

Fact Sheet on: Guardianship



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Please note:

If you require legal representation, we will be happy to help you find a Solicitor.



(pronounced Kier-tis) is a Gaelic word for equality, fairness and justice.

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What is Guardianship?

A Guardianship Order is a Court Order issued under the Adults with Incapacity (Scotland) Act (2000), through which a Sheriff appoints a person or organisation (known as the Guardian) to look after the affairs of someone who lacks the capacity to make decisions about these things for his- or herself (the subject of the Guardianship Order is often referred to as the Adult).

A Guardianship Order also sets out the scope and limits of the decisions that the Guardian can make on behalf of the Adult. Guardianship Orders can last for three years, or in some circumstances they can be made indefinite.

What do Capacity and Incapacity mean?

Everyone is presumed to have the capacity to make decisions for his- or herself unless or until they are assessed as being incapable of doing so. Someone is deemed as lacking capacity when they are not capable of acting on decisions, or making decisions, or communicating decisions, or understanding decisions, or retaining the memory of decisions.

Capacity could be impaired suddenly as a result of an incident such as a stroke or a brain injury; or more gradually due to a progressive condition like dementia or Parkinson's Disease.

Although a registered medical doctor will normally assess the Adult's capacity, decisions about capacity and incapacity are ultimately legal matters, and the authority to make and challenge these decisions lies within the legal system and not the healthcare system.

If someone is assessed as lacking capacity, their decision-making abilities will be affected in relation to certain aspects of their welfare or finances. But capacity is not an all-or-nothing decision: someone who lacks the capacity to make complex financial decisions may still have the capacity to decide what clothes to wear or what to have for their dinner.

The five principles of the Adults with Incapacity (AWI) Act require that the Adult is allowed to make any decisions that they are capable of making on their own, and that their views and preferences are taken into account in decisions that they are not capable of making on their own.

Please ask us for more information about the five principles of the AWI Act.

Why would you apply for Guardianship?

When an adult loses the capacity to make their own decisions, there is no legal basis for anyone else to take on that responsibility and make those decisions **unless the adult has granted Power of Attorney prior to their loss of capacity.**

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Next-of-kin has very little meaning under Scots Law: sons, daughters and spouses cannot legally make decisions for someone who can no longer make decisions for his– or herself. In these circumstances, they would need to make an application to the Court for a Guardianship Order for the Adult.

If, however, the Adult has registered a Power of Attorney with the Office of the Public Guardian (Scotland), no application for Guardianship will be allowed to proceed through the Courts.

Who can apply for Guardianship?

Anyone can apply to the Court for Guardianship - a partner, a family member, a friend or a professional like an accountant or a lawyer. In the absence of a personal contact it may be the Social Work department that makes the application.

How much does it cost, and who pays?

Applying for Guardianship is a Civil Court Case and will have associated costs, but in most cases it is eligible for Legal Aid. The Adult who is the subject of the Order, not the applicant, is deemed to be responsible for the legal costs.

If the Guardianship application includes Welfare Guardianship, the Adult will be eligible for free, non-means-tested Civil Legal Aid for the Court proceedings aspect of the application.

If the application is only for financial Guardianship, Civil Legal Aid for the Court proceedings is available, but will be means-tested on the circumstances of the Adult.

Legal costs to complete the paperwork, make the application and register the order may be eligible for means-tested Advice and Assistance Legal Aid. Eligibility for Advice and Assistance Legal Aid also depends on the financial circumstances of the Adult who is the subject of the application, not the applicant.

If you are intending to apply for Legal Aid for a Guardianship application, you need to ensure that the solicitor you use is registered with the Scottish Legal Aid Board (SLAB). Registered Solicitors will usually display this symbol in their window or on the signage of their premises.



Who is the Guardian responsible to?

There is no ongoing supervision for Guardians, but they are responsible for their actions in relation to the person they are Guardian for. If any concerns are raised with the relevant supervisory body, there may be an investigation.

Guardians should keep a record of the financial transactions they make on behalf of the Adult, and they should keep the Adult's money separate from their own money.

The Office of the Public Guardian (Scotland) has a supervisory role for financial and property matters, and the Social Work department has a supervisory role for welfare matters.

There is guidance available for Guardians, please ask us for more information.

How can Ceartas help?

Ceartas can provide you with information about how to go about applying for Guardianship, but our principal role would be to provide an independent voice for the Adult subject to the application.

To avoid any conflict of interest, Ceartas would not directly support you to make an application, but we can provide supporting evidence about the Adult's views and preferences in relation to you becoming their Guardian. This supporting evidence should add credibility to your application for Guardianship.