

### Once the Application is granted

In practice, the majority of applications are granted by the Sheriff without a formal hearing. Welfare Guardians can take up their powers once the Guardianship is registered. In many cases, the Guardian will have the legal authority to move an Adult to a care home, or to ensure that services are provided which will safeguard the Adult. Further powers are available if the Adult does not comply with the powers granted.

Financial Guardians are not usually able to take up their powers until a bond of 'caution' is lodged. This is, in effect, an insurance policy against any errors or omissions by the Guardian, and it can be several months before this is finalised.

If Highland Council is Welfare Guardian, and major decisions have to be made, relatives should be consulted before action is taken.

The Council has a statutory duty to supervise relatives who are acting as Welfare Guardians. This means regular visits to both the Guardian and the Adult who is subject to Guardianship.

Finally, Guardianships should be reviewed on an annual basis. Relatives and carers are invited as a matter of course to review meetings.

### Where there is conflict or disagreement

On occasion, there may be disagreement amongst family members, or between the family and The Highland Council, about the best way to proceed. The case conference is the best opportunity for a full discussion, and usually any difficulties can be resolved then. The views of family members are extremely important, and play a significant part when decisions about Guardianship are made.

If differences of opinion cannot be resolved, family members do have the right to make an application for Guardianship themselves to the Sheriff, or to object to an application by the Council or another relative, giving the right to be heard in Court.

### 'Private' Applications

As mentioned above, relatives, (or anyone with a legitimate interest in the affairs of the Adult), can make a Guardianship application. This can be an expensive and lengthy business, and you are strongly advised to consult a solicitor. It is, however, possible to undertake the application oneself, and advice is available from The Highland Council, the Office of the Public Guardian, and from the Code of Practice for Guardians which can be downloaded from the internet or obtained direct from the Scottish Executive.

The Highland Council Adults with Incapacity web-site also has copies of forms, Codes of Practice, and the Highland Guardianship procedures, including this leaflet.

## Useful Contacts

### Scottish Executive

St. Andrew's House  
Regent Road  
Edinburgh EH1 3DG  
Telephone: 0131 244 2193  
[www.scotland.gov.uk/justice/incapacity](http://www.scotland.gov.uk/justice/incapacity)

### The Highland Council Social Work Service

Kinmylies Building  
Leachkin Road  
Inverness IV3 8NN  
Telephone: 01463 7034546  
[www.highland.gov.uk](http://www.highland.gov.uk)

### The Office of the Public Guardian

Hadrian House  
Callendar Business Park  
Falkirk FK1 1XR  
Telephone: 01324 678300  
[www.public-guardian-scotland.gov.uk](http://www.public-guardian-scotland.gov.uk)

### Mental Welfare Commission for Scotland

Argyle House  
3 Lady Lawson Street  
Edinburgh EH3 9SH  
Telephone: 0131 222 6111  
[www.mwscot.org.uk](http://www.mwscot.org.uk)



# Guardianship under the Adults with Incapacity (Scotland) Act 2002

This leaflet is designed to help relatives and carers of Adults who lack the capacity to manage their own affairs, and who may become involved in case conferences and other proceedings relating to Welfare and Financial Guardianship under the Adults with Incapacity Act.

It will explain the procedure leading up to the decision as to whether or not to apply for Guardianship, the process of the application itself, and the part played by families and carers.

## Introduction

The Act is designed to ensure that Adults who lack the capacity to manage their own welfare and/or financial affairs because of dementia, learning disability, stroke, or for other reasons, are properly protected and safeguarded. A number of different interventions to meet a variety of situations were introduced.

Guardianship is the most complex intervention, and is only considered if there is no other way of protecting or managing the affairs of the Adult, for example to enable the financial affairs of a person who lacks capacity to be managed, or to ensure that the person is safe, either in their own home, or in a care home.

## Decision to apply for Guardianship

Relatives can decide to apply for Guardianship themselves without reference to a local authority. It is advisable to seek legal advice through consultation with a solicitor.

In all other cases, where an Adult lacks, or appears to lack the capacity to make decisions for themselves, and major decisions need to be made on their behalf, The Highland Council will call a **case conference** to look into the circumstances.

Those invited to the case conference should include the Adult themselves (where appropriate), an advocate, relatives, carers, and relevant professional staff and care staff. Relatives who cannot, or do not wish

to attend the case conference should still have their views taken into account, and can send a letter to the Chair of the conference stating their views if they wish. Carers can also seek support from an independent advocate.

Before any decision is taken, the views of everyone at the case conference have to be taken into account. The Highland Council usually takes responsibility for applying for Guardianship. Only in exceptional circumstances will the Council apply when relatives disagree (or, conversely, decide not to apply when relatives wish Guardianship to go ahead).

Relatives are still entitled to apply whether or not the Council makes an application. The Sheriff may have to rule between conflicting applications. In practice such disagreements are very rare. It must be noted that, as a relative, your views are of crucial importance when these decisions are made, and indeed sometimes it is not possible to make a decision until a relative's views have been canvassed.

As a close relative, you may be asked at the case conference if you wish to be the Guardian. In most cases, the Welfare Guardian is the Chief Social Work Officer of The Highland Council, and indeed the Council has a duty to do this when no-one else is able or willing to do so, but the Chair usually asks if relatives wish to undertake

this duty themselves. Many relatives do not feel they can take this on, but your decision will be respected either way.

At the end of a case conference, various decisions can be made. The two most common are either to proceed, or not to proceed, with an application for Guardianship. A third, less common option, is to defer a decision for a few weeks or months. A decision not to proceed with Guardianship could be changed if the Adult's circumstances changed markedly in the future.

Case conference decisions are recorded, and copies of the minutes are sent to all participants.

## Applying for Guardianship

There are two types of Guardianship. The first is **Welfare**, which enables decisions to be made about an Adult's welfare, including residence, daily activities, medical treatment, etc. The second is **Financial**, relating to property and finance, including house sale, bank accounts, pensions and benefits, etc.

Family members can be both Welfare and Financial Guardians, but local authorities can only be Welfare Guardians. Financial Guardianship is often taken on by solicitors, who charge a fee for their services, rather than family members.

A Sheriff makes the final decision about Guardianship. An application, accompanied

by two medical reports, and one by a Mental Health Officer, is lodged at the Sheriff Court. In the majority of cases, there are no objections to the application, and the Sheriff usually approves the order without the need for a formal hearing.

Close relatives, and others with an interest, have the right to make an application themselves, or to object to an application made by the Council, or by another person. In such cases, relatives have the right to be heard by the Sheriff.

The Mental Health Officer's (MHO) report is an independent report which comments on the appropriateness of the application. As a close relative, the MHO has a duty to offer you an interview so that your views can be represented in the report.

## Timescales

Following the case conference, it can take **up to three months** before the Sheriff approves the Guardianship application. If the case is contested, this process can take many more months, and sometimes up to a year.

The application has to be lodged **within 30 days** of the first medical examination for the purposes of Guardianship.

Guardianship is normally granted for a period of **3 years**, but can vary.