

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

CONSULTATION ON DRAFT REGULATIONS

RESPONSE BY EAST AYRSHIRE COUNCIL

The Adults with Incapacity (Certificates in relation to Powers of Attorney) (Scotland) Regulations 2008

Regulations prescribing a single certificate.

East Ayrshire Council supports the proposal to make a regulation to introduce one single, multi- use certificate for use in all three registration situations, particularly in making a grant of Power of Attorney when both welfare and financial powers are being granted in a single deed.

It is the Council's view that format of the single certificate is clear and well laid out.

By consolidating the single certificate into the document, it makes it explicitly clear what type(s) of grant are being certified.

Comments on Regulatory Impact Assessment (RIA)

The Council agrees with the RIA, that in making this regulation to introduce a single certificate, there will be benefit to the Granter; those signing certificates and the Office of the Public Guardian, in terms of time commitment; financial cost and error reduction.

The simplified certificate should make it easier for members of the public to draw up a Power of Attorney on their own, which should hopefully lead to an increase in the number of grants. This would have the additional savings benefit for the public purse, by potentially reducing the number of Guardianship applications which may have to be made at some future date in order to protect the welfare, property or financial affairs of vulnerable adults who have not made a grant of Power of Attorney.

Regulation for certification of revocation of powers of attorney.

East Ayrshire Council supports the proposal to make a regulation prescribing a certificate to support a revocation notice in relation to a Power of Attorney.

The present arrangement whereby the granter only has to notify the Public Guardian in writing that he /she wishes to revoke a Grant, potentially leaves vulnerable adults open to abuse and exploitation, as there is no way of authenticating this notice; of confirming that the adult fully understands the decision, or of ensuring the decision to revoke was not made under duress.

The certificate will therefore bring additional benefit to the Granter in terms of confirming that he/ she understands the action being taken ; confirming that he/she is not acting under any undue influence as well as authenticating the document.

Comments on Regulatory Impact Assessment (RIA)

The RIA has highlighted that there will be financial costs to the granter in terms of obtaining a certificate to support a revocation notice, and that these costs should be no more than those involved in making a Grant of a Power Of Attorney.

However, presumably in most cases where a Granter is wishing to revoke a Power of Attorney, he/she will also be wishing to make a further grant in order that a substitute proxy continues to be in place. This will mean that not only will there will be financial costs to the granter in obtaining a revocation certificate, but also the additional cost of obtaining a certificate in relation to the new grant. The R.I.A does not specifically highlight this.

It is the view of East Ayrshire Council that this additional cost could be financially disadvantageous to vulnerable adults using this process, particularly as there is a wide variation in the fees which different groups of prescribed persons may levy for signing a certificate. There is a risk that an adult may revoke a Grant and chose not to make a further nomination because of the financial costs.

Also there are likely to be cases where revocation may be required to change the Attorney, but the powers being granted will remain the same. The assessment by the prescribed person of the adult's capacity to revoke a grant and make a new one, is likely to be done at the same time, and is likely to involve little additional time commitment, other than in cases where the granter wishes to change the powers.

East Ayrshire Council has a view therefore, that there would be benefit in having one certificate to revoke and nominate where there is only a need to make a change in terms of the Attorney(s), but not the powers. This would reduce the financial costs to the adult; reduce the time commitment for prescribed persons who would only have to sign one certificate, and the time commitment for the Public Guardian who would only have to process one set of paperwork.

Classes of Persons

East Ayrshire Council supports the making of a regulation to clarify that a solicitor acting as a prescribed person will be a practicing solicitor. This will bring additional protection to the adult by ensuring that the solicitor has current knowledge, experience and skills to undertake this role.

The Adults with Incapacity (Accounts and Funds) (Scotland) Regulations 2008.

East Ayrshire Council supports the introduction of these regulations.

It is felt to be reasonable and necessary for the Public Guardian to be furnished with the information set down in the Regulations for the purposes of good record keeping and monitoring.

East Ayrshire Council welcomes the changes made by the legislation to take into account the Banking Regulations which made it difficult for a bank account to be opened by another

person on behalf of a vulnerable adult. This barrier has now been removed. This is viewed as a very positive step in the management of the funds of vulnerable adults.

East Ayrshire Council supports the regulation to prescribe a period of 21 days to allow for objections, where the Public Guardian has advised of an intention to refuse an application. The 21 day timescale is reasonable and is in keeping with the timescale for notifications for objections in relation to other interventions under the Act.

It is East Ayrshire Council's view that the medical certificate to accompany an application is clear and fit for purpose.

The Adults with Incapacity (Recall of Guardians' Powers) (Scotland) Amendment Regulations 2008.

East Ayrshire Council supports the making of these regulations.

The Mental Welfare Commission does not have a locus in terms of being notified by the Public Guardian, where a sheriff makes a welfare guardianship order in relation to an adult whose incapacity is due to communication difficulties, as the Mental Welfare Commission has no duties or responsibilities in relation to monitoring the welfare of these adults or the operation of the welfare guardianship order.

The Adult Support and Protection Act has made the necessary changes in terms of the Mental Welfare Commission no longer being able to recall welfare powers in these cases.

East Ayrshire Council is in agreement with the proposed regulation which will allow the Schedule 1 to include a statement highlighting the changes made by the legislation.

East Ayrshire Council is in agreement with the proposed regulation which will allow Schedules 2, 4 and 5 to include a section seeking the views of the adult's named person. This acknowledges the key role that has been ascribed to the named person under the Mental Health Act (Care & Treatment (Scotland) Act 2003; is in keeping with the consultation with the named person required by the provisions of that Act, and allows the outcome of that consultation with the named person to be reflected in writing in the Schedules.

The Adults with Incapacity (Reports in Relation to Guardianship and Intervention Orders) (Scotland) Amendment Regulations 2008

In principle, East Ayrshire Council welcomes the proposal to introduce regulations which tidy up the requirements for the process of renewals in respect of Intervention and Guardianship Orders in keeping with the legislation, and to change or create new forms to support simplifying the renewal process.

East Ayrshire Council welcomes and agrees with the proposed changes to the various Schedules to take account of the role of the named person and to consult the named person. The changes to the schedules allow the outcome of that consultation to be reflected in writing.

East Ayrshire Council agrees with the proposed change to the Schedule 1 to incorporate information where the medical examination of the adult takes place out with Scotland. It is felt

to be important to ensure that the adult is appropriately safeguarded through having information confirming the medical practitioner's qualifications as well as confirming that they have exercised their duty to consult with the Mental Welfare Commission prior to completing the renewal medical certificate.

East Ayrshire Council welcomes and supports the regulations prescribing the new report by the Public Guardian for renewal of financial guardianships. The submission of a report by the Public Guardian will allow the Public Guardian to give an expert opinion on both the applicant's conduct as the Guardian operating the order, and their continuing suitability, which is based on factual evidence gained via the Public Guardian exercising direct supervision over the Guardian during the period of the order. The Schedule allows the Public Guardian to reflect their opinion in writing via the provision of a text box.

East Ayrshire Council would however wish to highlight some concern regarding Schedules 3 and 6 which prescribe the report by Mental Health Officers and the Chief Social Work Officer in relation to renewal of welfare guardianship. The lay-out of these schedules solely provides opportunity for the Mental Health Officer or Chief Social Work Officer to confirm by means of ticking a box, that it is appropriate to continue the order and the continuing suitability of the guardian. If the boxes are not ticked, does the Sheriff then presume that the report writer is not in agreement? What if the report writer forgets to tick the box? For the avoidance of doubt, there should be a tick box option which allows the writer to state that they do not agree with the order being renewed and/or they do not agree that the Guardian continues to be suitable.

East Ayrshire Council would be of the view that in addition to the tick box options, there also needs to be a text box which allows the report writer to elaborate on their opinion, which would be drawn from evidence based on the Local Authority's discharge of its functions during the duration of the order. This evidence could be drawn from either the writer's personal knowledge of the case through as Authorised Officer or supervising social worker, or via consulting with others acting in this role; together with evidence drawn from social work records in relation to the operation of the order, and the Applicant's continuing suitability, where appropriate.

The provision of a text box in these Schedules would be in keeping with the Public Guardian being given an opportunity to elaborate on their opinion in respect of a renewal for financial guardianship. This would provide the Sheriff with more detailed information on which to base his decision about the renewal of financial or welfare guardianship.

East Ayrshire Council would be concerned that the Schedules for the renewal of welfare guardianship in their proposed form, suggests that it is acceptable for information in respect of a renewal of a welfare guardianship to be of a lesser quality and quantity than that which requires to be provided by the Public Guardian for the renewal of a financial guardianship. The information provided should be equally robust in order to afford appropriate protection to the adult.

Comments on Regulatory Impact Assessment (RIA)

East Ayrshire Council is concerned that the risk assessment takes no account of the potential loss of benefit in terms of protection to the adult, through the renewal schedules in respect of welfare guardianship, making no provision for the Mental Health Officer or Chief Social Work

Officer to provide written evidence to support their opinion as to whether or not the order should be renewed, and the Guardian's continuing suitability.

The Adult Support and Protection (Scotland) Act 2007 (Adults with Incapacity) (Consequential and Supplementary Provisions) Order 2008

East Ayrshire Council is in general agreement with the terms of these provisions

The Adults with Incapacity (Public Guardian's Fees) (Scotland) Amendment Regulations 2008

East Ayrshire Council is in general agreement with these regulations being made.

