

Adults with Incapacity (Scotland) Act 2000

Part 6 (Sections 53-79) Intervention and Guardianship Orders

Highland Procedures

Guardianship Procedures

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ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

Application for Intervention Orders and Guardianship Orders

These Procedures are concerned only with the application for Intervention Orders and Guardianship Orders. Reference should also be made to the separate notes on the supervision of Proxies and the notes dealing with the recall / termination of Guardianship.

1. Introduction

- 1.1 Part 6 of the Act relates to Guardianship and Intervention Orders.
- 1.2 As with all other interventions under the Act the **general principles** set out in Section 1 (4) of the Act must be applied when considering any action under this section.
- 1.3 An Intervention Order may be applied for in order to deal with either a financial or a welfare issue.
- 1.4 A Guardianship Order may relate to either welfare or financial issues or both.
- 1.5 A Guardian may be appointed to deal with financial or welfare matters or both.
- 1.6 Joint Guardians are possible.
- 1.7 The Chief Social Work Officer (Head of Social Work Service) may be appointed as Welfare Guardian but cannot be Financial Guardian.
- 1.8 A Local Authority officer may be appointed as intervener for welfare matters, **and**, in exceptional circumstances, for financial matters.

Please Note: Where the Adult has a mental disorder, consideration should be given to use of the Care Programme Approach, if this has not already been done.

2. Guardianship or Intervention Order?

- 2.1 Before an intervention order or guardianship order is applied for, consideration should be given to any other procedure, e.g. Access to Funds, which would achieve the desired effect for and on behalf of the Adult, according to the principle of least restrictive intervention.
- 2.2 An intervention order is appropriate to deal with one off situations such as the signing of a document or agreeing to a one off decision affecting an individual's welfare.

- 2.3 A Guardianship Order is more appropriate when continuing decisions over a longer period of time need to be made on behalf of an individual.
- 2.4 In accordance with the general principles, an Intervention Order is a less restrictive option compared to a Guardianship Order.
- 2.5 The Code of Practice for Persons authorised under Intervention Orders and Guardians gives more advice and guidance about this as does the Code of Practice for Local Authorities.
- 2.6 If a Guardianship Order is applied for and the Sheriff considers that an Intervention Order would suffice then the application will be treated as though it were for an Intervention Order.
- 2.7 The decision to apply for a Guardianship Order or Intervention Order will usually be reached through normal care management procedures. It is important to remember however that an application may be made direct to the court by anyone with an interest in the personal welfare or finances of the Adult and the first notice that the local authority may have is a requirement to provide reports to the court within twenty-one days.

3. Initial Assessment of Capacity

- 3.1 This procedure applies to adults with complex and/or significant care needs whose capacity is in question and where major decisions need to be made such as determining residence. **If it is clear that the adult has capacity, this procedure does not apply.**
- 3.2 An initial assessment of capacity should be carried out by a professional. A formal assessment by a Consultant Psychiatrist is not required at this stage.
- 3.3 The professional conducting the assessment could be a Community Psychiatric Nurse, GP, Hospital Doctor, Hospital Nurse or Social Worker, preferably a professional who knows the adult well
- 3.4 The initial assessment only needs to conclude that it is likely that the adult lacks capacity to make informed decisions about their welfare and/or financial affairs for the procedure to be invoked.
- 3.5 If there is an existing Certificate of Incapacity for Medical Treatment (or for any other AWI process), the initial assessment is not required

4. Calling A Case Conference

- 4.1 If the initial assessment concludes that the adult apparently lacks capacity, a case conference should be convened, to be chaired by the Manager of the relevant Community Care Team. **Decisions about Guardianship should only be taken at a formal case conference.**
- 4.2 The case conference should wherever possible be combined with the hospital discharge planning meeting or Protection of Vulnerable Adults meeting, especially where it is likely that Guardianship will not be required (see Section 7 below)
- 4.3 A team leader or manager must be involved throughout the process and should normally chair the case conference. A decision not to call a case conference must be recorded in writing with reasons. Where there is no other way of resolving a dispute, the professional who has raised concerns may have the right to apply to the Sheriff.
- 4.4 Highland Council's Legal Service should be consulted at this stage. If an application for a local authority officer to implement an intervention order relating to financial/property matters is being considered, the Finance Service should also be consulted.
- 4.5 All relevant professionals, the Adult, his or her relatives, carers and others having an interest in the Adult's property, finance or welfare should be invited to attend the case conference. Consideration should only be given not to invite the Adult when this might be detrimental to their health.
- 4.6 A protected period for professionals to discuss the case before the Adult and/or family join the conference should be considered, e.g. where there are serious concerns about a potential conflict of interest between the Adult and/or family members.
- 4.7 Where a protected period is held, the chair should ensure that the case conference minute indicates that a protected period was held, and who attended that part of the meeting.
- 4.8 Wherever possible, professional staff who may be involved in a potential Guardianship application should have seen the Adult before the case conference. Where relevant, reports should also be submitted.
- 4.9 Those attending the case conference should include a representative of Highland Council's legal service, and where the reason for incapacity is mental disorder, an MHO must be present. A representative from Highland Council's Finance Service must be present if an Intervention Order relating to finance/property is being considered and there is no-one except a local authority officer to act as Intervener.
- 4.10 Where the care manager is also an MHO, consideration should be given by the line manager before the case conference as to whether it is

advisable that another MHO is invited to attend, and, if necessary to complete the statutory report.

- 4.11 The Adult should be provided with all appropriate supports to enable them to attend the case conference. These supports should include, where available, an interpreter, an advocate or other person able to ensure that the Adult's point of view is communicated to the case conference.
- 4.12 If for any reason the Adult is unable to attend the case conference personally someone acting in an independent capacity should be present to put forward the Adult's viewpoint, as far as it can be ascertained.
- 4.13 The Highland Advocacy Service should be approached if an advocate is required to attend on the Adult's behalf. (See Appendix 2)
- 4.14 If any relative, carer or other person who has an interest in the welfare of the Adult is unable to be present, they may wish to contribute to the case conference by means of a written report or letter.
- 4.15 **Relatives and carers (and the Adult where appropriate), should be sent a copy of the Highland Council Guardianship leaflet when being invited to the case conference.** (See Appendix 4)

5. Purpose of the Case Conference

- 5.1 The case conference should open with a statement by the chair as to the purpose of the meeting, and possible outcomes. (See Appendix 5)
- 5.2 The case conference should confirm whether the Adult is incapable in respect of the proposed action(s).
- 5.3 The basic principles of the Act should be examined in respect of the Adult and the proposed action(s) to determine that they apply in the current situation.
- 5.4 The case conference should confirm a course of action, which should be incorporated into the Adult's care plan.
- 5.5 The case conference minutes should identify who will be responsible for each agreed action including making any application to the court and establish a plan of action including a time scale in which actions are to be completed, bearing in mind the time limits relating to medical and social work reports (See Section 57). Consideration should be given as to whether or not family members should make the application and/or be the designated Guardian(s).
- 5.6 It is recommended that a clerical assistant be present at the case conference to record the decisions made. Decisions made must be communicated in writing to all present or invited, including the Adult themselves unless considered detrimental to their health or welfare.

- 5.7 The views of all present should be taken into account.
- 5.8 Whilst Highland Council has to make the final decision as to whether or not to proceed with Guardianship, consensus should be reached amongst all present wherever possible.
- 5.9 If the decision of the case conference is to proceed with Guardianship, the powers of the Guardian should be considered (see Appendix 3).
- 5.10 The person responsible for the application should ensure that report writers are made aware of the powers being applied for.
- 5.11 In cases where the reason for incapacity is mental disorder and where an MHO has not been appointed before the case conference this should be done at this stage.
- 5.12 If the reason for incapacity is due only to the Adult's inability to communicate, the Director of Social Work, through the local Service Manager or authorised delegate, should be asked to nominate someone to prepare a report on his/her behalf for the court. **NB this member of staff need not be an MHO.**
- 5.13 The case conference should also decide who will be the named delegated Guardian. **NB Also known as the 'Effective Guardian'**. As per Para 5.12 this person does not have to be an MHO, and in some cases a care manager will be the most appropriate person.
- 5.14 Decisions at the case conference can include:
- 5.15.1 To proceed with an Intervention or Guardianship Order
 - 5.15.2 Not to proceed
 - 5.15.3 To delay until further review or action is taken
 - 5.15.4 To review after a specific time
- 5.16 The Project Manager (Mental Health and Learning Disability) and the AWI Database holder should be informed about case conferences, using the case conference form (Appendix 6)

6. Decision to apply for Guardianship

- 6.1 The decision as to whether or not to apply for Guardianship is dependent on the conditions laid out in Sections 53(3) and 57(2) being met. However these Sections do not clarify in any detail when local authorities should fulfil their duty to apply.
- 6.2 Guardianship **should** be considered in the following circumstances:
- 6.2.1 Where there are serious concerns about the welfare and/or finances and property of an Adult, and there is no other way of safeguarding

the Adult's interests. Such concerns will result from risks to the Adult's safety, exploitation or abuse from carers/family or others, and inability to manage financial affairs among others.

6.2.2 Where the assessment has resulted in a decision that the Adult needs to move to a care home, either from their own home, or from hospital, and they have expressed, and continue to express, a wish either not to go to the home, or that they wish to return to their own home. The Adult's wishes must be given serious consideration, even if they do not coincide with the views of the care team and/or family and carers.

6.2.3 Where an Adult is living at home, but is at risk and is refusing services. Whilst Guardianship may result in the Adult accepting services, it may not be effective if carers are refused access.

6.2.4 Guardianship does not need to be used where an Adult is moving to a care home, and all the indications are that they are in agreement with the move, and would have been if they had capacity, and family and the care team are in agreement that such a move would be in the Adult's best interests. In other words, if the principles can be applied successfully, there is no need to apply for Guardianship. However any such decision should be properly documented. (See Section 7 for more detail)

6.2.5 Please note that a decision to apply for Guardianship should be made and acted upon quickly if the Adult is in urgent need of protection. Delay could result in serious consequences for the Adult.

6.3 Guardianship **must** be applied for if any of the following circumstances apply:

6.3.1 The conditions for Guardianship are met and the adult is opposed to the course of action as far as can be ascertained

6.3.2 The proposed care regime amounts to a deprivation of liberty

6.3.3 The carer/family members have expressed a different view to that of the adult or health and social care professionals

6.3.4 Even where there is doubt about how convincing the evidence may be in court, where concerns remain over the capacity of the individual to protect their own welfare and there is such a disagreement, the matters should be placed before the court for a decision

7. Decision not to proceed with Guardianship

Guardianship need not be applied for under the following circumstances:

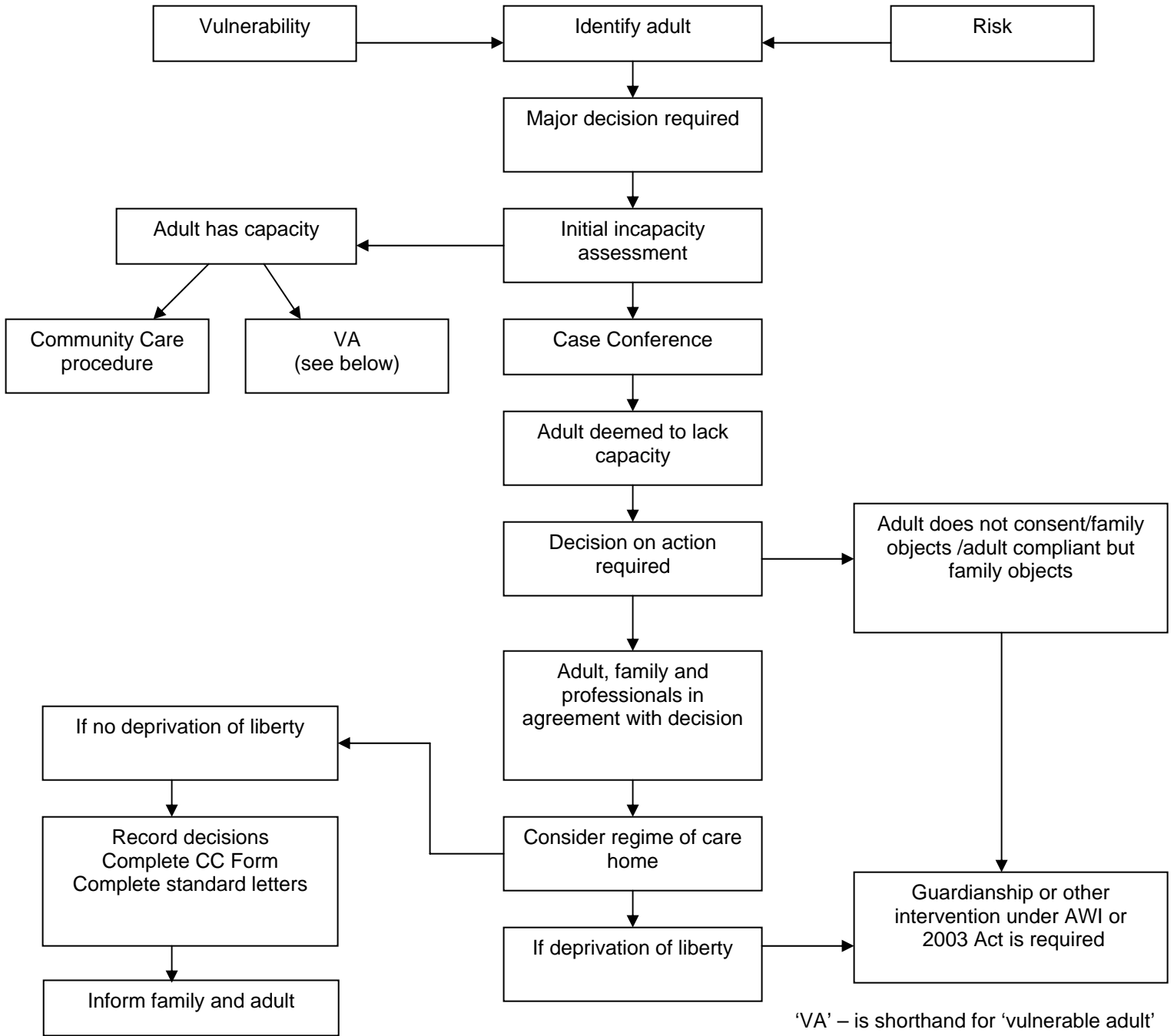
- 7.1 There is no proxy and no other AWI application underway
- 7.2 The risk assessment indicates that there are no issues to warrant Guardianship
- 7.3 The proposed care regime does not deprive the adult of their liberty (see Scottish Executive Guidance Annex A for further information)
- 7.4 There is no other benefit in applying for an order
- 7.5 The adult does not disagree with the proposed action and/or it appears that he/she is unlikely to indicate an unwillingness to remain in the care arrangements
- 7.6 All interested parties including family members agree with the care intervention proposed

8. Action to be taken after the case conference

- 8.1 The minute of the case conference should be circulated to all invited parties
- 8.2 A letter should be sent to the adult, his/her primary carer, independent advocate and professionals informing them of the decision made, using the standard letter (see AWI web-site)
- 8.3 A copy of the letter should be kept in the adult's case file
- 8.4 The revised case conference form (see Appendix 6) should be completed and forwarded to the Keeper of the AWI Database with a copy to the Project Manager (Mental Health and Learning Disability)
- 8.5 Monitoring of the adult's care arrangements will be required

Appendix 1

When to invoke the Adults with Incapacity Act – summary of the assessment and decision-making process (based on Scottish Executive Guidance)



9. Application by Local Authority

- 9.1 If the conditions in Section 6 apply, and no-one else is able or willing to be Guardian, Highland Council has a duty to apply for Guardianship.
- 9.2 Although a local authority cannot be Financial Guardian, an application can, and indeed **must**, be made by the Council for Financial Guardianship, if the conditions are met, and no-one else is willing or able to apply. **Please note that the Council may need to step in if a relative has agreed to make an application, but has not done so, and any further delay would be detrimental to the Adult.** This is particularly important where the application for Guardianship has resulted in a delayed discharge from hospital or where the adult's finances are at risk. In such cases an agreed timescale should be agreed with relatives. If there has been no progress 3 months after the case conference relatives should be informed that the Council may need to make the application instead.
- 9.3 Local authority staff should only be considered as Financial Interveners in exceptional circumstances.
- 9.4 The Case Conference would be the time and place to determine if the local authority should make the application.
- 9.5 The application process for Guardianship Orders and Intervention Orders is the same. The application is a summary application to the Sheriff Court, using Form 23, which can be accessed on the Highland Council AWI website.
- 9.6 In cases of urgency, the application may include a request for an interim order to be considered by the Sheriff. This still has to be notified to all interested parties with at least 3 days notice of the interim hearing to give an opportunity to object.
- 9.7 The officer responsible for the application should complete Form 23 and email it to legal services, who will ensure that it is lodged in Court.
- 9.8 A fee is payable to the Court, which must be paid at the time the application is presented. Legal services will arrange for this fee to be paid.
- 9.9 Although likely to be very rare, in some circumstances the Adult themselves may wish to be the applicant, e.g. a person with autistic spectrum disorder. Such Adults should be assisted through the process.
- 9.10 Where the local authority is applying for Financial Guardianship, all land and premises must be specified in the application (please refer to legal services) **Please also note that the Sheriff will require 'caution' i.e. an insurance policy to safeguard against errors or misuse of funds by the Financial Guardian. The two insurance companies doing this insurance may not supply it to relatives or private individuals if large sums are involved.**

- 9.11 Two medical reports must accompany the application. These medical reports must be based on an examination of the Adult no more than 30 days before the application is lodged. Both reports may be from GPs (**but see Para 8.12**)
- 9.12 If the reason for incapacity is mental disorder, one of these medical reports must be from a medical practitioner approved under Section 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (normally a consultant psychiatrist).
- 9.13 Where the application covers welfare issues a report from a Mental Health Officer must also accompany the application. **Note: the MHO report is only valid for 30 days.**
- 9.14 Where the incapacity is only because of an inability to communicate the Director of Social Work will delegate an officer to complete the report.
- 9.15 The applicant need not be the person authorised under an Intervention Order, or the potential Guardian.
- 9.16 Wherever possible, report-writers should have had sight of the application, the case conference minutes, and/or be aware of the proposed powers, before completing the report.
- 9.17 Officers responsible for the application should scrutinise the medical reports for errors, and, if necessary, return them for correction, otherwise they may be rejected by the Sheriff.
- 9.18 Careful consideration must be given to the powers to be applied for. The power to consent to medical treatment and research should normally be considered. The range of both welfare and financial powers is detailed in Appendix 3, but this list is not exhaustive.
- 9.19 Where the application is for Financial Guardianship only, the report should be provided by someone who has sufficient knowledge to make such a report, i.e. an accountant, bank manager, or solicitor. An MHO is not expected to complete such a report. In some cases a care manager can complete such a report.
- 9.20 Where a single joint application is being made, but there are separate Guardians, the MHO report regarding Welfare powers should be accompanied by a report from a suitable professional regarding the Financial powers. Where an application is made with the same Guardian or Guardians having both Welfare and Financial powers, the MHO should complete the report.
- 9.21 The welfare report and/or the financial report must be based on at least one interview with the Adult carried out no more than 30 days before the application is lodged at court.

9.22 All the reports required to support the application are to be made on prescribed forms.

9.23 Social Work Services will be entitled to reclaim expenses of making an application for financial Intervention or Financial Guardianship from the Adult's estate.

10. Application by Private Individual ('Private Guardianship')

10.1 An application for Guardianship or an Intervention Order may be made by any person claiming an interest in the property, financial affairs or welfare of an Adult. Where the Guardian is not the Chief Social Work Officer this is known as Private Guardianship. A Private Guardian will usually be a relative or in the case of Financial Guardianship, a solicitor or accountant.

10.2 It is possible that the local authority will have no prior knowledge of the Adult or may not have been involved in any discussions leading up to the application process being instigated.

10.3 Relatives should be encouraged to have a case conference, which could be convened by Highland Council.

10.4 In cases where there is no prior knowledge, the applicant must inform the Director of Social Work after which the Reporting Officer will have only 21 days to complete the report on welfare issues. The Reporting Officer will be a Mental Health Officer unless the incapacity is only because of an inability to communicate in which case it will be delegated by the Director of Social Work via the authorised delegate.

10.5 A request for a report of this type must be regarded as high priority.

10.6 Where the Adult has communication difficulties, the Reporting Officer acting on behalf of the Director of Social Work should be allocated as soon as possible to enable sufficient time to prepare the report.

10.7 Where someone makes the application other than the local authority, it is likely that that individual will need support through the process, which may come from a number of sources including a private solicitor, advocacy service or from the social work service.

10.8 The cost of engaging a solicitor to support the making of the application to the court may be recovered from the Adult's estate in the case of Financial Guardianship or through the Legal Aid Scheme in the case of Welfare Guardianship.

11. Private Guardianships where the adult is in hospital

- 11.1 Where an adult with impaired capacity is in hospital and decisions need to be made about discharge, a case conference should always take place when the applicant is a member of the adult's family.
- 11.2 If Welfare Guardianship is required in such cases, the family members should be informed about the delayed discharge procedure and of the need to expedite the application.
- 11.3 Family members should also be informed that Highland Council may have to initiate the application themselves if there is undue delay in processing the application and there has been no progress after 3 months following the case conference. Staff should however inquire into the reasons if there has been a delay in case there are specific reasons for the application not being completed.

12. The Report by an MHO or Chief Social Work Officer (Head of Social Work Service) to Accompany an Application For an Intervention Order or Guardianship Order

- 12.1 The views of the Adult and others with an interest in the Adult must be taken into account. This will inevitably mean that more than one interview will be required to ensure that sufficient information is gathered to produce the report.
- 12.2 In interviewing the Adult, the reporting officer must ensure that everything possible is done to enable the best possible means of communication with the Adult, including the use of mechanical or electrical aids.
- 12.3 If necessary the reporting officer should be prepared to abandon the interview and return at another time which may be more convenient.
- 12.4 The reporting officer must at all times be aware of the general principles contained in the Act.
- 12.5 If the reporting officer proposes to recommend that an Intervention Order or Guardianship Order be granted which goes against the known past or present wishes of the Adult he / she must be prepared to substantiate the reasons for this.
- 12.6 Similarly the reporting officer must be prepared to substantiate any difference of opinion between him/herself and any relative, carer or other person having an interest in the property, financial or welfare affairs of the Adult.
- 12.7 Special care must be taken in situations where the Adult is not able to express his or her past wishes. The views of more than one relative or carer should be obtained whenever possible to ensure that a balanced picture of the Adult's past wishes can be ascertained.

- 12.8 Where the Adult concerned has indicated that they do not wish legal representation, or it appears that they do not understand the process, the reporting officer should indicate this in the report, and consider using an advocate. The Court may be invited to consider the appointment of a safeguarder, to be followed up by a telephone call to the Sheriff Clerk. The safeguarder will usually be a 'Curator ad Litem' i.e. a lawyer appointed by the Court.
- 12.9 Where the primary carer is a care home or hospital, care must be taken to identify the staff responsible for the Adult's care when completing the report. This information is required by the Sheriff.

13. Report on the Suitability of a Welfare Guardian or Person Authorised Under an Intervention Order with Welfare Powers

- 13.1 This forms part of the report to accompany an application for Guardianship or Intervention Order (**but see Para 11.2 below**).
- 13.2 The report contains the author's opinion on the suitability of the person named in the application and must, as a matter of good practice, be based on at least one interview with the person or persons named in the application as the proposed Guardian(s), or Intervener, **except where the proposed Guardian is the Chief Social Work Officer. Report-writers should seek advice from their line manager or Project Manager (Mental Health and Learning Disability) before completing the section on the suitability of the Guardian, especially where there are concerns.**
- 13.3 Where the proposed Intervener is a named officer of Highland Council, the report should still comment on the suitability of that person. **As a result, the same officer cannot both write the report and be the named Intervener.**
- 13.4 Where there are serious concerns regarding the suitability of a Guardian or Intervener, the reporting officer should indicate this in the report, and the Sheriff is entitled to ask questions about previous criminal convictions. The reporting officer is not entitled to ask about previous convictions.
- 13.5 Where a relative is applying to be a **joint welfare and financial guardian**, the reporting officer is required to comment on their suitability in relation to welfare powers, and should consult with legal services as to the most appropriate professional to comment on financial powers.
- 13.6 The reporting officer should confirm:-
- That the person named is aware of the Adult's circumstances and condition

- That the person is aware of the responsibilities of becoming a Guardian to the Adult or acting under an Intervention Order on behalf of the Adult. This would include an understanding of the general principles of the Act.
- That the person is accessible to the Adult and or his / her carers
- That the person is able to carry out the duties of Guardian or the functions required under the intervention order.

13.7 The reporting officer should also comment on

- any adverse effects which the appointment of the Guardian or Intervener may have on the Adult
- any conflicts of interest arising from the Guardian or Intervener being appointed under the Act.
- any undue concentration of power which could arise by granting the appointment

13.8 The reporting officer must also consider the powers being sought under the Guardianship or Intervention Order. Would any other powers prove less restrictive on the freedom of the individual and still achieve the desired benefit for the Adult? Are the powers being sought sufficient to meet all the foreseeable needs of the Adult or should other powers be granted?

13.9 The supervision of a person authorised to act under an Intervention Order, or Guardianship Order, in respect of property and financial matters is a statutory function under the Act, which will be the responsibility of the Public Guardian.

13.10 There is no automatic supervision by the Local Authority of an Intervention Order in respect of welfare matters. It is open to the reporting officer to recommend that supervision would be of benefit in particular situations. The Sheriff may then if so minded order supervision by the local authority under Section 3 of the Act.

13.11 The supervision of a Welfare Guardian is however a statutory duty of the local authority (see Supervision Procedures). This will involve the guardian and the Adult being visited at least once every three months. The reporting officer could if necessary make recommendations to the sheriff requesting that specific direction should be given concerning supervision.

13.12 If the reporting officer reaches the conclusion that the application should not be supported for any reason, he/she should discuss this fully with his/her line manager as soon as possible.

13.13 If, after discussion with the line manager, it is still decided that the application should not be supported, the reporting officer should arrange to

meet with the applicant and any other appropriate person to discuss the reasons why the application cannot be supported. At this meeting the applicant should be advised, where necessary, about any alternative action either using another part of the Act or through other procedures. These alternatives should be included in the report to the court.

13.14 When the report has been completed, it should be sent immediately by recorded delivery to the person who intends to make application for Guardianship or an Intervention Order.

14. Court Proceedings

14.1 It is the responsibility of legal services to serve the papers on the Adult, either by registered post or through Sheriff Officers.

14.2 A doctor's Certificate is required if service of papers on the Adult is to be dispensed with because of anticipated distress.

14.3 When the Adult does not wish a relative to be informed of the application, this must be discussed with the Sheriff. However, there is no guarantee that the Adult's wishes will be respected.

14.4 Legal services will inform potential witnesses about the legal Proceedings.

14.5 The Sheriff has considerable discretion as to how he will deal with the application. If the application is not opposed and the report and medical certificates are all clear about the need for an Intervention or Guardianship Order then the sheriff may grant the application with a minimum of formality.

14.6 Where there are any queries or objections, the Sheriff may wish to have a hearing at which all concerned, including the Adult, will be able to be present and be represented, although this is not a statutory requirement. In practice there are very few hearings as the Adult and/or family rarely object.

14.7 Before granting the order, the Sheriff must consider if the Adult's interests have been adequately represented and can appoint a safeguarder to represent these interests.

14.8 The safeguarder's responsibilities will normally include conveying the Adult's views to the court. A 'Curator ad Litem' (an independent solicitor appointed by the Court) may act as safeguarder. However the Sheriff may also appoint another person to do this if it is felt that there would be a conflict between representing the Adult's interests and conveying his views to the court.

14.9 The sheriff may make any further enquiries that seem necessary before granting an order. He can request that assessments be carried out and

that reports are lodged with the court.

14.10 The Sheriff can make an interim order, if it seems appropriate, pending final disposal of the application, which may result in an interim Guardian being appointed. (see Para 6.6)

14.11 The Sheriff's decisions may be appealed in the first instance to the Sheriff Principal and the Sheriff Principal's decision could, with his consent, be appealed to the Court of Session.

15. Action after Order is Granted

15.1 After a Guardianship Order or an Intervention Order has been granted it will be the responsibility of the sheriff clerk to notify the Public Guardian. The Public Guardian issues a certificate of appointment, notifies the local authority and where the reason for incapacity relates to mental disorder, the Mental Welfare Commission. The Public Guardian maintains a register of all Intervention Orders and Guardianships.

15.2 The interlocutor containing the Sheriff's decision will normally be sent to the applicant. A copy of the interlocutor should then be forwarded to the the AWI Database Holder.

15.3 When the Chief Social Work Officer is appointed as Welfare Guardian a named professional will be nominated to carry out the day to day duties of the Guardian. The name of this person should have been decided at the case conference.

15.4 The name of the officer responsible for carrying out the functions and duties of Guardian must be notified to the Adult and, where the reasons for incapacity include mental disorder, the Mental Welfare Commission, within 7 working days of the appointment, using standard letters.

15.4 After the Order is granted and notification has been received from the Office of the Public Guardian, the named Guardian is responsible for sending out, within the time limit above, the standard letters notifying the Adult, database holder, MWC, and doctors who completed medical reports. The MWC and Consultant Psychiatrist should also receive copies of the application and accompanying reports.
Please note: standard letters can be accessed on the Highland Council AWI web-site.

15.5 Normally the officer responsible for the day-to-day duties of Guardian will be the worker who is also responsible for the Care Management of the individual concerned. Please note that the named Guardian does not have to be an employee of Highland Council – a nurse could be delegated as named Guardian if appropriate.

15.6 The Chief Social Work Officer is responsible for nominating the social worker to carry out the day to day duties of Guardian.

- 15.7 The nominated worker will be expected to maintain contact with the person under guardianship on a regular basis
- 15.8 The frequency of these contacts will vary but should be at least once every six months.
- 15.9 The frequency of contacts will be agreed between the nominated worker, his/her line manager the Adult, carers and relatives, and recorded in the Adult's file.
- 15.10 The nominated worker, acting on behalf of the chief social work officer, is subject to the same supervision requirements as any other Guardian. The worker's line manager should undertake this supervision (See Supervision Guidelines)
- 15.11 In the exceptional case that a local authority officer is appointed Intervener in relation to finance/property, the Finance Service will, in conjunction with the Council's Legal Service, be responsible for advising the Social Work Service about making the necessary arrangements once the Intervention Order has been granted.
- 15.12 Special notice must be taken of the Code of Practice for Persons Authorised under Intervention Orders and Guardianship Orders. In particular the Office of the Public Guardian must be consulted regarding the price to be paid for property that is to be sold, and other major financial transactions.

PLEASE NOTE: If the Guardianship powers, especially relating to residence, are not complied with, an application to the Sheriff may be made under Section 70 to ensure compliance. The Project Manager (Mental Health and Learning Disability) and legal services should be consulted in such cases.

Appendix 2

Useful Addresses and Web-sites

1. Scottish Executive web-site: www.scotland.gov.uk/justice/incapacity
2. The Highland Council AWI web-site can be accessed on the Intranet under Service Management then Social Work Services. The external web-site is: www.highland.gov.uk Codes of Practice, Procedures, Forms and statistics can all be downloaded from this site.
3. Information and advice concerning the Act may be obtained from The Mental Welfare Commission for Scotland, Thistle House, 91 Haymarket Terrace, Edinburgh EH12 5HE Tel: 0131 313 8777 web-site: www.mwcscot.org.uk
4. Information and Advice, particularly concerning issues of property and finance, may be obtained from the Office of Public Guardian, Hadrian House, Callander Business Park, Falkirk, FK1 1XR Tel 01324 678300 Web-site address : www.scotscourts.gov.uk
5. The Highland Independent Advocacy Service is: Advocacy Highland, Third Floor, 33 Academy Street, Inverness IV1 1JN Tel. No. 01463 233460 email: info@advocacy-highland.org.uk

Appendix 3

Welfare Powers available

(Please note that this list is not exhaustive)

1. Decide where the Adult should live
2. Have access to confidential documents or information relating to the Adult where he/she would have access to such documents or information on a personal basis
3. Consent or withhold consent to medical treatment
4. Consent to the adult's participation in research, in accordance with safeguards set out in Part 5 of the Act
5. Pursue, defend or compromise any legal action on behalf of the adult involving his or her personal welfare
6. Provide access to the adult for medical treatment, dentistry etc where this will benefit him or her
7. Make decisions on the adult's dress, diet and personal appearance
8. Make decisions on the social and cultural activities that the adult may pursue
9. Arrange for the adult to undertake work, education or training
10. Decide with whom the adult should or should not consort
11. Take the adult on holiday or authorise someone else to do so
12. Any other welfare power which would benefit the Adult

Appendix 4

Guardianship under the Adults with Incapacity (Scotland) Act 2000

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.

1. 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.

2. 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, 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. 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 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.

3. 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.

4. Timescales

Following the case conference, it can take **up to three months** before the Guardianship application is approved by the Sheriff. 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 the Sheriff can vary this.

5. 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.

6. Where there is conflict or disagreement

On occasion, there may be disagreement amongst family members, or between the family and 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.

7. '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 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.

8. Useful addresses

1. Scottish Executive,
St. Andrew's House,
Regent Road,
Edinburgh EH1 3DG
Tel. No. 0131 244 2193
www.scotland.gov.uk/justice/incapacity
2. Highland Council Social Work Service,
Kinmylies Building,
Leachkin Road,
Inverness IV3 8NN
Tel/ No. 01463 703456
www.highland.gov.uk
3. The Office of the Public Guardian,
Hadrian House,
Callendar Business Park,
Falkirk FK1 1XR
Tel. No. 01324 678300
www.public-guardian-scotland.gov.uk
4. Mental Welfare Commission for Scotland,
Thistle House,
91 Haymarket Terrace,
Edinburgh EH12 5HE Tel: 0131 313 8777
www.mwscot.org.uk

Appendix 5

Guardianship Case Conferences

Guidance for Chairs

1. Calling a case conference

Any professional can request a case conference regarding an Adult who has, or is thought to have, incapacity, where they have serious concerns about the welfare, finances, or property of that person.

If the 'line manager of the relevant team' agrees that a case conference should be held, then the professional concerned would normally organise the conference, inviting appropriate people as detailed in the procedures.

In complex cases it is always advisable to call a case conference, as it may be the only opportunity to discuss a case fully with all the relevant people present.

Usually the chair will be a Community Care Manager, Team Manager or Principal Mental Health Officer. Only when none of these is available should a main grade professional chair the case conference.

2. Chairing the conference

The Chair at a Guardianship case conference should:

- Prepare for the conference by obtaining as much information as possible in advance
- Give consideration to a protected period without family when there are serious concerns about a conflict of interest between the Adult and/or family members
- Begin the conference with a specific statement about the purpose, i.e. to discuss the necessity or otherwise for Guardianship
- Explain the process to relatives
- Ensure that everyone present or invited has an opportunity to air their views
- Ensure that the Adult's wishes and feelings are represented, either by themselves, or by an advocate
- Try to ensure, as much as possible, that consensus is reached, and to reconcile disagreements
- Ensure that a clear decision is reached at the end, and that decisions are properly recorded
- Allow enough time for a proper discussion without prolonging matters – 1-1 1/2 hours should be sufficient time
- Make one of the following decisions:
 1. Apply for Guardianship
 2. Not to apply
 3. Not to apply, but consider alternative arrangements, e.g. intromission with funds
 4. Defer decision until a further review

- Sum up at the end of the conference
- Cover the following issues:
 - capacity
 - risk assessment
 - major decisions which need to be made on the Adult's behalf
 - timescales
 - Guardianship powers
 - who does what
 - give relatives the opportunity to apply if they wish

3. What to do if there is disagreement

Consensus is reached in the vast majority of case conferences, and it is usually straightforward for the Chair to sum up the decisions reached and to reflect the views of those present.

However if it is not possible to reach agreement, whether with relatives and/or other professionals, in the end the Council, represented by the Chair, has to make a decision as to how to proceed, based on the information available, and bearing in mind the principles, especially that of least restrictive intervention, whilst weighing up the risk factors.

If the Council decide to go ahead with Guardianship, relatives have the right to object and be heard in Court, or to apply themselves, in which case both applications will be heard by the Sheriff. If there were serious concerns about the motives of relatives, the Council has the option of making an Interim application to ensure that the Adult's Welfare and/or Finances were protected speedily.

It should be noted that local authorities have a duty to apply for Guardianship if the conditions are met, and no-one else is willing or able to apply. This includes Financial Guardianship when a solicitor or accountant would have to be identified as Guardian.

4. Decision-making

In the end, the crucial factor that the Chair of a Case Conference has to consider is that of risk to the Adult's Welfare. Can the Adult's affairs be protected adequately without Guardianship? If the answer is yes, what alternatives are available? If the answer is no, then an application for Guardianship should be made.

In any decision about Financial Guardianship, the issue is less likely to concern risk. If the Adult has over £20,000 in assets, lacks capacity, and there is no-one else willing or able to apply, the Council has a duty to make the application.

However Financial Guardianship may also be necessary where the Adult is vulnerable and open to exploitation or abuse.

A decision can also be taken to review the case, and to defer a final decision until then.

A Guardianship case conference which decides not to apply for Guardianship is just as necessary as one where the decision is to apply. In complex cases, a case conference may be the only means of bringing all the relevant people together for a thorough discussion.

Appendix 6

AWI Case Conference/Review and Minute	
Name	
Address	
DOB	
Date of CC/ Review	
Venue	
MHO	
Care Manager (if different)	
RMO	
Summary of adult's circumstances and needs	
Risk factors	
Evidence of Incapacity	
Evidence of adult's consent/disagreement	
Evidence of agreement of family, professionals and carers	
Diagnosis	
Proposed Guardianship powers	
Outcome and Decisions made	