

West Dunbartonshire Community & Health Care Partnership

Adults with Incapacity (Scotland) Act 2000 Procedures

Guidance Note

The Duties of the Local Authority Guardian and The Support and Supervision of Non-Local Authority (Private) Welfare Guardian and Other Proxies

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West Dunbartonshire Community & Health Care Partnership

Adults with Incapacity (Scotland) Act 2000 Procedures

Welfare Guardianship Orders

Guidance Note: The duties of the Local Authority Guardian & the Support and Supervision of Non-Local Authority (Private) Welfare Guardians and other Proxies

Contents:

- 1. Introduction**
- 2. Purpose and Scope of the Guidance**
- 3. Guidance Note Format**
- 4. Part 1: Supervising and Supporting Private Welfare Guardians**
- 5. Purpose of Supervision/Support**
- 6. Access to the Adult and Guardian**
- 7. Addressing Matters of Concern**
- 8. Joint Welfare and Financial Guardianship Orders**
- 9. The Review Process and Recording**
- 10. Conflict of Interest**
- 11. Part 2: The Role of Day-to-day Guardian (Local Authority Welfare Guardianship Orders)**
- 12. Who Should be the Day-to-day Guardian**
- 13. Accessibility of Day-to-day Guardian**

14. Financial Considerations

15. Visiting the Adult and Reviewing the Order

16. Non-compliance with the Order

17. Renewing an Order

18. Recall of a Welfare Guardianship Order

19. Transferring Responsibility to Another Local Authority

1. Introduction

The 2000 Act confers duties upon local authorities when welfare guardianship orders are granted.

Section 10 of the Act requires that the local authority supervise and support an appointed non-local authority (hereafter referred to as *private*) guardian.

Under Section 53 of the Act, local authorities are obliged to apply to become welfare guardians in respect of an adult if this is deemed necessary, and if no application has been made or is likely to be made by any other person(s).

Section 59(1) and (2) sets out the duty on the local authority to *act* as guardian. Once granted, the local authority must routinely review the requirement for the order to remain in place as consistent with the principle of least restriction.

A number of further duties are conferred upon local authorities, and these will be referred to as appropriate throughout this guidance.

2. Purpose and Scope of the Guidance

This guidance has been produced in order to ensure that appointed officers of West Dunbartonshire CHCP discharge their duties on behalf of the local authority in a

consistent and professional manner that is in adherence with the principles of the 2000 Act.

While the guidance sets out the statutory duties associated with the supervision of guardians and functions of local authority day-to-day guardians, it should be remembered that the legislation prescribes the minimum requirements that must be in place to discharge these duties. It will be for the appointed officers and their supervisors to develop and implement appropriate, tailored approaches to each case based on regular assessment and review of need, complexity, and proportionality.

The guidance is largely drawn from two publications that are readily available for reference.

The Scottish Government *Code of Practice for Local Authorities Exercising Functions under the 2000 Act* was published in April 2008, and can be accessed online for the following link:

<http://www.scotland.gov.uk/Publications/2008/03/20114619/0>

In 2011, the Social Work Inspection Agency and Mental Welfare Commission for Scotland jointly published the practice guide, *Supervising and Supporting Welfare Guardians*. This publication can be accessed via the following link:

http://www.scswis.com/index.php?option=com_docman&task=doc_details&gid=402&Itemid=378

It is suggested that all relevant staff and their supervising officers familiarise themselves with the above publications. It should also be noted that the national legislative provisions surrounding the supervision of private proxies in particular are subject to review, and, as such, all related guidance is liable to amendment. Local policy and guidance will reflect any changes as they come into effect.

3. Guidance Note Format

Part 1 of the current guidance will focus on the duties associated with the supervision and support of private welfare guardians. **Part 2** will pertain to the duties of the delegated day-to-day guardian in respect of local authority welfare

guardianship orders. Reference will also be made to further provisions and requirements as appropriate.

4. Part 1

Supervising and Supporting Private Welfare Guardians

Local authorities must timeously appoint a supervising officer who will periodically visit the adult, and will maintain a minimum level of contact with the guardian in accordance with these timescales. Regulations stipulate the intervals within which the local authority must arrange visits.

In respect of private guardianship cases, **an initial visit should take place within three (3) months of the order being granted.** It should be noted that the local authority might receive notification of the granted order some weeks after the sheriff's decision. **Thereafter, further visits should take place at intervals of no more than six (6) months** throughout the duration of the order.

Where the adult lives out with the local authority area, the visiting function may be delegated, but the 'home' or named local authority retains the supervisory responsibility. If the visiting function is delegated, expectations as to how this will be undertaken should be clear, specific, and agreed. It is the responsibility of the named local authority to ensure that this agreement is adhered to.

Occasionally, an order will be granted for a period of less than one year. In such circumstances, the regulations pertaining to visiting the adult are different. The local authority must arrange for the adult to be visited within 14 days of the mid-point of the period for which the order has been granted. For example, if an order is granted for three months, this might be calculated as approximately 12 weeks, and the adult must therefore be visited between the beginning of week 4, and the end of week 7. A further visit must be undertaken within 14 of the expiry date of the order.

The requirements in respect of orders of duration under one year potentially present considerable challenges when taken in the context of the time that often elapses between the order being granted and the local authority receiving formal notification.

Where it is anticipated that this could be problematic, appointed officers should discuss this with their line manager in the first instance.

5. Purpose of Supervision/Support

The newly appointed guardian should be aware of the local authority's statutory duty to appoint a supervising officer. If it is apparent that the guardian has not been advised of this, or remains unclear as to the purpose and nature of the supervisory function, the supervising officer should explain this at the earliest opportunity. This can often serve to limit the potential for conflict that might arise from a lack of clarity as to respective roles and responsibilities. It can be particularly helpful to highlight the fact that the local authority, in appointing a supervising officer, is discharging its statutory duties, as opposed to employing discretion based on case specifics.

The purpose of supervision is to monitor the welfare of the adult, while seeking to ensure that the guardian has the necessary advice, guidance, and support to appropriately discharge the functions associated with the role.

Supervision should be proportionate to the needs of both the adult and the guardian, and should not be unnecessarily intrusive. It will often be appropriate to offer an increased level of support during the early stage of the guardianship order being in place, in order to support the guardian in becoming familiar with the role. This will often include the provision of information and advice as to how to access appropriate services.

The role of the supervisor centres on the welfare of the adult, and, as such, it is imperative that the supervisor is aware of the key elements of the current care plan. Equally important is the requirement to know who is responsible for taking necessary action in respect of the care plan, and this will often be the guardian who is likely to have primary decision making authority. The supervisor will have access to the powers contained in the guardianship order, and, as such should consider these when evaluating the extent to which the guardian is appropriately discharging his or her duties.

The guardian might require advice and guidance as to the scope of their powers as contained in the order. If the supervisor is of the view that the powers are insufficient, this should be discussed with the guardian. Similarly, if it is believed that the guardian is acting beyond the scope of the powers, there may be grounds to address this, as it is in the interest of the adult *and* the guardian to ensure that the terms of the guardianship order are adhered to.

As with a local authority guardianship order, it is important to routinely consider whether the requirements for guardianship remain. The circumstances of the adult can change to the extent that statutory measures may no longer be required, and this should be discussed with the guardian as appropriate.

6. Access to the Adult and Guardian

A key factor of effective supervision is the extent to which the supervising officer can access the adult and the guardian as required.

As noted above, in circumstances where the adult lives in another area from the supervising local authority, the visiting function can be delegated.

It is not uncommon for guardians to live in a different part of the country from the adult, and occasionally abroad. This should not automatically be considered as presenting an impediment to the guardian effectively discharging their functions in an appropriate manner.

Where the guardian lives in another area, it is acceptable to undertake interviews by telephone. Consideration should be given to the extent to which the guardian has maintained contact with the adult and any care provider. If unable to visit personally, the guardian might have an arrangement in place whereby the adult is visited by another family member or friend who in turn provides updates as to the former's progress. Increasingly, joint guardianship applications are submitted, and this is often preferred on the grounds that one of the applicants can more readily maintain routine contact with the adult and care providers.

7. Addressing Matters of Concern

When discharging the functions associated with the supervision role, the supervisor should always relate to the principles of the 2000 Act, and the principles should also guide the guardian. If the supervisor is of the view that the guardian is not acting in accordance with the principles, it will be necessary to address such concerns. The designated officer should discuss also this with his/her supervisor as matters that remain unresolved might prompt further action on the part of the local authority. In cases of particular complexity, advice can also be sought from a Mental Health Officer (MHO) and/or an officer of the CHCP's legal service.

In all cases, it is important to take account of the possibility that the guardian has reason to believe that s/he is acting in the best interest of the adult. As such, it should not be assumed that any matters of contention cannot be resolved through discussion and negotiation in the first instance. On occasion, it might be helpful to introduce another party to assist in addressing problematic developments. One option would be to access the local independent advocacy service with a view to ascertaining the adult's views where possible, or it might be appropriate to refer to the matter to the Mental Welfare Commission for Scotland for guidance.

8. Joint Welfare and Financial Guardianship Orders

The local authority does not have responsibility for supervising the financial element of any guardianship order. This lies with the Office of the Public Guardian (OPG). This does not preclude the supervising officer supporting the guardian in matters relating to finances and property, but it should be noted that this is not a formal function of the supervisor.

There are circumstances whereby the supervisor should liaise with the OPG, and these would include where any concerns exist in respect of the guardian's management of the adult's finances.

9. The Review Process and Recording

The CHCP's minimum standards for case recording must be adhered to in respect of all council officer supervisory duties. All contacts with the adult, guardian, care providers and any other relevant parties must be recorded as appropriate.

It is not necessary to complete formal review paperwork in respect of all cases, but general recordings must indicate where the officer was acting in the capacity of appointed supervisor, and evidence of line manager supervision must be present. Discretion should be applied as to when more formal recording mechanisms should be utilised (for example, in respect of complex cases).

The Mental Welfare Commission for Scotland will periodically request copies of review paperwork and/or recordings relating to the supervision of private (and local authority) guardianship orders. It is not necessary to routinely forward copies of reports, minutes, or recordings. However, when a specific request is received, this should be facilitated.

Supervising officers should also alert the Commission as to any significant concerns and investigations, following discussion with the appropriate line manager and the MHO service/legal section.

10. Conflict of Interest

There will be occasions when consideration must be given to the potential for conflict of interest arising in respect of a supervising officer discharging his/her duties. While this might often be perceived as to an actual conflict of interest, it should be acknowledged that such a perception can serve to undermine the extent to which the supervising officer can discharge the functions associated with the role in an appropriate manner.

Where a potential conflict of interest exists, the relevant manager should consider arranging for the appointment of another supervising officer.

An example of where a potential conflict of interest might arise is the situation whereby the adult's care manager is also the supervising officer in respect of a private guardian, and the latter is in dispute with the local authority surrounding elements of the care plan. While it is usually possible to negotiate a resolution to

such disputes, often with the direct support of the appropriate line manager (and/or perhaps an MHO), it must be acknowledged that in certain situations this cannot be achieved. In such circumstances, it might be prudent to consider the appointment of an alternative supervising officer or care manager in order to clearly differentiate between the respective roles.

11. Part 2

The Role of Day-to-day Guardian (Local Authority Welfare Guardianship Orders)

When the sheriff grants a welfare guardianship order following application by the local authority, the certificate names the Chief Social Work Officer as the guardian. The role of discharging the duties associated with the order will be delegated to an officer of the local authority who will be known as the *day-to-day guardian*. It is the responsibility of the Chief Social Work Officer to arrange notification of the adult (unless otherwise specified by the Sheriff), the Office of the Public Guardian, and the Mental Welfare Commission as appropriate, as to the name of the officer appointed as day-to-day guardian. This notification must be made no later than seven days from the local authority receiving confirmation of the order being granted.

In common with all nominated guardians, the day-to-day guardian will act in a manner that is consistent with the principles of the legislation. The day-to-day guardian will also undertake his or her duties in accordance with all relevant local and national policies, and should be familiar with the local authority's Adults with Incapacity (Scotland) Act 2000 (AWI Act) procedures and the relevant codes of practice.

12. Who Should be the Day-to-day Guardian?

The AWI Act does not specify who should be appointed as day-to-day guardian, but the code of practice indicates that “it would be appropriate in most cases for the person to whom the role has been delegated to have a specified locus in the local authority’s assessment and care management procedures” (pp56 – source link provided above). In practice, this would generally mean that the allocated care manager assume the role of day-to-day guardian, as s/he would already have a professional knowledge of the case, is likely to have undertaken an assessment, and will be familiar to the adult and any carers.

It is unlikely that a case will have progressed to the submission of a welfare guardianship order in the absence of an allocated care manager. In any instance whereby this has been the case, or where the previous care manager has relinquished responsibility, the relevant manager must ensure that a care manager is allocated as a matter of priority. In most circumstances, this officer will also be the nominated day-to-day guardian.

13. Accessibility of Day-to-day Guardian

It will be the responsibility of the designated guardian to ensure that all relevant parties (the adult; carer; and other proxy – eg: financial power of attorney; primary care provider etc.) have accurate contact details to ensure that s/he can be accessed as required. In the event of the guardian being away from work due to annual leave or sickness, arrangements must be in place in respect of a substitute guardian. The latter might be the routine guardian’s line manager, or a team colleague as designated for this purpose.

Where out of hours services are in place, all parties must be furnished with relevant contact details.

14. Financial Considerations

Local authorities cannot act as financial guardians in respect of an adult who lacks capacity. Notwithstanding this, the day-to-day guardian must give consideration to the adult’s financial circumstances, with the principles of the legislation as a guide in

this regard. If there is another proxy with financial powers, the day-to-day guardian should liaise with that individual or organisation with a view to ensuring that the adult's finances are managed in a controlled manner that is consistent with his or her best interests.

Where there is no-one in place with powers to manage the adult's finances, and it is deemed that provision is required in this respect, the day-to-day guardian should discuss options with the appropriate line manager, a mental health officer (MHO) colleague, or a representative from the local authority's legal service.

15. Visiting the Adult and Reviewing the Order

The prescribed timescales for visiting an adult subject to a local authority welfare guardianship order are the same as those prescribed in respect of the supervision of private guardians (see above).

Guardianship orders are granted for a specified period of time, or on an indefinite basis. Regardless of the duration of the order, there will be an ongoing requirement to review the necessity and appropriateness of the order. As such, the day-to-day guardian is responsible for ensuring that such reviews are undertaken and recorded.

The form that reviews of a guardianship order take is not prescribed in the legislation, and there is no specific template or pro-forma paperwork for this purpose.

In complex cases, it might be appropriate to arrange a multi-disciplinary case review with a minute taken and follow-up actions recorded as appropriate. In other cases, it will be sufficient to record visits on CareFirst (or equivalent), and to discuss the progress of the adult during formal supervision sessions.

16. Non-compliance with the Order

The day-to-day guardian must have a clear understanding of the scope of the powers contained within the order, and also the limitations thereof. For example, the

use of physical restraint, for example, is not a matter that should be considered as falling within the scope of a welfare guardianship order. Clarity should be sought from the MHO and legal services as required.

The areas of compulsion, detention, and restraint are legally and ethically complex and sensitive, and as such, the default position should always be that specialist advice and guidance must be sought where matters of this nature are being considered.

There is provision within the AWI Act (Section 70) whereby welfare guardians can apply to the sheriff for an order compelling an adult to comply with the decision of the guardian. An example of this might be where the adult is resisting moving into a residential care placement.

The provisions contained within Section 70 will only be applicable in exceptional circumstances, and after every effort has been made to support the adult to engage with the day-to-day guardian's decision.

17. Renewing an Order

As noted above; it is the responsibility of the day-to-day guardian, in consultation with relevant others, to routinely review the requirement for the order to remain in place.

When it is deemed necessary for a guardianship order that has not been granted for an indefinite period to be renewed, a referral will be made to the MHO service manager and the local authority's legal service. An application for the renewal of a guardianship order will be accompanied by a report by an appropriate medical practitioner and a further report by an MHO (or in cases of inability to communicate due to a physical condition, the Chief Social Work Officer).

The Office of the Public Guardian will alert the local authority to the expiry date of a welfare guardianship order no later than three months prior to the date of expiry. The day-to-day guardian should then discuss the option of applying for renewal with his or her line manager.

18. Recall of a Welfare Guardianship Order

In circumstances whereby it is deemed no longer appropriate for an order to be in place, this can be recalled. The process for recalling an order is to formally notify in writing, the adult; named person (if applicable); primary carer, Office of the Public Guardian; Mental Welfare Commission for Scotland; and any other relevant party who might have an interest. Where any objection to the proposed recall is raised, the local authority must remit the matter to the sheriff for consideration.

In order to progress the matter of recalling an order without undue delay, it is appropriate to indicate in the letters of notification that if no contrary representations are received within a fixed and reasonable period of time (perhaps four weeks), then it will be assumed that no such objections exist.

19. Transferring Responsibility to Another Local Authority

Section 76 of the AWI Act requires the Chief Social Work Officer (CSWO) to inform his or her counterpart in another local authority if the adult moves to this area. It is then the responsibility of the CSWO of the receiving authority to notify the Office of the Public Guardian, and, where appropriate, the Mental Welfare Commission.

It is good practice to allow for a period whereby the progress of the adult in his or her new place of residence is monitored prior to seeking a full transfer of responsibility to the receiving local authority. On occasion, the adult might not settle in a new placement, and a return to the previous place of residence will be considered. In this event, an immediate transfer of responsibility might not be beneficial as regards issues of continuity and consistency.

It is suggested that a 'settling-in' period of three months in a new placement would be appropriate in most circumstances. Thereafter, the day-to-day guardian should liaise with the CSWO with a view to transferring full responsibility for the guardianship order to the receiving local authority.

