

## **MEMO TO ALL LEGAL STAFF**

### **Adults with Incapacity (Scotland) Act 2000-Part 6**

#### **Guardianship and Intervention- Position from 1 Apr 2002**

##### **1 Introduction**

Part 6 of the Adults with Incapacity (Scotland) Act 2000 (hereinafter referred to as "the Act") came into force on 1 Apr 2002. This part of the Act, amongst other matters, makes provision for guardianship and intervention orders, two new forms of court appointment to replace the position of curator bonis. The Sheriff will pronounce an intervention order where only a single transaction with the incapable adult's property requires to be carried out. If there is a need for long term, ongoing management of the adult's affairs, the Sheriff will appoint a guardian to act for the adult. This memo considers those orders and deeds following on from such orders, so far as these require to be recorded in the Sasine Register.

##### **2 General points**

###### **2.1 A right of management and not of property, is transferred**

Neither type of order transfers the ownership of the adult's property to the guardian or authorised person. The adult remains owner. The interlocutor transfers only a personal right of management to the guardian or authorised person, limited to the extent specified by the Sheriff.

###### **2.2 Interlocutor may fall to be recorded contemporaneously with the adult's title**

The interlocutor cannot be recorded in advance of the adult's real right to specific subjects. Two main situations arise where the interlocutor should be recorded at the same time as the adult's real right:

- Where the authorised person or guardian has been authorised to acquire heritable property for the adult. The interlocutor should be recorded along with the disposition in favour of the adult
- Where the adult is an uninfert proprietor. Where the title of the previously infert proprietor is recorded in the Register of Sasines, the interlocutor should be recorded, along with a Notice of Title in the adult's favour.

###### **2.3 Certification of copy interlocutors**

Unless the intervention order or guardianship order is an extract decree, that is, one authenticated by the court, the Keeper requires that the copy interlocutor to be recorded must be certified a true copy. The Keeper will accept certification by a solicitor, clerk of court or a member of the Public Guardian's staff. The acceptance of certified copy interlocutors in the case of guardianship and intervention orders does not alter the Keeper's general policy toward certified copy deeds being recorded in

the Register of Sasines. Except as specified in this Memo, certified copy deeds are not acceptable for recording.

#### **2.4 Interlocutors do not induce first registration**

The grant of an intervention or guardianship order in relation to any given heritable subjects is not an event which induces first registration of those subjects in the Land Register (s2 (1) of the Land Registration (Scotland) Act 1979).

### **3 Recording of Guardianship and Intervention Orders in the Sasine Register**

The Act requires and authorises the registration of orders, which vest in an authorised person or guardian a right to deal with, convey or manage an interest in heritable property. The interest of the adult must itself be recorded or capable of being recorded (see ss 56(1) and 61(1) of the Act). In the Keeper's interpretation, the requirement to record is for interlocutors empowering dealings, conveyances or management activities of authorised persons or guardians where these alter the real or quasi real heritable rights of the adult.

It is not possible to provide an exhaustive list of interlocutors, which should be recorded, but some examples follow.

#### **3.1 Examples of orders which should be recorded**

- An order permitting the authorised person or guardian to acquire or dispose of heritable subjects; to grant, assign or renounce a long lease; to grant or vary a heritable security; to renounce or vary a proper liferent
- An order permitting the authorised person or guardian to renounce, waive or vary a recorded title condition
- An order permitting a guardian or authorised person to enter into an agreement creating real or quasi real rights or conditions affecting the adult's heritable property, such as an agreement under Section 75 of the Town and Country Planning (Scotland) Act 1997 or a boundary agreement in terms of Section 19 of the Land Registration (Scotland) Act 1979

#### **3.2 Orders which are not capable of recording**

- An order that permits the authorised person or guardian to renounce or assign the adult's right as lessee in a short lease (e.g. a council house tenancy). The adult's right is not capable of being recorded. Therefore, there would be no value in recording the interlocutor.
- An order authorising the authorised person or guardian to arrange maintenance to or insurance of, the adult's heritable property, but which otherwise confers no power to alter the real rights or conditions over the property.

It is anticipated that there may be cases where doubt exists as to whether it is appropriate to record a specific interlocutor. These cases should be referred to Senior Legal Group. Only if the order is clearly incapable of entering the Sasine Register or the application does not meet the requirements set out at 3.3 and 3.4 should the interlocutor be refused recording.

### **3.3 Recording of Intervention Order**

Section 56(4) of the Act requires that an application for recording contain:

- Name and address of the person authorised to intervene
- A statement that the person has powers relating to each property specified in the order
- A copy of the interlocutor

The authorised person's details should be entered in the grantee space on the CPB2 form. The statement may be entered upon the additional information box on the CPB2 form, or as an alternative in a covering letter. As previously stated, the copy of the interlocutor must be either in the form of an extract decree or a certified copy.

A warrant of registration must be endorsed upon the certified copy interlocutor or extract decree, in the name of the authorised person. The appropriate fee is the miscellaneous event fee.

### **3.4 Recording of Guardianship Order**

Section 61(4) of the Act requires that an application for recording contain:

- Name and address of the guardian
- Statement that the guardian has powers relating to each property specified in the order
- A copy of the interlocutor

The guardian's details should be entered in the grantee space on the CPB2 form. The statement may be entered upon the additional information box on the CPB2 form, or as an alternative in a covering letter. As previously stated, the copy of the interlocutor must be either in the form of an extract decree or a certified copy.

A warrant of registration must be endorsed upon the certified copy interlocutor or extract decree, in the name of the guardian. The appropriate fee is the miscellaneous event fee.

### **3.5 Checklist for recording of orders**

- Copy interlocutor (certified copy or extract decree)
- Warrant endorsed on copy interlocutor, on behalf of authorised person or guardian as appropriate
- CPB2 form with details of authorised person's or guardian's name and address
- Statement in terms of section 56(4) or section 61(4) in CPB2 or covering letter
- 'Miscellaneous event' recording fee

### **3.6 Forms of Minute**

#### **Intervention Order**

Certified Copy Interlocutor of the Sheriff of Lothian and Borders at Peebles dated [ ] vesting in A.B. [authorised person-design] as authorised person, management powers of C.D. [adult's name-design] in terms of Section 53 of the Adults with

Incapacity (Scotland) Act 2000, containing {inter alia} power to agree and execute a long lease of [subjects] on such terms as may be approved by the Public Guardian, with statement in terms of Section 56(4)(b) of the said Act.

### **Guardianship Order**

Certified Copy Interlocutor of the Sheriff of Lothian and Borders at Peebles dated [ ] vesting in A.B. [guardian-design] as guardian, management powers of C.D. [adult's name-design] in terms of Sections 57 and 58 of the Adults with Incapacity (Scotland) Act 2000, containing {inter alia} power to agree and execute a long lease of [subjects] on such terms as may be approved by the Public Guardian, with statement in terms of Section 61(4)(b) of the said Act.

Appropriate amendments can be made for Extract Decrees.

### **4 Deeds following upon Intervention or Guardianship Orders**

Whilst the following paragraphs will not cover every eventuality, they will hopefully serve to outline the Keeper's position in the situations which are most likely to arise in practice. These are anticipated to be the dispositions selling the adult's property, the purchase of property for the adult, or discharges of standard securities.

#### **4.1 Form of Disposition on Sale of Adult's subjects**

The adult remains proprietor of his or her heritable interests, as the guardianship order or intervention order only transfers power to convey to the authorised person or guardian. Since the order divests the adult of the power to convey, where a deed purports to be a conveyance by the adult, even where the deed bears to have been signed by the authorised person or guardian, the matter should be referred to a Senior Team Leader and the matter should be discussed with the agent.

The narrative of the disposition granted in terms of an intervention order or guardianship order should be similar to the following:

I, X.Y (authorised person-design) being authorised person/guardian under an intervention order [or guardianship order as appropriate] in terms of section 53 [or section 57 in case of guardianship order] of the Adults with Incapacity (Scotland) Act 2000 in respect of the affairs of A.B. (adult-design), heritable proprietor of the subjects and others, in consideration of the sum of £ paid to me by C.D. DO HEREBY DISPONE....

#### **4.2 Recording of disposition by authorised person or guardian**

The interlocutor should already be recorded or should be presented for recording (with the items specified in 3.5) contemporaneously with the disposition by the authorised person or guardian. In the event of such a disposition being presented where no interlocutor has been recorded and has not been presented with the disposition, the agent should be contacted by telephone and asked to provide information indicating why it is expedient to record the disposition in advance, unless the reasons are presented in the form of a covering letter. The matter should be referred to a Team Leader.

#### **4.3 Acquisition of subjects by authorised person or guardian for adult**

The grantee of the disposition or conveyance should be the adult although the deed

may narrate the consideration was paid by the authorised person or guardian in that capacity. The warrant of registration should be on behalf of the adult. See the comments above at 2.2.

#### **4.4 Discharge of Standard Security**

Adult is proprietor/debtor:

The grantee of the discharge should always be the adult, though the narrative may set out that the guardian or authorised party has repaid the loan. The warrant of registration should be on behalf of the adult.

Adult is creditor:

As the granting of the discharge is an exercise of management powers, the granter should be the guardian or authorised person. The interlocutor should have been or be recorded contemporaneously against the title of the security subjects.

Other queries arising in specific transactions pertaining to recording in the Sasine Register may be referred through the usual channels.

**IAN A DAVIS**

**Director of Legal Services**

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