely to be made for an order under this section; and
 - (c) a guardianship order is necessary for the protection of the property, financial affairs or personal welfare of the adult,
- they shall apply under this section for an order.
- 15 (3) There shall be lodged in court along with an application under this section—
- 20 (a) reports, in prescribed form, of an examination and assessment of the adult carried out not more than 30 days before the lodging of the application by at least two medical practitioners one of whom, in a case where the incapacity is by reason of mental disorder, must be a medical practitioner approved for the purposes of section 20 of the 1984 Act as having special experience in the diagnosis or treatment of mental disorder;
 - 25 (b) where the application relates to the personal welfare of the adult, a report, in prescribed form, from the mental health officer, (but where it is in jeopardy only because of the inability of the adult to communicate, from the chief social work officer), containing his opinion as to—
 - 30 (i) the general appropriateness of the order sought, 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 individual nominated in the application to be appointed guardian; and
 - 35 (c) where the application relates only to the property or financial affairs of the adult, a report, in prescribed form, based on an interview and assessment of the adult carried out not more than 30 days before the lodging of the application, by a person who has sufficient knowledge to make such a report as to the matters referred to in paragraph (b)(i) and (ii).
- 40 (4) Where an applicant claims an interest in the personal welfare of the adult and is not the local authority, he shall give notice to the chief social work officer of his intention to make an application under this section and the report referred to in subsection (3)(b) shall be prepared by the chief social work officer or, as the case may be, the mental welfare officer, within 21 days of the date of the notice.
- 45 (5) The sheriff may, on an application being made to him, at any time before the disposal of the application made under this section, make an order for the appointment of an interim guardian.
- (6) The appointment of an interim guardian in pursuance of this section shall, unless recalled earlier, cease to have effect—

- (a) on the appointment of a guardian under section 52; or
 - (b) at the end of the period of three months from the date of appointment,
- whichever is the earlier.

52 Disposal of application

- 5 (1) Where the sheriff is satisfied in considering an application under section 51 that—
- (a) the adult is incapable of making, incapable of communicating, incapable of understanding, or incapable of retaining the memory of, decisions about, or is incapable of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare, and is likely to continue to be so unable; and
 - 10 (b) no other means provided by or under this Act would be sufficient to enable the adult's interests in his property, financial affairs or personal welfare to be safeguarded or promoted,
- he may grant the application.
- 15 (2) Where the sheriff is satisfied that an intervention order would be sufficient as mentioned in subsection (1), he may treat the application under this section as an application for an intervention order under section 49 and may make such order as appears to him to be appropriate.
- 20 (3) Where the sheriff grants the application under section 51 he shall make an order (in this Act referred to as a “guardianship order”) appointing the individual or office holder nominated in the application to be the guardian of the adult for a period of 3 years or such other period (including an indefinite period) as, on cause shown, he may determine.
- 25 (4) Where more than one individual or office holder is nominated in the application, a guardianship order may, without prejudice to the power under section 56(1) to appoint joint guardians, appoint two or more guardians to exercise different powers in relation to the adult.
- (5) Where the sheriff makes a guardianship order the sheriff clerk shall forthwith send a copy of the interlocutor containing the order to the Public Guardian who shall—
- (a) enter prescribed particulars of the appointment in the register maintained by him under section 4(2)(b)(iv);
 - 30 (b) when satisfied that the guardian has found caution, issue a certificate of appointment to the guardian;
 - (c) notify the adult of the appointment of the guardian; and
 - (d) notify the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder and the intervention order relates to the adult’s personal welfare or factors which include it) the Mental Welfare Commission of the terms of the interlocutor.
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53 Who may be appointed as guardian

- 40 (1) The sheriff may appoint as guardian—
- (a) any individual whom he considers to be suitable for appointment and who has consented to being appointed;

- (b) where the guardianship order is to relate only to the personal welfare of the adult, the chief social work officer of the local authority.
- (2) The sheriff shall not appoint an individual as guardian to an adult unless he is satisfied that the individual is aware of—
- 5 (a) the adult's circumstances and condition and of the needs arising from such circumstances and condition; and
- (b) the functions of a guardian.
- (3) In determining if an individual is suitable for appointment as guardian, the sheriff shall have regard to—
- 10 (a) the accessibility of the individual to the adult and to his primary carer;
- (b) the ability of the individual to carry out the functions of guardian;
- (c) any likely conflict of interest between the adult and the individual;
- (d) any undue concentration of power which is likely to arise in the individual over the adult;
- 15 (e) any adverse effects which the appointment of the individual would have on the interests of the adult;
- (f) such other matters as appear to him to be appropriate.
- (4) Paragraphs (c) and (d) of subsection (3) shall not be regarded as applying to an individual by reason only of his being a close relative of, or person residing with, the adult.
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54 Renewal of guardianship order by sheriff

- (1) At any time before the end of a period in respect of which a guardianship order has been made or renewed, an application may be made to the sheriff under this section by the guardian for the renewal of such order, and where such an application is so made, the order shall continue to have effect until the application is determined.
- 25 (2) Section 51(3) shall apply for the purposes of an application made under this section as it applies for the purposes of an application made under that section; and for the purposes of so applying that subsection references to the appointment of a guardian (however expressed) shall be construed as references to the continuation of appointment.
- 30 (3) Section 52 shall apply to an application under this section as it applies to an application under section 51; and for the purposes of so applying that section—
- (a) references to the making of a guardianship order and the appointment of a guardian (however expressed) shall be construed as references to, respectively, the renewal of the order and the continuation of appointment;
- 35 (b) for subsection (3) there shall be substituted—
- “(3) Where the sheriff grants an application under section 54, he may continue the guardianship order for a period of 5 years or for such other period (including an indefinite period) as, on cause shown, he may determine.”.
- (4) Where the sheriff refuses an application under this section, the sheriff clerk shall forthwith send a copy of the interlocutor containing the refusal to the Public Guardian who shall—
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- (a) enter prescribed particulars in the register maintained by him under section 4(2)(b)(iv); and
- (b) notify the adult and the local authority and (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 which include it) the Mental Welfare Commission.

55 Registration of guardianship order relating to heritable property

- (1) This section applies where the sheriff makes a guardianship order which confers powers relating to heritable property of the adult.
- (2) In making such an order the sheriff shall specify each property affected by the order, in such terms as enable it to be identified in the Register of Sasines or, as the case may be, the Land Register of Scotland.
- (3) The guardian shall, after finding caution if so required by the order, forthwith apply to the Keeper of the Registers of Scotland for recording of his appointment in the General Register of Sasines or, as the case may be, registering of it in the Land Register of Scotland.
- (4) An application under subsection (3) shall contain—
 - (a) the name and address of the guardian;
 - (b) a statement that the guardian has powers relating to each property specified in the order;
 - (c) a copy of the interlocutor containing the order appointing the guardian.
- (5) Where the appointment is to be recorded in the General Register of Sasines, the Keeper shall—
 - (a) record the interlocutor in the Register; and
 - (b) endorse the interlocutor to the effect that it has been so recorded.
- (6) Where the appointment is to be registered in the Land Register of Scotland, the Keeper shall—
 - (a) amend the title sheet of the property to show the appointment of the guardian; and
 - (b) issue an amended Land Certificate showing the appointment.
- (7) The guardian shall send the endorsed interlocutor or, as the case may be, the amended Land Certificate to the Public Guardian who shall enter particulars of it in the register maintained by him under section 4(2)(b)(iv).

Joint and substitute guardians

56 Joint guardians

- (1) An application may be made to the sheriff—
 - (a) by two or more individuals seeking appointment, for their appointment as joint guardians to an adult; or
 - (b) by an individual seeking appointment, for his appointment as an additional guardian to an adult jointly with one or more existing guardians.
- (2) Joint guardians shall not be appointed to an adult unless—

- (a) the individuals so appointed are parents, siblings or children of the adult; or
- (b) the sheriff is satisfied that, in the circumstances, it is appropriate to appoint as joint guardians individuals who are not related to the adult as mentioned in paragraph (a).

5 (3) Where an application is made under subsection (1)(a), sections 52 and 53 shall apply for the purposes of the disposal of that application as they apply for the disposal of an application under section 51.

10 (4) In deciding if an individual is suitable for appointment as additional guardian under subsection (1)(b), the sheriff shall have regard to the matters set out in section 53(2) to (4).

(5) Where the sheriff appoints an additional guardian under this section, the sheriff clerk shall send a copy of the order appointing him to the Public Guardian who shall—

15 (a) enter prescribed particulars in the register maintained by him under section 4 (b)(iv) of this Act;

(b) when satisfied that the additional guardian has found caution issue a certificate of appointment to the additional guardian and a new certificate of appointment to the existing guardian;

20 (c) notify the adult and the local authority and (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 which include it) the Mental Welfare Commission.

(6) Joint guardians may, subject to subsection (7), exercise their functions individually, and each guardian shall be liable for any loss or injury caused to the adult arising out of—

25 (a) his own acts or omissions; or

(b) his failure to take reasonable steps to ensure that a joint guardian does not breach any duty of care or fiduciary duty owed to the adult,

and where more than one such guardian is so liable they shall be liable jointly and severally.

30 (7) A joint guardian shall, before exercising any functions conferred on him, consult the other joint guardians, unless—

(a) consultation would be impracticable in the circumstances;

(b) the joint guardians agree that consultation is not necessary.

(8) Where joint guardians disagree as to the exercise of their functions, either or both of them may apply to the sheriff for directions under section 3.

35 (9) Where there are joint guardians, a third party in good faith is entitled to rely on the authority to act of any one or more of them.

57 **Substitute guardian**

40 (1) In any case where an individual is appointed as guardian under section 52 and becomes unable to act as guardian for any reason the sheriff may, on an application, appoint to act as guardian any individual or office holder who could competently be appointed by virtue of section 53.

- (2) In this Act an individual appointed under section 52 and an individual or office holder appointed under this section are referred to respectively as an “original guardian” and a “substitute guardian”.
- (3) An application for appointment as a substitute guardian may be made at the time of the application for the appointment of the original guardian or at any time thereafter.
- (4) Subsection (1) shall apply to an individual who, having been appointed as a substitute guardian subsequently, by virtue of this section, becomes the guardian as it applies to an individual appointed under section 52 and, for this purpose, any reference in this section to the “original guardian” shall be construed accordingly.
- (5) Where the sheriff appoints a substitute guardian (other than a substitute guardian appointed in the same order as an original guardian) under subsection (1), the sheriff clerk shall send a copy of the interlocutor containing the order appointing the substitute guardian to the Public Guardian who shall—
- (a) enter prescribed particulars in the register maintained by him under section 4(2)(b)(iv); and
- (b) notify the adult, the original guardian and the local authority and (in a case where the adult’s incapacity is by reason of, or by reasons which include, mental disorder and the guardianship order relates to the adult’s personal welfare or factors which include it) the Mental Welfare Commission.
- (6) On the death or incapacity of the original guardian, the substitute guardian shall, without undue delay, notify the Public Guardian—
- (a) of the death or incapacity (and where the original guardian has died, provide the Public Guardian with documentary evidence of the death); and
- (b) whether or not he is prepared to act as guardian.
- (7) The Public Guardian on being notified under subsection (6) shall, if the substitute guardian is prepared to act—
- (a) enter prescribed particulars in the register maintained by him under section 4(2)(b)(iv);
- (b) when satisfied that the substitute guardian has found caution, issue the substitute guardian with a certificate of appointment;
- (c) notify the adult that the substitute guardian is acting.
- (8) Unless otherwise specified in the order appointing him, the substitute guardian shall have the same functions and powers as those exercisable by the original guardian immediately before the event mentioned in subsection (1).

Functions etc. of guardian

58 Functions and duties of guardian

- (1) Subject to the provisions of this section, an order appointing a guardian may confer on him—
- (a) power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the order;
- (b) power to deal with all aspects of the personal welfare of the adult, or with such aspects as may be specified in the order;

(c) power to pursue or defend an action of divorce or separation in the name of the adult;

(d) power to manage the property or financial affairs of the adult, or such parts of them as may be specified in the order;

5 (e) power to authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.

(2) A guardian may not place the adult in a hospital for the treatment of mental disorder against his will.

10 (3) A guardian shall (unless prohibited by an order of the sheriff and subject to any conditions or restrictions specified in such an order) have power by virtue of his appointment to act as the adult's legal representative in relation to any matter within the scope of the power conferred by the guardianship order.

15 (4) The guardian shall not later than 7 days after any change of his own or the adult's address notify the Public Guardian and the local authority and (in a case where the adult's incapacity is by reason of, or reasons which include it, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission), of the change, and the Public Guardian shall enter prescribed particulars in the register maintained by him under section 4(2)(b)(iv)

20 (5) A guardian having powers relating to the property or financial affairs of the adult shall, subject to—

(a) such restrictions as may be imposed by the court;

(b) any management plan prepared under paragraph 3 of schedule 2; or

(c) paragraph 8 of that schedule,

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

(6) The guardian may arrange for some or all of his functions to be exercised by one or more persons acting on his behalf but shall not be entitled to surrender or transfer any part of them to another person.

30 (7) The guardian shall comply with any order or demand made by the Public Guardian in relation to the property or financial affairs of the adult in so far as so complying would be within the scope of his authority; and where the guardian fails to do so the sheriff may, on the application of the Public Guardian, make an order to the like effect as the order or demand made by the Public Guardian, and the sheriff's decision shall be final.

(8) An interim guardian appointed under section 51(5) having powers relating to—

35 (a) the property or financial affairs of an adult shall report to the Public Guardian;

(b) the personal welfare of an adult shall report to the chief social work officer of the local authority,

every month as to his exercise of those powers.

40 (9) Where the chief social work officer of the local authority has been appointed guardian he shall notify any person who received notification of the appointment of the name of the officer responsible at any time for carrying out the functions and duties of guardian.

(10) If, in relation to the appointment of the chief social work officer as guardian, the sheriff has directed that that intimation or notification of any application or other proceedings should not be given to the adult, the chief social work officer shall not notify the adult under subsection (9).

5 (11) The Scottish Ministers may by regulations define the scope of the powers which may be conferred on a guardian under subsection (1) and the conditions under which they shall be exercised.

(12) Schedule 2 (which makes provision as to the guardian's management of the estate of an adult) has effect.

10 **59 Gifts**

(1) A guardian having powers relating to the property or financial affairs of an adult may make a gift out of the adult's estate only if authorised to do so by the Public Guardian.

(2) Authorisation by the Public Guardian under subsection (1) may be given generally, or in respect of a particular gift.

15 (3) On receipt of an application in the prescribed form for an authorisation to make a gift, the Public Guardian shall, subject to subsection (4), intimate the application to the adult, his nearest relative, his primary carer and any other person who the Public Guardian considers has an interest in the application and advise them of the prescribed period within which they may object to the granting of the application; and he shall not grant
20 the application without affording to any objector an opportunity of being heard.

(4) Where the Public Guardian is of the opinion that the value of the gift is such that intimation is not necessary, he may dispense with intimation.

(5) Having heard any objections as mentioned in subsection (3), the Public Guardian may grant the application.

25 (6) Where the Public Guardian proposes to refuse the application he shall intimate his decision to the guardian and advise him of the prescribed period within which he may object to the refusal; and he shall not refuse the application without affording to the guardian, if he objects, an opportunity of being heard.

30 (7) The Public Guardian may at his own instance or at the instance of the guardian or of any person who objects to the granting of the application remit the application for determination by the sheriff, whose decision shall be final.

(8) A decision of the Public Guardian—

(a) to grant an application under subsection (5) or to refuse an application; or

(b) to refuse to remit an application to the sheriff under subsection (7),

35 may be appealed to the sheriff, whose decision shall be final.

60 Effect of appointment and transactions of guardian

(1) The adult shall have no capacity to enter into any transaction in relation to any matter which is within the scope of the authority conferred on the guardian except in a case where he has been authorised by the guardian under section 58(1)(e); but nothing in this
40 subsection shall be taken to affect the capacity of the adult in relation to any other matter.

- (2) Where the guardian has powers relating to the property or financial affairs of the adult, the certificate of appointment issued to him by the Public Guardian shall, subject to the terms of the order appointing him, have the effect of—
- (a) authorising the guardian to take possession of, manage and deal with any moveable or immoveable estate (wherever situated) of the adult;
- (b) requiring any payment due to the adult to be made to the guardian,
- in so far as the estate, payment or matter falls within the scope of the guardian's authority.
- (3) A guardian having powers relating to the personal welfare of an adult may exercise these powers in relation to the adult whether or not the adult is in Scotland at the time of the exercise of the powers.
- (4) The guardian shall be personally liable under any transaction entered into by him—
- (a) without disclosing that he is acting as guardian of the adult; or
- (b) which falls outwith the scope of his authority,
- but where a guardian has acted as mentioned in paragraph (a) and is not otherwise in breach of any requirement of this Act relating to such guardians, he shall be entitled to be reimbursed from the estate of the adult in respect of any loss suffered by him in consequence of a claim made upon him personally by virtue of this subsection.
- (6) Where a third party with whom the adult entered into a transaction was aware at the date of entering into the transaction that authority had been granted by the guardian under section 58(1)(e), the transaction shall not be void only on the ground that the adult lacked capacity.
- (7) A transaction for value between the guardian purporting to act as such and a third party acting in good faith shall not be invalid on the ground only that the guardian acted outwith the scope of his authority or failed to observe any requirement, whether substantive or procedural, imposed by or under this Act, or by the sheriff or by the Public Guardian.
- (8) In subsections (3) and (4) any reference to a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland.

61 Reimbursement and remuneration of guardian

- (1) A guardian shall be entitled to be reimbursed out of the estate of the adult for any outlays reasonably incurred by him in the exercise of his functions.
- (2) In subsection (1), “outlays”, in relation to a guardian—
- (a) who is someone other than the chief social work officer of a local authority, includes payment for items and services other than those items and services which the guardian is expected to provide as part of his functions;
- (b) who is the chief social work officer of a local authority, includes payment for items and services only if they would not normally be provided free of charge by the local authority to a person who is in similar circumstances but who does not have a guardian.

(3) The local authority shall, in relation to the cost of any application by them for appointment of their chief social work officer as guardian or of any subsequent application by that officer while acting as guardian—

(a) where the application relates to the personal welfare of the adult, meet such cost;

(b) where the application relates to the property or financial affairs of the adult, be entitled to recover such cost from the estate of the adult,

and where the application relates to the personal welfare and to the property or financial affairs of the adult the sheriff shall, in determining the application, apportion the cost as he thinks fit.

(4) Remuneration shall be payable out of the adult's estate—

(a) in respect of the exercise of functions relating to the personal welfare of the adult, only in a case where special cause is shown;

(b) in respect of the exercise of functions relating to the property or financial affairs of the adult, unless the sheriff directs otherwise in the order appointing the guardian,

but shall not be payable to a local authority in respect of the exercise by their chief social work officer of functions relating to the personal welfare of the adult.

(5) In determining whether or not to make a direction under subsection (4)(b), the sheriff shall take into account the value of the estate and the likely difficulty of managing it.

(6) Any remuneration payable to the guardian and the amount of outlays to be allowed under subsection (1) shall be fixed by the Public Guardian—

(a) in a case where the guardian is required to submit accounts, when the guardian's accounts for that period are audited;

(b) in any other case, on an application by the guardian,

and in fixing the remuneration to be paid to the guardian the Public Guardian shall take into account the value of the estate.

(7) The Public Guardian may allow payments to account to be made by way of remuneration during the accounting period if it would be unreasonable to expect the guardian to wait for payment until the end of an accounting period.

(8) A decision by the Public Guardian—

(a) under subsection (6) as to the remuneration payable and the outlays allowable to the guardian;

(b) under subsection (7) as to payments to account to the guardian

may be appealed to the sheriff, whose decision shall be final.

62 Forfeiture of guardian's remuneration

Where a guardian is in breach of any duty of care, fiduciary duty or obligation imposed by this Act the sheriff may, on an application being made to him by any person claiming an interest in the property, financial affairs or personal welfare of the adult, order the forfeiture (in whole or in part) of any remuneration due to the guardian.

63 Non-compliance with decisions of guardian with welfare powers

- (1) Where any decision of a guardian with powers relating to the personal welfare of the adult is not complied with by the adult, the sheriff may, on an application by the guardian—
- 5 (a) make an order ordaining the adult or any person named in the order to implement the decision of the guardian;
- (b) where the non-compliance relates to a decision of the guardian as to the place of residence of the adult, grant a warrant authorising a constable—
- 10 (i) to enter any premises where the adult is, or is reasonably supposed to be;
- (ii) to apprehend the adult and to remove him to such place as the guardian may direct.
- (2) Where any decision of a guardian with powers relating to the personal welfare of the adult is not complied with by any person other than the adult, the sheriff may, on an application by the guardian make an order ordaining the person named in the order to implement the decision of the guardian.
- 15 (3) On receipt of an application in the prescribed form for an order or warrant under subsection (1) or for an order under subsection (2), the court shall intimate the application to the adult or, as the case may be, to the person named in the application as a person against whom the order or warrant is sought and shall advise them of the prescribed period within which they may object to the granting of the application; and the sheriff shall not grant the order or warrant without affording to any objector an opportunity of being heard.
- 20 (4) Having heard any objections as mentioned in subsection (3), the sheriff may grant the application.
- 25 (5) A constable executing a warrant under subsection (1)(b) may use such force as is reasonable in the circumstances and shall be accompanied by the guardian or such person as the guardian may authorise in writing.
- 30 (6) In this section any reference to a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland.

Termination and variation of guardianship and replacement, removal or resignation of guardian

64 Replacement or removal of guardian or recall of guardianship by sheriff

- 35 (1) The sheriff, on an application made to him by an adult subject to guardianship or by any other person claiming an interest in the adult's property, financial affairs or personal welfare, may—
- (a) replace a guardian by an individual or office holder nominated in the application if he is satisfied, in relation to an individual, that he is suitable for appointment having regard to the matters set out in section 53(2) to (4);
- 40 (b) remove a guardian from office if he is satisfied—
- (i) that there is a substitute guardian who is prepared to act as guardian; or
- (ii) in a case where there are joint guardians, that the remaining guardian is or remaining guardians are prepared to continue to act; or

(c) recall a guardianship order or otherwise terminate a guardianship if he is satisfied—

- (i) that the grounds for appointment of a guardian are no longer fulfilled; or
- (ii) that the interests of the adult in his property, financial affairs or personal welfare can be satisfactorily safeguarded or promoted otherwise than by guardianship,

and where an application under this subsection is granted, the sheriff clerk shall send a copy of the interlocutor to the Public Guardian

(2) The Public Guardian on receiving a copy of the interlocutor under subsection (1) shall—

(a) enter prescribed particulars in the register maintained by him under section 4(2)(b)(iv);

(b) where the sheriff—

- (i) replaces the guardian by the individual or office holder nominated in the application, when satisfied that, in the case of an individual, the individual has found caution, issue him with a certificate of appointment;
- (ii) removes a guardian from office and a substitute guardian is prepared to act, when satisfied that the substitute guardian has found caution, issue the substitute guardian with a certificate of appointment;
- (iii) removes a joint guardian from office and there is a joint guardian who is prepared to continue to act, issue a remaining joint guardian with a new certificate of appointment;

(c) notify the adult and the local authority and (in a case where the incapacity of the adult 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.

(3) Where the sheriff recalls the guardianship order he may at the same time make an intervention order.

(4) In this section any reference to a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland; and “guardianship order” shall be construed accordingly.

65 Discharge of guardian with financial powers

(1) At any time after—

- (a) the recall of a guardianship order appointing a guardian with powers relating to the property or financial affairs of an adult;
- (b) the resignation, removal or replacement of such a guardian; or
- (c) the death of the adult,

the Public Guardian may, on an application by the former guardian or, if the former guardian has died, his representative, grant a discharge in respect of the former guardian's actings and intromissions with the estate of the adult.

- 5 (2) On receipt of an application in the prescribed form, the Public Guardian shall intimate the application to the adult, his nearest relative, his primary carer and any other person who the Public Guardian considers has an interest in the application and advise them of the prescribed period within which they may object to the granting of the application; and he shall not grant the application without affording to any objector an opportunity of being heard.
- (3) Having heard any objections as mentioned in subsection (2) the Public Guardian may grant the application.
- 10 (4) Where the Public Guardian proposes to refuse the application he shall intimate his decision to the applicant and advise him of the prescribed period within which he may object to the refusal; and he shall not refuse the application without affording to the applicant, if he objects, an opportunity of being heard.
- 15 (5) The Public Guardian may at his own instance or at the instance of the applicant or of any person who objects to the granting of the application remit the application for determination by the sheriff, whose decision shall be final.
- (6) A decision of the Public Guardian—
- (a) to grant a discharge under subsection (1) or to refuse a discharge;
 - (b) to grant an application under subsection (3) or to refuse an application;
 - (c) to refuse to remit an application to the sheriff under subsection (5)
- 20 may be appealed to the sheriff, whose decision shall be final.

66 Recall of guardianship by Public Guardian, Mental Welfare Commission or local authority

- 25 (1) The Public Guardian, at his own instance or on an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult in respect of whom a guardian has been appointed, may recall the powers of a guardian relating to the property or financial affairs of the adult if it appears to him that—
- (a) the grounds for appointment of a guardian are no longer fulfilled; or
 - (b) the interests of the adult in his property, financial affairs or personal welfare can be satisfactorily safeguarded or promoted otherwise than by guardianship.
- 30 (2) Where the Public Guardian recalls the powers of a guardian under subsection (1) he shall—
- (a) enter prescribed particulars in the register maintained by him under section 4(2)(b)(iv);
 - (b) notify the adult, the guardian, the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder and the guardianship order relates to the person welfare of the adult or factors including it) the Mental Welfare Commission.
- 35 (3) The Mental Welfare Commission or the local authority in whose area an adult in respect of whom a guardian has been appointed habitually resides (other than a local authority whose chief social work officer has been appointed guardian), at their own instance or on an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of the adult, may recall the powers of a guardian relating to the personal welfare of the adult if it appears to them that—
- 40

- (a) the grounds for appointment of a guardian are no longer fulfilled; or
- (b) the interests of the adult in his property, financial affairs or personal welfare can be satisfactorily safeguarded or promoted otherwise than by guardianship.

5 (4) Where the Mental Welfare Commission or the local authority recall the powers of a guardian under subsection (3) they shall notify the other and the Public Guardian who shall—

- (a) enter prescribed particulars in the register maintained by him under section 4(2)(b)(iv);
- (b) notify the adult and the guardian.

10 (5) The local authority need not, however, notify the Mental Welfare Commission in any case other than that mentioned in subsection (2).

(6) The Public Guardian, Mental Welfare Commission or local authority, as the case may be, shall—

- 15 (a) where acting on an application, on receipt of the application in the prescribed form intimate it;
- (b) where acting at his or their own instance, intimate the intention to recall the powers of a guardian,

20 to the adult, his nearest relative, his primary carer and any person who he or they consider has an interest in the recall of the powers and advise them of the prescribed period within which they may object to such recall; and he or they shall not recall the powers without affording to any objector an opportunity of being heard.

(7) Having heard any objections as mentioned in subsection (6) the Public Guardian, Mental Welfare Commission or local authority may recall the powers of a guardian.

25 (8) Where the Public Guardian, Mental Welfare Commission or local authority proposes or propose to refuse the application he or they shall intimate the decision to the applicant and the adult and advise them of the prescribed period within which they may object to the refusal; and he or they shall not refuse the application without affording to the applicant or the adult, if he objects, an opportunity of being heard.

30 (9) The Public Guardian, Mental Welfare Commission or local authority may at his or their own instance or at the instance of an applicant or of any person who objects to the recall of the powers of the guardian remit the matter for determination by the sheriff whose decision shall be final.

(10) A decision of—

- 35 (a) the Public Guardian, Mental Welfare Commission or local authority to recall the powers of a guardian under subsection (7);
- (b) the Public Guardian, Mental Welfare Commission or local authority to remit or not to remit the matter to the sheriff under subsection (9),

40 may be appealed to the sheriff, whose decision shall be final, and the decision of the Public Guardian or local authority as to the recall of the powers of a guardian shall remain in force pending the final determination of the appeal.

(11) The Scottish Ministers may prescribe the forms and procedure for the purposes of any recall of guardianship powers by the Mental Welfare Commission or the local authority.

67 Variation of guardianship order

- (1) The sheriff, on an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of the adult, may vary the guardianship order and any existing ancillary order.
- 5 (2) Where the sheriff varies a guardianship order or an ancillary order under this section, the sheriff clerk shall send a copy of the interlocutor containing the order to the Public Guardian who shall—
- (a) enter prescribed particulars in the register maintained by him under section 4(2)(b)(iv);
- 10 (b) notify the adult and to the local authority and (in a case where the incapacity of the adult 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; and
- 15 (c) if he is satisfied that the guardian has caution which covers the varied order, issue a new certificate of appointment where necessary.

68 Resignation of guardian

- (1) A joint guardian, or a guardian in respect of whom a substitute guardian has been appointed, may resign by giving notice in writing of his intention to do so to the Public Guardian and the local authority and (in a case where the incapacity of the adult is by
- 20 reason of, or reasons which include it, mental disorder and the guardianship order relates to the adult's personal welfare or factors including it) the Mental Welfare Commission.
- (2) The resignation of a guardian as mentioned in subsection (1)—
- (a) shall not take effect unless—
- (i) the remaining joint guardian is willing to continue to act; or
- 25 (ii) the substitute guardian is willing to act;
- (b) shall take effect on the receipt by the Public Guardian of notice in writing under subsection (1) together with evidence as to the matters contained in paragraph (a)(i) or (ii).
- (3) On receiving notice in writing and evidence as mentioned in subsection (2)(b), the
- 30 Public Guardian shall—
- (a) enter prescribed particulars in the register maintained by him under section 4(2)(b)(iv);
- (b) if satisfied that the substitute guardian has found caution, issue him with a new certificate of appointment;
- 35 (c) issue a remaining joint guardian with a new certificate of appointment;
- (d) notify the adult.
- (4) A substitute guardian who has not subsequently become guardian by virtue of section 57 may resign by giving notice in writing to the Public Guardian and the local authority and (in the case mentioned in subsection (1)) the Mental Welfare Commission and the resignation shall take effect on the date of receipt of the notice by the Public Guardian; and on its becoming effective, the Public Guardian shall—
- 40 (a) notify the guardian and the adult; and

(b) enter prescribed particulars in the register maintained by him under section 4(2)(b)(iv).

(5) A guardian—

(a) who has no joint guardian; or

(b) in respect of whom no substitute guardian has been appointed; or

(c) being a joint guardian or guardian in respect of whom a substitute has been appointed who cannot effectively resign by reason of subsection (2)(a)(i) or (ii),

shall not resign until a replacement guardian has been appointed under section 64.

69 Change of habitual residence

(1) Where the guardian is the chief social work officer of the local authority and the adult changes his place of habitual residence to the area of another local authority, the chief social work officer of the first mentioned local authority shall notify the chief social work officer of the second mentioned local authority (the “receiving authority”) who shall become guardian on receipt of the notification and shall with 7 days of that receipt notify the Public Guardian and the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult’s personal welfare or factors which include it) the Mental Welfare Commission.

(2) The Public Guardian shall—

(a) enter prescribed particulars in the register maintained by him under section 4(2)(b)(iv) and issue a certificate of appointment to the new guardian; and

(b) subject to subsection (4), notify the adult within 7 days of receipt of the notification from the receiving authority.

(3) Subject to subsection (4), the chief social work officer of the receiving authority shall notify the adult of the name of the officer responsible at any time for carrying out the functions and duties of guardian.

(4) If, in relation to the original application for a guardianship order, the sheriff has directed that intimation or notification of any application or other proceedings should not be given to the adult, the Public Guardian and the chief social work officer shall not notify the adult under subsection (2)(b) or (3) as the case may be.

Termination of power to intervene and guardianship on death of adult

70 Termination of power to intervene and guardianship on death of adult

(1) An intervention order or a guardianship order in respect of an adult under this Part shall cease to have effect on his death.

(2) A person authorised under an intervention order or a guardian having powers relating to the property or financial affairs of the adult shall, until he becomes aware of the death of the adult or of any other event which has the effect of terminating his authority, be entitled to act under those powers if he acts in good faith.

(3) Where the authority of a person authorised under an intervention order or of a guardian (including a joint guardian) is terminated or otherwise comes to an end, a third party in good faith is entitled to rely on the authority of the person or guardian if he is unaware of the termination or ending of that authority.

- (4) In this section any reference to a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland.

5 **71 Amendment of registration under section 55 on events affecting guardianship or death of adult**

- (1) The Public Guardian shall—

10 (a) where under section 64(2)(a), 66(2)(a) or (4)(a), 67(2)(a), 68(3)(a) or 69(2)(a) he enters in the register maintained by him under section 4(2)(b)(iv) prescribed particulars relating to a guardianship order in respect of which the appointment of the guardian was recorded or registered under section 55; or

(b) where an adult in respect of whom there was such a guardianship order has died, apply forthwith to the Keeper of the Registers of Scotland for the recording of the interlocutor or other document vouching the event giving rise to the entry or, as the case may be, the certificate of the death or, as the case may be, the registering of the event of the death in the Land Register of Scotland.

- (2) On an application under subsection (1), the Keeper shall, as appropriate—

(a) record the interlocutor or other document or certificate in the Register of Sasines and endorse it that it has been so recorded;

20 (b) amend the title sheet of the heritable property accordingly and issue an amended Land Certificate.

PART 7

MISCELLANEOUS

25 **72 Future appointment of curator bonis etc. incompetent**

In any proceedings begun after the commencement of this Act it shall not be competent to appoint a curator bonis, tutor-dative or tutor-at-law to a person who has attained the age of 16 years.

30 **73 Limitation of liability**

- (1) No liability shall be incurred by a guardian, a continuing attorney, a welfare attorney, a person authorised to act under an intervention order, a withdrawer or the managers of an establishment for any breach of any duty of care or fiduciary duty owed to the adult if he has or they have—

(a) acted reasonably and in good faith and in accordance with the general principles set out in section 1; or

35 (b) failed to act and the failure was reasonable and in good faith and in accordance with the said general principles.

- (2) In this section any reference to—

(a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;

5 (b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity; and

10 (c) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.

74 Offence of ill-treatment and wilful neglect

15 (1) It shall be an offence for any person exercising powers under this Act relating to the personal welfare of an adult to ill-treat or wilfully neglect that adult.

(2) A person guilty of an offence under subsection (1) shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;

20 (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine, or both.

75 Regulations

Any power of the Scottish Ministers to make regulations under this Act shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.

76 Interpretation

(1) In this Act, unless the context otherwise requires—

“adult” shall be construed in accordance with section 1;

“continuing attorney” shall be construed in accordance with section 13;

“guardianship order” shall be construed in accordance with section 52;

30 “incapable”, “incapable adult” and “incapacity” shall be construed in accordance with section 1;

“intervention order” shall be construed in accordance with section 49;

35 “local authority” means a council constituted under section 2 of the Local Government (Scotland) etc. Act 1994 (c.39), and references to a local authority shall be construed as references to the local authority for the area in which the incapable adult resides;

“managers of an establishment” shall be construed in accordance with Schedule 1;

“mental disorder” means mental illness (including personality disorder) or mental handicap however caused or manifested; but an adult shall not be treated as suffering from mental disorder by reason only of promiscuity or other immoral conduct, sexual deviancy, dependence on alcohol or drugs, or acting as no prudent person would act;

“Mental Welfare Commission” means the Mental Welfare Commission for Scotland continued in being by section 2 of the 1984 Act;

“nearest relative” means the person who would be, or would be exercising the functions of, the adult's nearest relative under sections 53 to 57 of the 1984 Act if the adult were a patient within the meaning of that Act and notwithstanding that the person neither is nor was caring for the adult for the purposes of section 53(4) of that Act;

“office holder”, in relation to a guardian, means the chief social work officer of the local authority;

“person claiming an interest” includes the local authority, the Mental Welfare Commission and the Public Guardian;

“power of attorney” includes a factory and commission;

“prescribed”, except for the purposes of anything which may be or is to be prescribed by the Public Guardian, means prescribed by regulations made by the Scottish Ministers;

“primary carer” in relation to an adult, means the person or organisation primarily engaged in caring for him;

“Public Guardian” shall be construed in accordance with section 4;

“State hospital” shall be construed in accordance with section 102 of the National Health Service (Scotland) Act 1978 (c.29);

“substitute guardian” shall be construed in accordance with section 57;

“welfare attorney” shall be construed in accordance with section 14;

“withdrawer” shall be construed in accordance with section 25;

“the 1984 Act” means the Mental Health (Scotland) Act 1984 (c.36).

- (2) For the purposes of this Act, a person is bankrupt if his estate has been sequestrated for insolvency or he has granted a trust deed which has become a protected trust deed under Schedule 5 to the Bankruptcy (Scotland) Act 1985 (c.66), or he has been adjudged bankrupt in England and Wales, or he has become bankrupt (however expressed) under the law of any other country.

77 Continuation of existing powers, minor and consequential amendments and repeals

- (1) Schedule 3, which contains provisions relating to the continuation of existing powers, shall have effect.
- (2) Schedule 4, which amends the Criminal Procedure (Scotland) Act 1995 (c.46) in respect of Guardianship orders, shall have effect.
- (3) Schedule 5, which contains minor amendments and amendments consequential on the provisions of this Act, shall have effect.

- (4) The enactments mentioned in schedule 6 are hereby repealed to the extent specified in the third column of that schedule.

78 Citation, commencement and extent

- (1) This Act may be cited as the Adults with Incapacity (Scotland) Act 1999.
- 5 (2) This Act shall come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint and different days may be appointed for different purposes.

SCHEDULE 1
(introduced by section 34)

MANAGERS OF AN ESTABLISHMENT

1 For the purposes of Part 4 “the managers” of an establishment means—

- 5 (a) in relation to a hospital vested in the Scottish Ministers under the National Health Service (Scotland) Act 1978 (c.29)], the Health Board responsible for the administration of that hospital;
- (b) in relation to a hospital managed by a National Health Service trust established under section 12A of the said Act of 1978, the directors of the trust;
- 10 (c) in relation to a State hospital—
- (i) the Scottish Ministers; or
- (ii) if a State Hospital Management Committee has been appointed to manage that hospital, that Committee; or
- (iii) if the management of that hospital has been delegated to a Health Board, to a Special Health Board, to a National Health Service trust or to the Common Services Agency for the Scottish Health Service, that Board, trust or Agency, as the case may be, or any person appointed by the Board, trust or agency, as the case may be, to manage the hospital;
- 15 (d) in relation to a private hospital registered under Part IV of the 1984 Act and an unregistered hospital, the person or persons carrying on the hospital or any other person appointed by that person or persons to manage the hospital;
- (e) in relation to a residential establishment provided by a local authority under section 59 of the Social Work (Scotland) Act 1968 (c.49), the local authority or any person appointed by the local authority to manage the establishment;
- 20 (f) in relation to an establishment in respect of which there is registration under section 62 or 63 of the said Act of 1968, the person registered in respect of it or any person appointed by that person to manage the establishment provided that the person so appointed has been named in the application for registration as a person who may be so appointed;
- 25 (g) in relation to a nursing home in respect of which there is registration under the Nursing Homes Registration (Scotland) Act 1938 (c.73), the person registered in respect of it or any person appointed by that person to manage the nursing home provided that the person so appointed has been named in the application as a person who may be so appointed.

35 2 The Scottish Ministers may by regulations amend paragraph 1 for the purpose of adding to, removing or altering the establishments and persons specified as managers thereof.

SCHEDULE 2
(introduced by section 58)

MANAGEMENT OF ESTATE OF ADULT

Management plan

- 5 1 (1) A guardian with powers relating to the property and financial affairs of the adult shall, unless the sheriff otherwise directs, prepare a plan (a “management plan”), taking account of any directions given by the sheriff in the order appointing him, for the management, investment and realisation of the adult's estate and for the application of the estate to the adult's needs, so far as the estate falls within the guardian's authority.
- 10 (2) The management plan shall be submitted in draft by the guardian to the Public Guardian for his approval, along with the inventory of the adult's estate prepared under paragraph 3, not more than 1 month, or such other period as the Public Guardian may allow, after the submission of the inventory.
- 15 (3) The Public Guardian may approve the management plan submitted to him under sub-paragraph (2) or he may approve it with amendments and the plan as so approved or as so amended shall be taken account of by the guardian in the exercise of his functions in relation to the adult.
- (4) Before the management plan is approved, the guardian shall, unless the sheriff on appointing him has conferred wider powers, have power only to—
- 20 (a) ingather and take control of the assets of the adult's estate so as to enable him, when the management plan has been approved, to intromit with them;
- (b) make such payments as are necessary to provide for the adult's day to day needs.
- (5) The Public Guardian may authorise the guardian to exercise any function within the scope of his authority before the management plan is approved, if it would be unreasonable to delay him exercising that function until the plan had been approved.
- 25 (6) The guardian shall keep the management plan under review and shall put forward to the Public Guardian proposals for variation of it whenever it appears to him to be appropriate.
- (7) The Public Guardian—
- 30 (a) may at any time propose any variation to the management plan; and
- (b) shall review the plan whenever the guardian submits his accounts for audit.
- (8) The Public Guardian shall notify the guardian of any variation which he proposes to make to the management plan and shall not make any such variation without affording the guardian an opportunity to object.
- 35 (9) Having heard any objections by the guardian as mentioned in sub-paragraph (8) the Public Guardian may make the variation with or without amendment.

Directions from sheriff

- 2 Where the guardian disagrees with any decision made by the Public Guardian in relation to a management plan prepared under paragraph 1, he may apply to the sheriff for a determination in relation to the matter and the sheriff's decision shall be final.
- 40

Inventory of estate

- 3 (1) A guardian with powers relating to the property or financial affairs of the adult shall, as soon after his appointment as possible and in any event within 3 months of the date of registration of his appointment or such other period as the Public Guardian may allow, submit to the Public Guardian for examination and approval a full inventory of the adult's estate in so far as it falls within the scope of the guardian's authority, along with such supporting documents and additional information as the Public Guardian may require.
- 5
- (2) The inventory shall be in a form, and contain information, prescribed by the Public Guardian.
- 10
- (3) Errors in and omissions from the inventory which are discovered by the guardian after the inventory has been approved by the Public Guardian shall be notified by him to the Public Guardian within 6 months of the date of discovery or when submitting his next accounts to the Public Guardian, whichever occurs sooner.
- (4) The Public Guardian may dispense with the need for the guardian to submit an inventory under sub-paragraph (1) or may require the guardian to take such other action as he thinks appropriate in lieu of submitting an inventory.
- 15

Money

- 4 The guardian shall deposit all money received by him as guardian in a bank or a building society in an account in the name of the adult and shall ensure that all sums in excess of £500 (or such other sum as may be prescribed) so deposited shall earn interest.
- 20

Powers relating to investment and carrying on of business by guardian

- 5 (1) Subject to the following provisions of this paragraph, a guardian with powers relating to the property or financial affairs of the adult shall be entitled—
- 25
- (a) after obtaining and considering proper advice, to retain any existing investment of the adult;
- (b) to use the adult's estate to make new investments in accordance with the management plan prepared under paragraph 1 or with the consent of the Public Guardian.
- 30
- (2) For the purpose of sub-paragraph (1)—
- (a) proper advice is the advice of a person authorised to carry on investment business in the United Kingdom for the purposes of the Financial Services Act 1986 (c.60) who is not the guardian or any person who is an employer, employee or business partner of the guardian; and
- 35
- (b) the advice must be given or subsequently confirmed in writing.
- (3) The guardian shall keep every investment under review and in doing so shall have regard to the following principles—
- (a) that the investment must be prudent;
- (b) that there must be diversification of investments; and
- 40
- (c) that the investment must be suitable for the adult's estate.
- (4) The Public Guardian may at any time direct the guardian to realise any investment.
- (5) The guardian may, subject to any direction given by the Public Guardian, carry on any business of the adult.

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

Purchase or disposal of accommodation

- 6 (1) The guardian shall not, without the consent of the Public Guardian—
- (a) in principle; and
 - (b) to the purchase or selling price,
- 10 purchase accommodation for, or dispose of any accommodation used for the time being as a dwelling house by, the adult.
- (2) On receipt of an application for consent in principle under sub-paragraph (1)(a) in the prescribed form, the Public Guardian shall intimate the application to the adult, his nearest relative, his primary carer and any person who the Public Guardian considers has an interest in the application and advise them of the prescribed period within which they may object to the granting of the application.
- 15 (3) The Public Guardian shall remit any objection under sub-paragraph (2) for determination by the sheriff (whose decision shall be final) and—
- (a) if the sheriff upholds the objection, shall refuse the application;
 - (b) if the sheriff dismisses the objection, shall grant the application.
- 20 (4) Where the Public Guardian proposes to refuse the application other than under sub-paragraph (3)(a) he shall intimate his decision to the applicant and advise him of the prescribed period within which he may object to the refusal; and he shall not refuse the application without affording the applicant, if he objects, an opportunity of being heard.
- 25 (5) Having heard any objections as mentioned in sub-paragraph (4) or where there is no objection as mentioned in sub-paragraph (2), the Public Guardian may grant the application.
- (6) The Public Guardian may at his own instance or at the instance of any person who objects to the granting or refusal (other than a refusal under sub-paragraph(3)(a)) of the application remit the application to the sheriff for determination by the sheriff, whose decision shall be final.
- 30 (7) If consent in principle to the purchase or disposal of the accommodation is given, the guardian shall apply to the Public Guardian for consent under sub-paragraph (1)(b) to the purchase or selling price.
- 35 (8) A decision of the Public Guardian—
- (a) to grant or to refuse (other than under sub-paragraph (4)(a)) an application; or
 - (b) to refuse to remit an application to the sheriff under sub-paragraph (5),
- may be appealed to the sheriff, whose decision shall be final.
- 40 (9) A decision of the Public Guardian to give or to refuse consent under sub-paragraph (1)(b) shall be final.

Accounting and auditing

- 7 (1) A guardian with powers relating to the property or financial affairs of the adult shall submit accounts in respect of each accounting period to the Public Guardian within one month from the end of the accounting period or such longer period as the Public Guardian may allow.
- 5
- (2) There shall be submitted with the accounts under sub-paragraph (1) such supporting documents as the Public Guardian may require, and the Public Guardian may require the guardian to furnish him with such information in connection with the accounts as the Public Guardian may determine.
- 10
- (3) For the purposes of this paragraph, the first accounting period shall commence with the date of appointment of the guardian and end at such date not later than 18 months after the date of registration of the guardian's appointment as the Public Guardian may determine; and thereafter each accounting period shall be a year commencing with the date on which the immediately previous accounting period ended.
- 15
- (4) Notwithstanding the foregoing provisions of this paragraph, the Public Guardian may at any time—
- (a) give directions as to the frequency of accounting periods;
 - (b) dispense with the need for the submission of accounts by the guardian; or
 - (c) require the guardian to do anything which the Public Guardian thinks appropriate in lieu of submitting accounts.
- 20
- (5) The accounts shall be in such form as is prescribed by the Public Guardian and different forms may be prescribed for different cases or descriptions of case.
- (6) Where the estate of the adult includes a business or an interest in a business that part of the accounts which relates to the business or to the interest in the business shall be accompanied by a certificate from such person and in such form as may be prescribed by the Public Guardian, certifying the accuracy of that part of the accounts.
- 25
- (7) The accounts submitted to the Public Guardian under sub-paragraph (1) (other than any part to which a certificate as mentioned in sub-paragraph (6) relates) shall be audited by the Public Guardian or by an accountant appointed by, and responsible to, the Public Guardian for that purpose.
- 30

Approval of accounts

- 8 (1) After the accounts of the guardian have been audited, the Public Guardian shall, if the accounts appear to him—
- 35
- (a) to be a true and fair view of the guardian's management of the adult's estate, approve them and fix the remuneration (if any) due to the guardian;
 - (b) not to be a true and fair view of the guardian's management of the adult's estate, prepare a report as to the extent to which they do not represent such a true and fair view and adjusting the accounts accordingly.
- (2) The Public Guardian may approve the accounts, notwithstanding any minor inconsistencies or absence of full documentation in the accounts, if he is satisfied that the guardian acted reasonably and in good faith.
- 40
- (3) The Public Guardian shall send any report prepared by him under sub-paragraph (1)(b) to the guardian, who may object to anything contained in the report within 28 days of it being sent to him.

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

SCHEDULE 3

(introduced by section 77(1))

CONTINUATION OF EXISTING CURATORS, TUTORS, GUARDIANS AND ATTORNEYS UNDER THIS ACT

Curators and tutors

- (1) On the relevant date, any person holding office as curator bonis to an adult shall become guardian of that adult with power to manage the property or financial affairs of the adult.
- (2) Where any proceedings for the appointment of a curator bonis to an adult have been commenced and not determined before the relevant date, they shall be determined in accordance with the law as it was immediately before that date; and any person appointed curator bonis shall become guardian of that adult with power to manage the property or financial affairs of the adult.
- (3) On the relevant date, any person holding office as tutor-dative to an adult shall become guardian of that adult and shall continue to have the powers conferred by the court on his appointment as tutor-dative.
- (4) Where any proceedings for the appointment of a tutor-dative to an adult have been commenced and not determined before the relevant date, they shall be determined in accordance with the law as it was immediately before that date; and any person appointed tutor-dative shall become guardian of that adult with such power to manage the property, financial affairs or personal welfare of the adult as the court may determine.
- (5) On the relevant date, any person holding office as tutor-at-law to an adult shall become guardian of that adult with power to manage the property, financial affairs or personal welfare of the adult.
- (6) Where any proceedings for the appointment of a tutor-at-law to an adult have been commenced and not determined before the relevant date, they shall be determined in accordance with the law as it was immediately before that date; and any person appointed tutor-at-law shall become guardian of that adult with power to manage the property, financial affairs or personal welfare of the adult.

Guardians

2 (1) On the relevant date, any person holding office as guardian of an adult under the 1984 Act shall become guardian of that adult under this Act and shall continue to have the powers set out in paragraphs (a) to (c) of section 41(2) of that Act notwithstanding the
5 repeal of that section by this Act.

(2) Where any proceedings for the appointment of such a guardian of an adult have been commenced and not determined before the relevant date, they shall be determined in accordance with the 1984 Act as it was in force immediately before that date; and any person appointed guardian shall become guardian of that adult under this Act with the
10 powers set out in the said paragraphs (a) to (c) of section 41(2) of the 1984 Act.

Proceedings relating to existing appointments

3 Where any proceedings in relation to the functions of an existing curator bonis, tutor-dative, tutor-at-law or guardian, have been commenced and not determined before the relevant date, they shall be determined in accordance with the law as it was immediately
15 before that date.

Attorneys

4 (1) On the relevant date, any person holding office as a continuing attorney under a contract of mandate or agency shall become a continuing attorney under this Act.

(2) For the purposes of their application to persons who have become continuing attorneys by virtue of sub-paragraph (1), the following provisions shall have effect as modified or
20 disapplied by the following provisions of this paragraph.

(3) Sections 4(2)(c)(i), 13, 17, 18(3)(a), 20 and 21 shall not apply.

Managers

5 (1) Any managers of a hospital who have received and hold money and valuables on behalf of any person under section 94 of the 1984 Act may continue to do so in relation to that person on and after the relevant date under this Act.
25

(2) This Act applies to managers as mentioned in sub-paragraph (1) notwithstanding that no certificate has been issued under section 35 in respect of the owner of the money or valuables.

(3) Sections 34 and 36 shall not apply in the case of managers who continue to hold money by virtue of sub-paragraph (1).
30

(4) Where the managers have authority from the Mental Welfare Commission to hold and manage money and other property in excess of the aggregate value mentioned in section 39 they may do so in relation to the money and valuables of any person which they
35 continue to hold under sub-paragraph (1).

Application of Act to persons who become guardians by virtue of this schedule

6 (1) For the purposes of their application to persons who have become guardians by virtue of this schedule, the following provisions shall have effect as modified or disapplied by this paragraph.

(2) In section 60(2) the reference to the certificate of appointment issued under section 52 shall be construed as a reference to the order of the court appointing the person as curator bonis, tutor-dative, tutor-at-law or guardian under the 1984 Act, as the case may be.
40

- 5 (3) Section 54 shall apply to a person who has become a guardian to an adult by virtue of this Schedule and who was a curator bonis or tutor-at-law to that adult with powers relating to the adult's personal welfare; and, for the purpose of that application, for the reference in section 54(1) to a period in respect of which a guardianship order has been made or renewed there shall be substituted a reference to the period of 5 years from the relevant date.
- 10 (4) Section 54 shall not apply to a person who has become a guardian to an adult by virtue of this schedule and who was—
- (a) a curator bonis or tutor-at-law to that adult with powers relating only to the adult's property or financial affairs, in which case the powers shall continue in force indefinitely;
 - (b) a tutor-dative to that adult, in which case the powers shall continue for the period specified in the order appointing him or, if no period is specified, indefinitely;
 - 15 (c) a guardian of that adult under the 1984 Act, in which case the powers shall continue until such time as they would have continued had he not become a guardian by virtue of this Schedule to this Act.
- (5) In sections 61(2) and (3) and 69 the references to the chief social work officer of the local authority shall be construed as including references to the local authority.
- (6) Schedule 2 shall apply only—
- 20 (a) in a case where; and
 - (b) to the extent that,
- the Public Guardian has determined that it should apply.
- (7) Any determination by the Public Guardian under sub-paragraph (5), or a decision by him not to make such a determination, may be appealed to the sheriff, whose decision shall be final.
- 25 (8) No reference in this Act to registration shall have effect in relation to any person who becomes a guardian by virtue of this schedule.

Interpretation

- 7 In this schedule the "relevant date" in relation to any paragraph in which it appears
30 means the date of coming into force of that paragraph.

SCHEDULE 4 (introduced by section 77)

GUARDIANSHIP ORDERS UNDER THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

- 1 (1) The Criminal Procedure (Scotland) Act 1995 (c.46) shall be amended as follows.
- 35 (2) In section 57—
- (a) in subsection (2)(c), for "the person" there shall be substituted "the person's personal welfare";
 - (b) at the end there shall be added—
- 40 "(6) Section 58A of this Act shall have effect as regards guardianship orders made under this section."

(3) In section 58—

(a) in subsection (1), for "him" where last occurring there shall be substituted "his personal welfare";

(b) at the end there shall be added—

"(11) Section 58A of this Act shall have effect as regards guardianship orders made under this section."

(4) After section 58 there shall be inserted—

“58A Guardianship orders under sections 57 and 58

(1) This section has effect as regards orders under section 57 or 58 of this Act placing a person’s personal welfare under guardianship.

(2) In making an order the court shall confer powers relating only to the personal welfare of the person and shall specify these powers in the order.

(3) An order shall continue in force for a period of 3 years or such other period (including an indefinite period) as, on cause shown, the court may determine.

(4) Where the court places the person under the guardianship of a local authority it shall appoint as guardian the chief social work officer of the local authority, who shall notify the court and the person of the name of the officer responsible at any time for carrying out the functions and duties of guardian.

(5) Where the court intends to make an order placing a person under the guardianship of a person other than the chief social work officer of the local authority it shall, before making the order, obtain from that chief social work officer a report as to the suitability of that other person for appointment.

(6) Section 54 of the Adults with Incapacity (Scotland) Act 1999 (in this section referred to as “the 1999 Act”) shall apply for the purposes of renewing an order to which this section applies as it applies for the purposes of renewing an order under that Act subject to the following modifications—

(a) any reference to the sheriff shall be construed as a reference to the court making the order;

(b) any reference to the sheriff clerk shall include a reference to the Clerk of Justiciary;

(c) subsection (3) shall not apply.

(7) The court may appoint two or more individuals as joint guardians or an individual to act jointly with one or more existing guardians; and section 56 of the 1999 Act shall apply in relation to such an appointment subject to the following modifications—

(a) subsections (1) and (3) shall not apply;

(b) any reference to the sheriff shall be construed as a reference to the court making the order;

(c) any reference to the applicant shall be constructed as a reference to the person appointed as guardian;

(d) the reference in subsection (4) to subsection (1)(b) shall be omitted;

(e) any reference to an adult shall be construed as a reference to the person in respect of whom the order is made.

(8) The court may, on application, appoint to act as guardian on the inability to act, for any reason, of a person appointed guardian under section 57 or 58, any person or office holder whom it could have appointed under either of those sections; and section 57 of the 1999 Act shall apply to such an appointment subject to the following modifications—

(a) subsection (1) shall not apply;

(b) any reference to an individual appointed under section 44 of the 1999 Act shall be construed as a reference to a person appointed under section 57 or 58 of this Act;

(c) any reference, however expressed, to an individual appointed under section 48 of the 1999 Act shall be construed as a reference to a person appointed under this subsection;

(d) the reference in subsection (3) to the time of the application for the appointment of the original guardian shall be construed as a reference to the time at which the amount court makes the order under section 57 or section 58;

(e) the reference in subsection (4) to "subsection (1) above" shall be construed as a reference to the power of the court under this subsection to appoint a substitute guardian and the reference to "this section" shall be construed as a reference to this subsection.

(9) Where the court makes an order appointing a guardian it shall send a copy of the order to the Public Guardian who shall enter the fact of the appointment and the name of the person appointed in the register maintained by him under section 4(2)(b)(iv) of the 1999 Act.

(10) Section 8 of the 1999 Act shall apply in relation to a guardian appointed under section 57 or 58 subject to the following modifications—

(a) any reference to an adult shall be construed as a reference to the person in respect of whom the order is made;

(b) any reference to "this Act" shall be construed as a reference to this Act.

(11) The Mental Welfare Commission for Scotland shall have the same functions in relation to a person placed in guardianship by an order under section 57 or 58 of this Act as it has under section 7 of the 1999 Act in relation to a mentally disordered adult subject to any reference, however expressed, to a mentally disordered adult being construed as a reference to the person in respect of whom such an order is made.

(12) A guardian shall be entitled to be reimbursed out of the estate of the person placed under guardianship, in respect of any outlays reasonably incurred by him in the exercise of his functions and for that purpose section 61(2) and (8) of the 1999 Act shall apply subject to the following modifications—

(a) any reference to an adult shall be construed as a reference to a person in respect of whom an order is made;

(b) any reference to the sheriff shall be construed as a reference to the court.

(14) The court on an application by any person claiming an interest in the personal welfare of the person may vary the order [and any existing ancillary order] and section 67(2) of the 1999 Act shall apply to such a variation subject to the following modifications—

- (a) any reference to the sheriff shall be construed as a reference to the court which varies the order or ancillary order;
- (b) any reference to the Public Guardian shall be construed as a reference to the Mental Welfare Commission or to the local authority, as the case may be;
- (c) any reference to the adult shall be construed as a reference to the person in respect of whom an order is made.

(15) The Mental Welfare Commission or the local authority may recall the powers of a guardian appointed under section 57 or 58 and section 58(3) to (8) of the 1999 Act shall apply to such a recall, subject to any reference to the Public Guardian in subsections (5) to (8) being omitted.”

SCHEDULE 5

(introduced by section 77(3))

MINOR AND CONSEQUENTIAL AMENDMENTS

General

1 With effect from the commencement of this paragraph any reference in any enactment or document to a curator bonis or a tutor or curator of a person of or over the age of 16 years shall be construed as a reference to a guardian with similar powers appointed to that person under this Act.

Defence Act 1842 (c.94)

- 2 (1) In section 15 of the Defence Act 1842—
- (a) after “nonage” in both places there shall be inserted “or mental incapacity”;
 - (b) “or not of whole mind” shall be repealed;
 - (c) for “out of prison, within this land, or of whole mind” there shall be substituted “within this land”.
- (2) In section 27 of that Act for “lunacy” there shall be substituted “mental incapacity”.

Judicial Factors Act 1849 (c.51)

- 3 (1) In section 10 of the Judicial Factors Act 1849 for “guardians and tutors and curators” there shall be substituted “and guardians”.
- (2) In section 27 of that Act—
- (a) “or Court of Exchequer, as the case may be,” shall be repealed;
 - (b) for “guardians and tutors and curators” there shall be substituted “and guardians”.
- (3) In section 33 of that Act for “guardian or tutor or curator” there shall be substituted “or guardian”.
- (4) In section 34 of that Act for “guardian, tutor, or curator” in both places there shall be substituted “or guardian”.
- (5) In section 34A of that Act—
- (a) “tutors and curators” and “tutory or curatory” shall be repealed;

(b) for “recovery, death or coming of age of the ward” there shall be substituted “coming to an end of the situation giving rise to it”.

(6) In section 36 of that Act for “guardianships, tutories, and curatories” there shall be substituted “and guardianships”.

5 (7) In section 37 of that Act for “guardian, tutor or curator” there shall be substituted “or guardian”.

(8) In section 40 of that Act—

(a) “tutors and curators” where first occurring shall be repealed;

10 (b) for “factors, guardians, tutors and curators” there shall be substituted “factors and guardians”.

Improvement of Land Act 1864 (c.114)

4 (1) In section 24 of the Improvement of Land Act 1864—

(a) “tutors,” “curators,” “tutor,” and “curator,” shall be repealed;

15 (b) for “persons suffering from mental disorder within the meaning of the Mental Health (Scotland) Act, 1960” there shall be substituted “adults who are incapable within the meaning of the Adults with Incapacity (Scotland) Act 1999”.

(2) In section 68 of that Act for “Mental Health (Scotland) Act 1984” there shall be substituted “Adults with Incapacity (Scotland) Act 1999”.

Titles to Land (Consolidation) (Scotland) Act 1868 (c.101)

20 5 (1) In section 24 of the Titles to Land (Consolidation) (Scotland) Act 1868 for “mental disorder within the meaning of the Mental Health (Scotland) Act 1960” there shall be substituted “mental or other incapacity”.

(2) In section 62 of that Act for “of insane mind” there shall be substituted “mental or other incapacity”.

25 *Judicial Factors (Scotland) Act 1880 (c.4)*

6 In section 3 of the Judicial Factors (Scotland) Act 1880 after “guardian” there shall be inserted “of a person who is under the age of 16 years”.

Judicial Factors (Scotland) Act 1889 (c.39)

30 7 (1) In section 2 of the Judicial Factors (Scotland) Act 1889 at the beginning there shall be inserted “Without prejudice to section 4(1) of the Adults with Incapacity (Scotland) Act 1999 (Accountant of Court to be Public Guardian)”.

(2) In section 6 of that Act, in the proviso, after “apply to” there shall be inserted “guardians appointed under the Adults with Incapacity (Scotland) Act 1999, to”.

Heritable Securities (Scotland) Act 1894 (c.44)

35 8 In section 13 of the Heritable Securities (Scotland) Act 1894—

(a) after “taken; and” there shall be inserted “the person entitled to act as the legal representative of any such person”;

(b) “tutors, curators,” shall be repealed.

Trusts (Scotland) Act 1921 (c.58)

9 In section 2 of the Trusts (Scotland) Act 1921 in the definition of “trustee” after “16 years” there shall be inserted “but not including a guardian holding office under the Adults with Incapacity (Scotland) Act 1999”.

5 *National Assistance Act 1948 (c.29)*

10 In section 49 of the National Assistance Act 1948 as it applies to Scotland—

(a) immediately before “the council” where last occurring there shall be inserted “or applies for an intervention order or for appointment as a guardian under the Adults with Incapacity (Scotland) Act 1999”;

10 (b) immediately before “in so far as” there shall be inserted “or his functions under the intervention order or as guardian”.

Offices, Shops and Railway Premises Act 1963 (c.41)

11 In section 90(1) of the Offices, Shops and Railway Premises Act 1963 in the definition of “owner” for “, tutor or curator” there shall be substituted “or person entitled to act as
 15 legal representative of a person under disability by reason of nonage or mental or other incapacity”.

Social Work (Scotland) Act 1968 (c.49)

12 After section 61A of the Social Work (Scotland) Act 1968 there shall be inserted—

“61B Registration for purpose of managing residents’ finances

20 (1) Any residential or other establishment in respect of which there is no requirement to register under section 61 of this Act may nonetheless apply for registration under this Part of this Act for the purposes only of Part 4 (Management of Residents’ Finances) of the Adults with Incapacity (Scotland) Act 1999.

25 (2) Where an application for registration under subsection (1) is granted, the establishment shall be entered in the register kept for the purposes of section 61(2) above by the local authority or, as the case may be, the [Scottish Ministers].

30 (3) The provisions of this Part of this Act shall apply to establishments to which this section applies subject to the following—

(a) section 61(2) and (3) shall not apply;

(b) section 62(8) and (8A) shall not apply;

(c) section 65 shall not apply;

(d) the provisions of section 67(1) shall apply only where the person
 35 carrying on the establishment is registered; and

(e) section 67(2) shall not apply.”.

13 In section 64A(1) of that Act “and” between paragraphs (c) and (d) shall be repealed and after paragraph (d) there shall be inserted “and

(e) an application for registration of an establishment under section 61B of this Act”.

14 In section 68(3) of that Act after “persons” where second occurring there shall be inserted “or, where the establishment is one which has power to manage residents’ financial affairs, for the purpose of ensuring that such financial affairs are being properly managed.”.

5 *Medicines Act 1968 (c.67)*

15 In section 72 of the Medicines Act 1968—

(a) in subsection (1) for “curator bonis” there shall be substituted “guardian”;

(b) in subsections (3)(d) and (4)(c) “curator bonis,” shall be repealed.

Sheriff Courts (Scotland) Act 1971 (c.58)

10 16 In section 32(1) of the Sheriff Courts (Scotland) Act 1971 after paragraph (j) there shall be inserted—

“(k) prescribing the procedure to be followed in appointing a person under section 3(4) of the Adults with Incapacity (Scotland) Act 1999 and the functions of such a person.”.

15 *Solicitors (Scotland) Act 1980 (c.46)*

17 In section 18(1) of the Solicitors (Scotland) Act 1980—

(a) in paragraph (a) “or becomes subject to guardianship” shall be repealed;

(b) for paragraph (b) there shall be substituted—

“(b) a guardian is appointed to a solicitor under the Adults with Incapacity (Scotland) Act 1999;”.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55)

18 In group C of Part I of Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 for paragraphs (b) and (c) there shall be substituted—

“(b) persons for the time being subject to guardianship under the Adults with Incapacity (Scotland) Act 1999”.

Mental Health (Scotland) Act 1984 (c.36)

19 (1) In section 3 of the Mental Health (Scotland) Act 1984—

(a) in subsection (1) “or subject to guardianship under the following provisions of this Act” shall be repealed;

(b) in subsection (2) in paragraph (b) “or who are subject to guardianship” shall be repealed.

(2) In section 5(2) of that Act “and the guardianship of any person subject to guardianship under this Act” shall be repealed.

(3) In section 19 of that Act—

(a) in subsection (1) for “either by the nearest relative of the patient or by a mental health officer” there shall be substituted “by the nearest relative of the patient, by a mental health officer, or by a guardian or welfare attorney of the patient who has powers to do so”;

(b) in subsection (2) after “relative” there shall be inserted “, guardian or welfare attorney, as the case may be,”;

- (c) in subsection (3) after “relative” in both places there shall be inserted “, guardian or welfare attorney, as the case may be”;
- (d) in subsection (5)(b) after “relative” there shall be inserted “and any guardian or welfare attorney”.
- 5 (4) In section 20(1)(a) of that Act for “or his nearest relative” there shall be substituted “, his nearest relative, guardian or welfare attorney, as the case may be”.
- (a) at the end there shall be added—
- (5) In section 21(2)(b) of that Act—
- 10 (a) after “relative” where first occurring there shall be inserted “, guardian or welfare attorney, as the case may be”;
- (b) after “relative” where second and third occurring there shall be inserted “guardian or welfare attorney”;
- (6) In section 22(4)(c) of that Act after “relative” there shall be inserted “and any guardian or welfare attorney”.
- 15 (7) In section 24 of that Act—
- (a) in subsection (2) after “relative” there shall be inserted “, of any guardian or welfare attorney who has powers to do so,”;
- (b) in subsection (5) after “relative” there shall be inserted “and any guardian or welfare attorney”.
- 20 (8) In section 26 of that Act—
- (a) in subsection (1)(b) after “patient” there shall be inserted “, by any guardian or welfare attorney of the patient who has power so to consent,”;
- (b) in subsection (4)(b) after “relative” where first occurring there shall be inserted “and any guardian or welfare attorney “ and after “relative” where second
- 25 occurring there shall be inserted “, guardian or welfare attorney, as the case may be”;
- (9) In section 26A of that Act—
- (a) in subsection (4) after “relative” there shall be inserted “or any guardian or welfare attorney who has powers to do so”;
- 30 (b) in subsection (6)(b) after “relative” where first occurring there shall be inserted “and any guardian or welfare attorney” and after “relative” where second occurring there shall be inserted “, guardian or welfare attorney, as the case may be”.
- (10) In section 29 of that Act—
- 35 (a) in subsection (2) after “relative” there shall be inserted “, to any guardian or welfare attorney”;
- (b) in subsection (4) after “relative” there shall be inserted “, guardian or welfare attorney”.
- (11) In section 30(5) of that Act after “relative” there shall be inserted “and any guardian or welfare attorney of his”;
- 40 (12) In section 33(5) of that Act for “or by the nearest relative” there shall be substituted “, by the nearest relative or by any guardian or welfare attorney who has powers to do so”;

(13) In section 34 of that Act—

- (a) in subsection (1) after “relative” wherever occurring there shall be inserted “, or guardian or welfare attorney with powers to do so”;
- (b) in subsection (2) after “relative” where first occurring there shall be inserted “, guardian or welfare attorney, as the case may be” and after “relative” where second occurring there shall be inserted “, guardian or welfare attorney”;
- (c) in subsection (3) after “relative” there shall be inserted “or by any guardian or welfare attorney”.

(14) In section 35 of that Act—

- (a) in subsection (1) for “or his nearest relative or both” there shall be substituted “, his nearest relative, his guardian or his welfare attorney or all of them”;
- (b) in subsection (3) after “relative” there shall be inserted “or any guardian or welfare attorney”.

(15) In section 55(3) of that Act for “apart from section 41(2) of this Act” there shall be substituted “but for the appointment of a guardian under the Adults with Incapacity (Scotland) Act 1999”.

(16) In section 55(3) of that Act for “apart from section 41(2) of this Act” there shall be substituted “but for the appointment of a guardian under the Adults with Incapacity (Scotland) Act 1999”.

(17) In section 81 of that Act—

- (a) in subsection (1) after “that Order)” there shall be inserted “or subject to guardianship under the Adults with Incapacity (Scotland) Act 1999”;
- (b) in subsection (3) after “Northern Ireland” there shall be inserted “or under the Adults with Incapacity (Scotland) Act 1999”.

(18) In section 87(1) of that Act after “Act” there shall be inserted “or under the Adults with Incapacity (Scotland) Act 1999”.

(19) In section 88(1) of that Act after “1983” there shall be inserted “or subject to guardianship under the Adults with Incapacity (Scotland) Act 1999”.

(20) In section 89(2) of that Act after “1983” there shall be inserted “or is subject to guardianship under the Adults with Incapacity (Scotland) Act 1999”.

(21) In section 95 of that Act—

- (a) in subsection (1) after “tutor” there shall be inserted “, guardian”;
- (b) in subsection (2) after “tutor” there shall be inserted “, guardian”.

(22) In section 125(1) of that Act—

- (a) for the definition of ““application for admission” and “guardianship application”” there shall be substituted—

““application for admission” has the meaning assigned to it by section 18 of this Act”;

- (b) in the appropriate place, there shall be inserted—

““guardian” includes a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for an adult

during his incapacity, if the guardianship is recognised by the law of Scotland;”;

5 ““welfare attorney” includes a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter’s personal welfare and having effect during the granter’s incapacity;”.

Insolvency Act 1986 (c.45)

20 In section 390(4)(c) of the Insolvency Act 1986 at the end there shall be added “or has had a guardian appointed to him under the Adults with Incapacity (Scotland) Act 1999.”.

Financial Services Act 1986 (c.60)

21 In section 45(1)(d) of the Financial Services Act 1986 at the end there shall be added “or when acting in the exercise of his functions as Public Guardian under the Adults with Incapacity (Scotland) Act 1999;”.

15 *Child Support Act 1991 (c.48)*

22 In section 50 of the Child Support Act 1991 in subsection (8)(c) for paragraph (i) there shall be substituted “(i) a guardian or other person entitled to act on behalf of the person under the Adults with Incapacity (Scotland) Act 1999.”.

Social Security Administration Act 1992 (c.5)

20 23 In section 123 of the Social Security Administration Act 1992 in subsection (10)(c) for paragraph (i) there shall be substituted “(i) a guardian or other person entitled to act on behalf of the person under the Adults with Incapacity (Scotland) Act 1999.”.

Health Service Commissioners Act 1993 (c.4)

25 24 In section 7A of the Health Service Commissioners Act 1993 after “patients)” there shall be inserted “or”, “or 50 (orders discharging patients from guardianship)” shall be repealed, and at the end there shall be inserted “or section 66 of the Adults with Incapacity (Scotland) Act 1999”.

Clean Air Act 1993 (c.11)

30 25 In section 64 of the Clean Air Act 1993 in subsection (1) in the definition of “owner” for “tutor or curator” there shall be substituted “or person entitled to act as the legal representative of a person under disability by reason of nonage or mental or other incapacity”.

SCHEDULE 6
(introduced by section 77(4))

REPEALS

	<i>Enactment</i>	<i>Extent of Repeal</i>
5	Curators Act 1585 (c.25(S))	The whole Act.
	Judicial Factors Act 1849 (12&13Vict. c.51)	In section 1, “and curator bonis” and the words from “the word “tutor” “ to “Act 1960” where second occurring. In section 7, the words from “and if any factor” to “not subject to appeal”.
10		Section 25(1). Section 26. In section 27, “or Court of Exchequer, as the case may be,”. Section 28.
15		In section 31, “tutor or curator” and “or curator bonis”. In section 32, “tutor or curator”. In section 34A, “tutors and curators” and “tutory or curatory”. In section 40, “tutors and curators” where first occurring.
20	Improvement of Land Act 1864 (27&28Vict. c.114)	In section 24, “tutors,”, “curators,”, “tutor,” and “curator,”.
	Titles to Land (Consolidation) (Scotland) Act 1868 (31&32Vict. c.101)	In section 3 in the definition of “judicial factor”, “or curators bonis”.
25	Judicial Factors (Scotland) Act 1880 (43&44Vict. c.4)	In section 3, “a curator bonis”.
	Judicial Factors (Scotland) Act 1889 (52&53Vict. c.39)	In section 13, “tutor, curator” in both places.
30	Heritable Securities (Scotland) Act 1894 (57&58Vict. c.44)	In section 13, “tutors, curators”.

<i>Enactment</i>	<i>Extent of Repeal</i>
Trusts (Scotland) Act 1921 (11&12Geo.5 c.58)	In section 2 in each of the definitions of “trust”, “trust deed” and “trustee” the words “tutor, curator”; in the definition of “judicial factor” the words “or curator”; the definitions of “curator” and “tutor”.
U.S.A. Veterans’ Pensions Act 1949 (12&13Geo.6 c.45)	In section 1(4), “tutor, factor loco tutoris,” and “curator bonis or”.
Medicines Act 1968 (c.67)	In section 72(3)(d) and (4)(c), “curator bonis,”.
Solicitors (Scotland) Act 1980 (c.46)	In section 18(1)(a), “or becomes subject to guardianship”
Mental Health (Scotland) Act 1984 (c.36)	In section 3 in subsection (1) “or subject to guardianship under the following provisions of this Act; in subsection (2)(b), “or who are subject to guardianship”.
	In section 5(2) “or subject to guardianship under the following provisions of this Act”.
	In section 7(1)(b), “under the following provisions of this Act”.
	In section 10(1)(b) “the following provisions of this Act or under”.
	In section 29 in subsection (1), paragraphs (b) and (c) and “or” which precedes them; in subsection (2), “or, as the case may be, by the local authority concerned”; in subsection (3), paragraph (b).
	Sections 36 to 52.
	In section 53(3), “or his reception into guardianship”.
	Section 55(3).
	In section 57(4), “or subject to guardianship” and “or so subject” wherever occurring.
	In section 59, subsections (1)(b) and (2) and in subsection (3), “or 44”.
	Section 61.
	In section 76(1) paragraph (b) and “, a guardianship order”.
	In section 92, subsection (1) and in subsection (2)(a), “or subject to guardianship thereunder”.

Enactment

Extent of Repeal

Sections 93 and 94.

In section 105(2), “subject to his guardianship under this Act or otherwise”.

5

In section 107(1)(b), “subject to his guardianship under this Act or otherwise”.

In section 108(1)(a), “or being subject to guardianship”.

10

In section 110 in subsection (1), “, or in the case of a patient subject to guardianship, the local authority concerned”, “or subject to guardianship”, “or guardianship” in both places, “or his reception into guardianship”; in subsection (4), “or, as the case may be, the local authority concerned in relation to a patient subject to guardianship as aforesaid”.

15

In section 112, “or his reception into guardianship”.

In section 113(1), “or for reception into guardianship”.

In section 119, “guardianship under this Act”.

20

In section 121 in subsection (1)(b), “or subject to guardianship”, “or 44”; in subsection (2), “or subject to guardianship”, “or 44”, “and subsection (2) of the said section 44”; in subsection (6), the words from “(in the case of” where first occurring to “guardianship)”, “or section 44”, “respectively”, “or the said section 44 (as the case may be)”.

25

In section 125 in subsection (4), “or subject to guardianship”; in subsection (5), “or received, or liable to be received, into guardianship”, “(other than under Part V of this Act)”, “or received or liable to be received into guardianship”.

30

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40)

Section 71.

Criminal Procedure (Scotland) Act 1995 (c.46)

In section 58(1), sub-paragraph (a)(ii) and “or, as the case may be” which precede it.

Adults with Incapacity (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision as to the property, financial affairs and personal welfare of adults who are incapable by reason of mental disorder or inability to communicate; and for connected purposes.

Introduced by: Mr Jim Wallace
On: 8 October 1999
Supported by: Susan Deacon, Angus MacKay, Iain Gray
Bill Type: Executive Bill

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