

## **ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000 – PART 6**

### **GUARDIANSHIP AND INTERVENTION - REGISTRATION IN THE LAND REGISTER AND REGISTER OF SASINES**

#### **1. Introduction**

Part six of the Adults with Incapacity (Scotland) Act 2000 (hereafter referred to as 'the 2000 Act') came into force on 1 April 2002 bringing into effect long awaited reforms. In their general application these have received and will doubtless continue to receive more learned and able comment than might be offered here.

Amongst the detail it is provided that some intervention and guardianship orders are to be recorded in the Register of Sasines, or given effect to in the Land Register. For the properties concerned, new conveyancing and registration issues arise. The focus of this paper is to give conveyancers notice of the Keeper's policy and requirements on these issues, which we hope will prove useful.

#### **2. Recording and registration of intervention and guardianship order - general points**

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

Sections 56(1) and 61(1) of the 2000 Act provide that certain orders which vest rights in relation to heritable property in a guardian or person authorised to intervene fall to be registered in the Land Register of Scotland or recorded in the General Register of Sasines. In these cases the Sheriff's interlocutor transfers the personal right of management from adult to guardian or authorised person. On general registration principles, third parties need only have regard to this transfer when it has been completed and made public by registration in one or other of the property registers. In effect, registration will confer on the guardian or authorised person a real right of management.

However, a guardianship or intervention order does not transfer ownership of the adult's property to the guardian or authorised person. Ownership remains with the adult and the transfer of management power to the guardian or authorised person is limited to the extent specified by the Sheriff.

##### **2.2. Intervention and guardianship interlocutors cannot be used as midcouples**

The 2000 Act requires a guardian or person authorised under an intervention order to forthwith apply for registration of the interlocutor in the appropriate property register<sup>1</sup>. As a midcouple or link in title does not enter either register it will not be an adequate discharge of that duty to rely on the interlocutor as an unregistered midcouple.

##### **2.3. Situations where the interlocutor falls to be registered contemporaneously with the adult's title**

The Land Register and Register of Sasines are registers of real rights in specific property. Although the 2000 Act requires that relevant orders be registered forthwith, the transfer of management power cannot be registered in advance of the adult's real right to particular subjects. Two main situations will arise in which it will be appropriate to register the interlocutor at the same time as the adult's real right:-

<sup>1</sup> Ss. 56(3) and 61(3)

- Where the authorised person or guardian has been authorised to acquire heritable property for the adult. The interlocutor should be registered along with the disposition in favour of the adult.
- Where the adult is an unfeft proprietor. In the Register of Sasines, the interlocutor should be recorded alongside a Notice of Title in the adult's favour. For registered subjects, application for registration of the interlocutor and application for registration of the adult as proprietor should be made together.

#### **2.4. Intervention and guardianship 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<sup>2</sup>.

#### **2.5. Identification of the property**

An interlocutor which falls to be registered in one or other property register must adequately identify each property<sup>3</sup>. It follows that the application to the Sheriff should include adequate descriptions of each heritable property affected.

Where title to the subjects is registered in the Land Register, the description in the interlocutor will require to refer to the Title Number.<sup>4</sup>

Where title to the subjects rests on Sasine deeds the description should be either a particular description or a description by reference to a recorded deed which, in either case, gives the public adequate notice of the subjects involved.

#### **2.6. Certification of copy interlocutors**

There is a distinction to be drawn between cases where the intervention or guardianship order to be registered is an extract decree and those where it is some other form of copy interlocutor.

An extract decree is authenticated by the Court. However, with other types of copy interlocutor, authentication is an issue. It is desirable for all those placing reliance on the registers to have the assurance that the terms of the copy interlocutor appearing on the register are correct. The Keeper therefore requires that, where a copy guardianship or intervention order is not in the form of an extract decree, it be certified a true copy. The Keeper will accept certification by a solicitor, a clerk of the court or a member of the Public Guardian's staff.

### **3. Which orders are registrable in the property registers?**

#### **3.1. The Keeper's policy**

The 2000 Act both requires and authorises registration of orders which vest in an

<sup>2</sup> The right to manage is not in itself an interest in land (it is a right in relation to the adult's interest in land). Transfer of management power is therefore not a trigger for first registration in terms of s.2(1) of the Land Registration (Scotland) Act 1979 ('1979 Act').

<sup>3</sup> 2000 Act ss. 56(2) and 61(2)

<sup>4</sup> 1979 Act s.15 (1)

authorised person or guardian a right to deal with, convey or manage an interest in heritable property. The first qualification to this is that the heritable interest of the adult must in itself be capable of registration<sup>5</sup>.

Further, the explanatory notes to the 2000 Act indicate that the object is to disclose the guardianship or intervention order on a conveyancing search. This is clearly only necessary where the guardian or authorised person is empowered to carry out the sort of activity in which a search or equivalent report might be obtained. In the Keeper's interpretation the requirement to register is for interlocutors empowering dealings, conveyances or management activities of authorised persons or guardians which alter the real or quasi real heritable rights of the adult.

### **3.2 Examples of orders which should be registered:-**

- An order which permits 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 which permits an authorised person or guardian to renounce, waive or vary a registered or recorded title condition.
- An order which permits a guardian or authorised person to enter into an agreement creating real or *quasi* real rights or conditions affecting the adult's heritage, such as an agreement under section 75 of the Town and Country Planning (Scotland) Act 1997 or a boundary agreement under section 19 of the Land Registration (Scotland) Act 1979.

### **3.3 Orders which are not registrable**

- An order authorising 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). As the adult's right of tenancy is incapable of registration there is no purpose to registering a variation of the right.
- An order authorising the authorised person or guardian to arrange routine maintenance to or insurance of the adult's heritable property but which confers no power to alter the real rights or conditions over the subjects.

**There will inevitably be some situations in which there is doubt whether or not an interlocutor should be registered.** Enquiry may be made to the Keeper's Pre-Registration Enquiries Section. Where it is clear to the Keeper that there is no cause for registration or recording and that an application is frivolous, the application will be rejected.<sup>6</sup>

## **4. Recording or registration of interlocutor**

### **4.1 Sasine recording of intervention order**

Section 56(4) of the 2000 Act requires that an application for recording in the Register of Sasines contain (a) the name and address of the person authorised to intervene, (b) a statement that the person has powers relating to each property specified in the order and (c) a copy of the interlocutor.

Criterion (a) is met simply by filling in the authorised person's details in the grantee spaces on the Sasine Application Form (SAF). In most cases it should be possible to put the statement required by criterion (b) in the additional information box on the SAF. The alternative is to make that statement in a covering letter.

<sup>5</sup> 2000 Act ss 56(1) and 61(1).

The application for recording should be accompanied by a SAF and the appropriate fee. This is the miscellaneous event fee,

How interlocutor will be recorded: -

The interlocutor will be recorded as any other writ. On presentment it will be noted in the computerised presentment book and on completion of recording a Minute will appear on the Computerised Sasine Register, allowing disclosure of the order on subsequent Sasine searches or Form 10 or 11 reports in the usual manner. The normal Register of Sasines Certificate of Registration stamp and seal of the register will be applied to the interlocutor. This will satisfy the requirements<sup>8</sup> that the interlocutor be endorsed to the effect that it has been recorded. No separate endorsement will be added.

#### Checklist – Sasine recording of intervention order

- Copy interlocutor (certified if it is not an extract decree)
- SAF completed (and giving name and address of authorised person)
- Statement required by s.56(4)(b) made on SAF or in covering letter
- 'Miscellaneous event' recording fee

#### **4.2 Sasine recording of guardianship order**

Section s.61(4) of the 2000 Act gives the statutory requirements for the application to 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 and (c) a copy of the interlocutor. The practical points made above in respect of intervention orders apply *mutatis mutandi* to recording of guardianship orders.

Checklist – Sasine recording of guardianship order

- Copy interlocutor (certified if it is not an extract decree)
- SAF completed (and giving name and address of authorised person)
- Statement required by s.61(4)(b) made on SAF or in covering letter
- 'Miscellaneous event' recording fee

#### **4.3 Land Register - registration of intervention order**

As in Sasine recording, the three criteria specified by section 56(4) of the 2000 Act must be met. The name and address of the authorised person or guardian may be given by completing the applicant fields on the Form 2 registration application. The statement required by s.56(4)(b) of the 2000 Act (to the effect that the authorised person has powers relating to the subjects) may be made in the answer space for question 8(c) on the Form 2, or alternatively in a covering letter.

The application for registration should be made on a Form 2 and accompanied by Form 4. The appropriate registration fee is a miscellaneous event fee.

Completion of Form 2: -

The name of deed box should be completed 'intervention order.' The applicant box should be completed with the authorised person's details. Question 8(a) inside the

<sup>6</sup> For the Land Register, the Keeper's statutory power to reject frivolous applications is given at s.4(2)(c) of the 1979 Act.

Order 1995 (as amended).

<sup>8</sup> of s.56(5)(b) of the 2000 Act

Form should be answered YES and a note added along the following lines; '[name of adult] has restricted capacity - see interlocutor.'

How interlocutor will be registered: -

The Keeper will give effect to the interlocutor by making a noting in the B (Proprietorship) section of the title sheet. The adult will remain registered as proprietor but the entry will be amended to disclose that the authorised person has management powers as described in the interlocutor. If short, the whole terms of the interlocutor will be noted in the B section. Where the interlocutor is lengthy a summary of its terms in so far as relevant to the particular subjects will be given and the Keeper will retain on archive a copy of the full terms.<sup>10</sup>

Checklist – Land registration of intervention order

- Copy interlocutor (certified if it is not an extract decree)
- Form 2 completed (and giving name and address of authorised person)
- Statement required by s.56(4)(b) made on Form 2 or in covering letter
- Form 4
- Miscellaneous event registration fee

#### 4.4 Land Register - registration of guardianship order

As with Sasine recording, the criteria specified by s.61(4) of the 2000 Act must be met. Criterion (a) may be met by completing the guardian's name and address in the relevant fields on the Form 2. The statement required by criterion (b) can be entered in the answer field to question 8(c) on the Form 2, or otherwise be given in a covering letter.

The various comments above on land registration of intervention orders apply *mutatis mutandi*, the only specific difference being that name of deed field on the Form 2 should be completed 'guardianship order.'

The guardian – unless exceptionally exempted – must find caution prior to applying for registration.<sup>11</sup> A copy of the bond of caution or other evidence that this requirement has been met should be submitted with the application and listed on the Form 4. Given the terms of s.58(7)(b) of the 2000 Act, the Keeper will accept a copy of the guardian's certificate of appointment issued by the Public Guardian as evidence that caution has been found.

Checklist – land registration of guardianship order

- Copy interlocutor (certified if it is not an extract decree)
- Form 2 completed (and giving name and address of guardian)
- Statement required by s.61(4)(b) made on Form 2 or in covering letter
- Form 4
- Evidence of guardian having found caution submitted
- Miscellaneous event registration fee

## 5. Sale of adult's subjects by authorised person or guardian

### 5.1. Form of disposition

<sup>9</sup> Land Registration (Scotland) Rules 1980 Rules 9(3) and 18

<sup>10</sup> This will enable the Keeper to supply an Office Copy of the full terms under section 6(5) of the 1979 Act should this be necessary.

In considering the form of any disposition or other conveyance to be granted by an authorised person or guardian it must be borne in mind that the adult remains

proprietor of his or her heritable interests. However, the registered guardianship or intervention order has transferred power to convey to the authorised person or guardian. As an example, the opening clauses of a disposition granted in terms of an intervention order could take the following form: -

*I, A.B. (authorised person – design) being authorised person under a intervention order in terms of section 53 of the Adults with Incapacity (Scotland) Act 2000 in respect of the affairs of X.Y. (adult – design), the heritable proprietor of the subjects and others hereinafter disposed, in consideration of the price of paid to me by C.D. (disponnee –design) hereby DISPONE to and in favour of the said C.D. ALL AND WHOLE (subjects) together with ..... the whole right title and interest, present and future, of the said X.Y. therein and thereto....*

Likewise, as the authorised person or guardian does not become proprietor of the adult's heritage, any reservation of a real right should be reserved to the adult; for example: -

*...but always reserving to the said X.Y. (the adult) the whole metals and minerals in or under the said subjects....*

Similarly any burdens should be created in favour of the adult and his or her successors as proprietor of the benefited property. Where an order has vested the right to convey property in an authorised person or guardian, the Keeper will reject any application for registration or recording of a deed which purports to be a conveyance by the adult (even if the authorised person or guardian signs such deed.) The adult has been divested of the power to convey. A deed which treats the adult as grantor is therefore not an effective conveyance.

## **5.2. Matrimonial Homes (Family Protection)(Scotland) Act 1981**

The Keeper will extend his current policy in relation to sales by *curators bonis*<sup>12</sup> to sales by guardians and authorised persons. He will therefore adopt the view that such a sale is not a dealing by the adult and will therefore not require to see any Matrimonial Homes Act evidence for such transactions.

## **5.3. Sasine recording of disposition by authorised person or guardian**

The interlocutor in favour of the authorised person or guardian should either already be on record or presented (with a separate SAF and fee – see 4.1 and 4.2 above) at the same time as the disposition. The Keeper is of the view that the disposition should not be recorded unless the interlocutor is first or contemporaneously on record. There may be some specific circumstances in which there is some expediency to the disposition being recorded, for whatever effect or value that may confer, in advance of the interlocutor. The Keeper will therefore contact the presenting agent by telephone before taking a decision as to the recording of such a deed. Where special circumstances do exist it will be preferable that these be explained to the Keeper in a covering letter sent with the deed.

Checklist – Sasine recording of disposition by authorised person or guardian

- Interlocutor already on record or presented same day
- Granter of deed is authorised person/guardian but adult is proprietor (see 5.1 above)

<sup>11</sup> This follows from sections 58(6) and 61(3) of the 2000 Act.

## **5.4. Land Register - registration of disposition by authorised person**

Where the adult is registered proprietor of the subjects, an application should already have been made for registration of the intervention interlocutor. If this application has not been made it should be made (with a separate Form 2 and fee – see 4.3 above) at the same time as the application for registration of the disposition by the authorised person. In any case in which the Keeper receives an application for registration of a disposition by an authorised person in advance of application for registration of an interlocutor empowering the transaction, his policy

<sup>12</sup> See Registration of Title Practice Book (2<sup>nd</sup> Edition) paragraph 6.41

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will be as follows: - (a) the Keeper will contact the agent presenting the application for registration of the disposition suggesting that the application be withdrawn pending application being made for registration of the authorised person's right of management; (b) if the disposition is not withdrawn, the Keeper will make a requisition requiring that application for registration of the empowering interlocutor be made within 60 days.<sup>13</sup> If this requisition is met, an express exclusion of indemnity will be made in respect of any consequence of the date of registration of the conveyance to the disponee pre-dating the date of registration of the authorised person's right to convey the subjects. If the requisition is not met the application for registration of the disposition will be rejected.<sup>14</sup>

Where the disposition induces first registration, the same policy will apply. We would expect the interlocutor to have been presented for recording in the Register of Sasines no later than the day prior to the application for registration of the disposition.<sup>15</sup> If it has not been so recorded, the Keeper will suggest that the application for registration of the disposition be temporarily withdrawn pending the interlocutor being presented to the Sasine register. If the disposition is not withdrawn, it will be impossible for the interlocutor to be recorded in the Register of Sasines after the application for first registration of the subjects has been made<sup>16</sup>. Instead Application will need to be made for registration in the Land Register. As above, a 60 day requisition will be made. If complied with, an exclusion of indemnity will be made in respect of any consequence of the registration of the disponee's interest pre-dating that of the authorised person.

The Keeper will check the terms of the interlocutor to ensure that the transaction undertaken falls within the powers conferred on the authorised person.

In a sale by an authorised person, if the Keeper is to indemnify the grantee's title, certain additional evidence may also require to be submitted with the registration application.

First, the Keeper will require confirmation that the authorised person has complied with any obligation to find caution under s. 53(7) of the 2000 Act. Acceptable evidence will include either a copy of the bond of caution or letter from the authorised person's law agent which confirms that caution has been found.

<sup>13</sup> Land Registration (Scotland) Rules 1980, Rule 12.

<sup>14</sup> This result is permitted by Rule 12.

<sup>15</sup> Standing the terms of ss 7 and 8 of the 1979 Act, same day Sasine recording of the interlocutor and land registration of the disposition does not appear possible.

<sup>16</sup> Other than where the interlocutor confers management right to larger subjects than those conveyed by the disposition.

- Second, if the subjects are accommodation which had, for the time being, been used as a dwelling house by the adult, the Keeper will require to examine the Public Guardian's consent as to the consideration received. This consent is required by s.53(6) of the 2000 Act.

Checklist – land registration of disposition granted by authorised person

- Intervention interlocutor registered/on record in advance – or contemporaneous *registration* application.
- Granter of deed is authorised person but adult is proprietor (see 5.1 above)
- Transaction within powers conferred by intervention order
- Evidence that any requirement to find caution met
- Any necessary consent or evidence in respect of s.53(6) [consent to consideration on sale of accommodation] submitted.

#### **5.5. Land Register - registration of disposition by guardian**

In points discussed above in relation to registration of a disposition by authorised person apply also to a disposal by a guardian subject only to some minor differences.

Where the guardianship interlocutor has already been given effect to on the Land Register, the Keeper will already have examined evidence of the guardian having found caution. In such case the Keeper will not require to re-examine evidence of caution having been found. In practical terms this means that the Keeper will only require evidence of caution having been found in cases where the guardianship order is registered in the Register of Sasines and the disposal by the guardian induces first registration.

Where the disposal is of accommodation used as a dwelling house by the adult, a guardian needs two consents of the Public Guardian. Firstly consent to the disposal in principle and secondly consent to the price.<sup>17</sup> Both should be exhibited to the Keeper.

Checklist – land registration of disposition granted by guardian

- guardianship interlocutor registered/on record in advance – or contemporaneous *registration* application.
- Granter of deed is guardian but adult is proprietor (see 5.1 above)
- Transaction within powers conferred by guardianship order
- Evidence that of any requirement to find caution met (first registration transactions only)
- Any necessary consents or evidence in respect of sched. 2 para 6(1) [consents as to principle and price on sale of accommodation] submitted.

#### **6. Purchase of subjects for adult: -**

The grantee of the disposition or other conveyance should be the adult although the deed may narrate that the consideration was paid by the authorised person or guardian acting in that capacity. Where the disposition or other deed is to be registered in the Land Register the Keeper will require to see evidence that the authorised person or guardian has complied with any direction to find caution in his or her appointing interlocutor. The application should include a copy of any Public Guardian's consent required for the transaction. In the case of an intervention order, the Public Guardian must consent as to the price if the subjects are accommodation for the adult<sup>18</sup>. In respect of guardianship, if the subjects are to be accommodation for the adult, the Public Guardian's consent to both the principle of the purchase and the

<sup>17</sup> 2000 Act, Schedule 2 paragraph 6(1).

price is needed<sup>19</sup>.

The applicant fields on Land Register Form 1, 2 or 3 are completed as follows:- In surname enter the adult's surname. In forename enter the adult's forename and the

type of appointee, for example 'Mary, guardian of' or 'William, authorised person for.' The address fields are completed with the adult's address.

### **7. Discharge of standard security where adult is proprietor/debtor**

The normal style at Form F in schedule 4 to the Conveyancing and Feudal Reform (Scotland) Act 1970 should be followed inserting the name of the adult at C.D. If the loan was repaid (wholly or partly) by the authorised person or guardian acting in that capacity, the Keeper will take no objection to this being narrated in the deed. However, in all cases, the grantee of a discharge is the adult.

In a Sasine the SAF should give the adult's details in the grantee fields. However, on a Land Register Form 2, the application is made by the guardian or authorised person on behalf of the adult. The applicant fields should on Form 2 should be completed as described in paragraph 6 above. Question 8(a) on the Form 2 should be answered YES and an explanatory note along the following lines added;

*'[Name of adult] has restricted capacity. This application is made by [name of authorised person or guardian] in terms of intervention (or, as the case may be, guardianship) order dated (date).*

In an application for registration of a discharge in an adult's favour, the Keeper does not require production of any evidence or documentation showing the authorised person's or guardian's power to act.

### **8. Discharge of standard security where adult is creditor**

The authorised person or guardian must be empowered to grant the discharge and the interlocutor must be recorded or registered against the title of the security subjects. The granting of the discharge is an exercise of management power and the deed therefore runs in the name of the guardian or authorised person, as in the following example: -

*I, A.B. (authorised person – design) being authorised person under a intervention order in terms of section 53 of the Adults with Incapacity (Scotland) Act 2000 in respect of the affairs of X.Y.. (adult – design) in consideration of £ paid to me (or to X.Y., or as the case may be) by C.D.. (debtor – design) hereby discharge a standard security for £ by the said C.D.. in favour of the said X.Y. registered on (date) over the subjects in Title Number ....*

<sup>18</sup> 2000 Act s.53(6)

<sup>19</sup> 2000 Act Sched. 2, para. 6(1)

### **9. Concluding remarks**

Whilst the foregoing paragraphs do not cover every eventuality, they will hopefully serve to outline the Keeper's policy in the majority of situations which will arise in practice. Other queries arising in specific transactions leading to registration in the Land Register may be raised with the Keeper's Pre-Registration Enquiries Section. Thanks are due to Mr Tom Thomson and his staff at the Office of the Public Guardian for finding the time to comment upon an earlier draft of this document; to the Law Society of Scotland's Conveyancing and Mental Health Committees, both of which considered the draft; and to Mr Adrian Ward MBE who went beyond his role as convenor of the Mental Health Committee to contact the Keeper personally with valuable comments.

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