

Two aspects of the Adults with Incapacity (Scotland) Act 2000 impact on agents' dealings with the Keeper:

1. registration of the new types of continuing and welfare powers of attorney for preservation in the Register of Deeds in the Books of Council and Session;
2. registration of the appointment of financial guardians and persons authorised under intervent orders in the Land Register and Register of Sasines.

The relevant parts of the Act have now been in force sufficiently long for some practical problems and solutions to emerge.

1. Continuing and Welfare Powers of Attorney
Section 19 of the 2000 Act imposes a requirement for registration of continuing and welfare powers of attorney with the public guardian. Nonetheless, there is still a substantial demand for registration for preservation in the Books of Council and Session.

There will be various reasons for this. One noteworthy example being a 'springing' power of attorney (that is to say a power of attorney which is worded to spring into effect on the type of occurrence of a future event - for example when the granter becomes incapable of looking after themselves). This type of power of attorney may not be registrable with the Public Guardian until the occurrence of the event.¹ In this situation registration in the Books of Council and Session may be appropriate to guard against the loss of the original before the springing event happens.



Where a continuing or welfare power of attorney has been registered in the Books of Council and Session, the Public Guardian has made it known that an extract will be acceptable for later registration in his register in place of the original.

Some confusion has been caused by the requirement of the 2000 Act that a continuing or welfare power of attorney must contain a

certificate by a solicitor (or person of another prescribed class) confirming that the granter understood what he or she was signing. The Keeper and Public Guardian are agreed that such certificates - even if on a separate sheet of paper - form part of the deed itself.

If such a power of attorney is being presented for registration for preservation, it should be submitted inclusive of the certificate(s). The practical point is that an extract obtained in future will then include the certificate which is essential to the operation of the power. As the Keeper considers the certificate to be part of the deed, incorporated into it by statute, he does not require the execution of the certificate to be self-proving - only that of the execution by the granter of the power be self-proving.²

2. Guardianship and Intervention

The Agency produced guidance notes on the implications for registration in the Land and Sasine Registers when Part 6 of the 2000 Act was brought into force.³ The indications are that these guidance notes work satisfactorily in practice.

The first area of interaction with the Keeper is where an intervention or guardianship order is granted by the Sheriff conferring powers in respect of heritable property. The Act requires that such orders are forthwith registered in the appropriate property register.⁴ If the adult's title is registered, this is the Land Register, whereas if the title rests on Sasine deeds it is that register.

¹ 2000 Act s. 19(3)

² Section 6(1)(b) of the Requirements of Writing (Scotland) Act 1995 imposes the general requirement that writs entering the Books and Council of Session be self proving.

³ These guidelines can be obtained from, www.ros.gov.uk/pdfs/awi.pdf

⁴ 2000 Act s. 56 (intervention orders) and s. 61 (guardianship orders)



The Office of the Public Guardian routinely sends out a copy of the appointing interlocutor together with the appointee's certificate of appointment and it is sometimes assumed that both documents need to be sent to the Keeper. However, the statute only requires and permits registration of the interlocutor itself. In particular, for Sasine recording, the warrant of registration needs to be endorsed on the interlocutor and not the certificate of appointment. To maintain the reliability of the registers, the Keeper requires copy interlocutors appointing guardians and persons authorised to intervene to be certified.⁵

The second area of interaction is where a guardian or person authorised under an intervention order is transacting with an incapable adult's heritable property.

The rights of the new types of appointee to deal with an adult's heritage are not absolute - they are constrained by the terms of the 2000 Act and the appointing interlocutor. This influences the Keeper's requirements in respect of forms of deeds and, in the Land Register, supporting evidence to be submitted. Full details are given in the guidance notes stated overleaf.

It is particularly relevant to draw attention to the statutory requirements to obtain consents from the Public Guardian. A person authorised under an intervention order who is selling accommodation used for the time being as a dwellinghouse by the adult needs to obtain consent as to the sale price.⁶ A guardian needs consents to both the principle of selling and the price.⁷

The statutory words 'accommodation used for the time being as a dwellinghouse by the adult' are open to interpretation and this in itself can present a source of difficulty. The Public Guardian, having regard to the intention of the Act, takes a wide interpretation of the phrase and further advises that it is good practice to seek consent in every transaction with a dwellinghouse. This is clearly the safe course to adopt.

The Keeper will consider any land registration application in which it is possible that the transaction proceeded without a required consent of the Public Guardian on the whole facts and circumstances. When it is apparent that such consent was required in terms of the 2000 Act, but the guardian or authorised person disregarded this safeguard to the adult's rights, the registration application may be rejected as vexatious.



In any case in which there is doubt as to whether consent was required and no consent has been obtained, it is likely that the Keeper will exclude indemnity in respect of the possibility that the disposal by the guardian or authorised person may be prone to challenge. One consequence of which is that it leaves it possible for a court or the Lands Tribunal to order rectification of the register, even against a proprietor in possession, to restore the adult to the ownership of the property

⁵ See guidance notes paragraph 2.6

⁶ 2000 Act s. 53(6)

⁷ 2000 Act Schedule 2 paragraph 6(1)

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