



Some people in receipt of certain benefits may qualify for fee exemptions, see <http://www.publicguardian-scotland.gov.uk/meta1/fee-exemption> for up to date information.

Guardianship could be sought where a person fails to grant a power of attorney before becoming incapacitated and unable to make their wishes known. Having MND is unlikely to make someone incapacitated within the terms of the Adults with Incapacity (Scotland) Act 2000 (referred to as the AWI Act) However, having MND gives no protection against Alzheimer's Disease and other dementias in older people and vice versa.

The AWI Act introduced some new arrangements for making decisions about the personal welfare, property and financial affairs for adults who are incapable of doing so for themselves.

The Adults Support & Protection (Scotland) Act 2007 has brought in some changes to the AWI Act and these mostly affect the processes involved when applying for a guardianship order. The information which follows includes the changes which became effective from 1st April 2008.

What is a guardianship order?

A guardianship order is a court appointment which authorises a person to take action or make decisions on behalf of an adult with incapacity. A guardianship order can be in relation to property and financial matters, personal welfare, or a combination of these.

Guardianship is likely to be more suitable where the adult has long-term needs in relation to these matters. The standard term for a guardianship appointment is 3 years, although the Sheriff has the discretion to make the appointment for a longer or shorter period.

Guardianship can be applied for when a person is over the age of 16 years. For young adults about to reach the age of 16 years, guardianship can be applied for in the three month period leading up to their 16th birthday. This means that the guardianship will take effect on their 16th birthday.

Who can apply?

A guardian must be an individual, unless the guardianship order relates to personal welfare matters only, in which case the Chief Social Work Officer for the adult's local authority may be nominated. An individual can be a private individual, e.g. a relative or friend of the adult, or someone acting in a professional capacity, such as a solicitor or accountant. An application can be made to appoint more than one guardian and/or substitute guardians.

How do I make an application for guardianship?

Before applying for a guardianship order, the applicant should be satisfied that the

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MND Factsheet 25 Guardianship and Intervention Orders

intervention will benefit the adult and be the least restrictive means of managing their affairs. The adult and relevant others must also be consulted. An application for guardianship is made to the local sheriff court in the area in which the adult resides by “summary application”. The application will detail the powers needed to manage the adult’s affairs. A list of local Sheriff Courts is available to download from the MND Scotland website.

A Code of Practice is available from the Scottish Government which is useful for carers or anyone thinking about applying for a guardianship order. The publication can be downloaded from <http://www.gov.scot/Topics/Justice/law/a/wi/010408awiwebpubs/cop>

What is involved in making an application?

To make an application for a guardianship order, you will have to obtain two independent medical reports of incapacity, which are based on an examination and assessment of the adult carried out, where possible not more than 30 days before the application is lodged with the sheriff court. From 1st April 2008, the Sheriff **has** discretion to accept medical reports older than 30 days.

Where the adult’s incapacity is the result of a mental disorder, one of the medical practitioners must be approved under Section 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003. If the adult lives outwith Scotland, you may wish to contact the Mental Welfare Commission, as a suitably qualified medical practitioner in the adult’s local area may complete this medical report. The Mental Welfare Commission will be

able to tell you if the medical practitioner is a suitably qualified person.

The medical reports must be accompanied by another report. This report will depend on the type of powers being sought, for example, welfare powers, financial powers or a combination.

Application for powers over Welfare matters

If the order relates to personal welfare, a report will also be required from a Mental Health Officer for the adult’s local authority.

Application for powers over Financial and Property affairs

If the order only relates to property and financial matters, a report will be required by someone who has sufficient knowledge to make such a report on the appropriateness of the order and suitability of the proposed guardian. This report must not be older than 30 days when lodging the application at the sheriff court.

What is Caution?

When granting the guardianship order, the Sheriff may require a financial guardian to find caution (pronounced “kayshun”) or give some other form of security. Caution is an insurance bond to safeguard the adult’s estate from loss caused by negligent actions or omissions by the guardian. The fee to register a guardianship order is currently £83. For details of other fees relating to guardianship orders visit the OPG website at www.publicguardian-scotland.gov.uk/guardianship-orders/fees

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Who supervises guardians?

The AWI Act requires the Public Guardian to supervise financial guardians. This is intended to ensure that guardians are carrying out their duties properly. A financial guardian will normally be required to lodge with the Office of the Public Guardian an Inventory detailing the estate of the adult over which they have been granted authority and a Management Plan showing how they are going to utilise the adult's estate. They will also be required to provide an annual accounting of their actions with the adult's funds.

Whilst under the supervision of the Public Guardian, the financial guardian, if appropriate, will be required to obtain consent to make gifts from the adult's estate and for the purchase or sale of accommodation which the adult lived in and also owned.

The AWI Act requires local authorities to supervise welfare guardians. This is intended to provide the welfare guardian

with advice, guidance and support. Supervision can be used to identify whether a guardianship order requires to be renewed at the end of the period of appointment, or to confirm that the criteria on the suitability of the guardian is still met.

Renewing the authority

At the end of the period of appointment if powers are still needed to help the adult manage their affairs or to make decisions on the adult's behalf you will need to re-apply to the sheriff court to renew your appointment. Renewal may be by minute or summary application.

It is highly recommended that the code of practice for persons authorised under intervention orders and guardians is read in conjunction with the above. Please view and download the code of practice at www.gov.scot/Publications/2011/03/24114616/0 or contact the Scottish Government.

For Further Information:

The Office of the Public Guardian

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opg@scotcourts.gov.uk

Code of practice

<http://www.gov.scot/Publications/2011/03/24114616/0>

Factsheets

Factsheet 38

Financial and Legal Considerations

Factsheet 8

Care Planning and End of Life Issues

Factsheet 24

Powers of Attorney

Appendix

Sheriff Courts 2009.

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