

SHERIFFS' BRIEFING NOTE ON CHILDREN'S LEGAL AID BY THE SCOTTISH LEGAL AID BOARD

Children's legal aid for sheriff court proceedings arising under Chapters 2 and 3 of Part II of the Children (Scotland) Act 1995.

The Scottish Legal Aid Board has produced a Children's Legal Assistance Handbook which is available on its website at www.slab.org.uk. This Handbook, which is regularly updated, contains detailed guidance on children's legal aid and a full text of the legal aid statutory provisions referred to in this briefing paper.

Safeguarders and Curators ad Litem – Chapter 10 of the Handbook explains in detail the legal aid position for persons who hold these offices and it is advised that this Chapter is referred to when an application for legal aid is made on behalf of a child by such a person.

*In addition, should a sheriff or sheriff clerk require to contact a Board solicitor regarding any children's legal aid matter then the named contact persons are: **Elizabeth Cuschieri** (Direct dial: **0131-240-2179**) and **Laura Thomson** (Direct dial: **0131-240-1896**).*

A. Definition and Availability of Children's Legal Aid

Children's legal aid is defined in S29 (11) of the Legal Aid (Scotland) Act 1986. It consists of representation by a **solicitor** and, where appropriate, by **counsel** in proceedings listed in S29 (1) and shall include all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to such proceedings.

This definition does not include therefore representation by a curator *ad litem* or a safeguarder even where that person so happens to be a practising solicitor. Chapter 10 of the Children's Legal Assistance Handbook referred to in the preamble above contains detailed information regarding applications for legal aid made on behalf of these offices and explains what can and cannot be paid for from the Legal Aid Fund. For example, a curator *ad litem* could elect to be both the curator *ad litem* to the child and the solicitor to the child. In this case payments from the Fund can be made to this curator-solicitor but only in respect of representation carried out qua solicitor.

In terms of S29 (1), children's legal aid is available for proceedings before the sheriff (including appeals to the Sheriff Principal) in respect of any matter arising under Chapters 2 or 3 of Part II of the Children (Scotland) Act 1995 and for related appeals to the Court of Session.

Chapters 2 and 3 of Part II of the Children (Scotland) Act 1995 concern children's panel hearings and associated court hearings along with Exclusion Orders sought by Local Authorities.

S29 (2) of the 1986 Act provides that legal aid is available to a **child** and any **relevant person** in relation to him in: -

- (a) proceedings before the sheriff on an application for a child protection order or child assessment order or for the variation or recall of such an order;
- (b) an appeal to the sheriff against any decision of a children's hearing including a decision to grant a warrant;
- (c) an application to the sheriff for a finding as to whether the grounds for referral are established or for a review of such a finding;
- (d) proceedings before the sheriff on an application for an Exclusion Order or for the variation or recall of such an order;
- (e) an appeal to the Sheriff Principal or to the Court of Session against a decision of the sheriff and an appeal (with leave of the Sheriff Principal) to the Court of Session against a decision of the Sheriff Principal.

Children's legal aid is not therefore available to a curator *ad litem* or to a safeguarder in their own right although such offices can make an application on behalf of the child or incapable adult. Chapter 10 of the Children's Legal Assistance Handbook is again referred to in this respect and explains this in more detail if required.

Applications for legal aid in proceedings specified at (a) to (d) above are made to and considered by the **sheriff** who requires to apply specified statutory tests in reaching a decision.¹

Applications for legal aid in proceedings specified at (e) above are made to and considered by the **Scottish Legal Aid Board**.

Children's legal aid will not be available for any other proceedings arising from Chapters 2 or 3 of Part II of the Children (Scotland) Act 1995 that are not specifically listed in S29 (2) of the Legal Aid (Scotland) Act 1986, for example, for Petitions for Judicial Review or appeals to the Nobile Officium².

¹ See Paragraph C

² Civil legal aid is available for these proceedings and an application for civil legal aid is made to the Legal

B. Application Process

Form of Application

All applications to the sheriff for children's legal aid must be made in writing other than applications for legal aid to appeal a decision of a children's hearing to grant a warrant for the detention of the child which can be made "orally or otherwise"³.

Applications are almost always made on the Scottish Legal Aid Board's form "CHILD/APP" but they can be in any other written form as the sheriff may require⁴.

It is also important to note that the Scottish Legal Aid Board form "CHILD/APPL/APP" is used for applications to the **Board** for legal aid to appeal a decision of the **sheriff**. Any such form submitted to the sheriff court should therefore be rejected. An application for legal aid to appeal a decision of a **children's hearing**, as opposed to a decision of a sheriff, is made to the **sheriff** on the "CHILD/APP" form.

A written application for children's legal aid requires to be brought as soon as possible before the sheriff⁵.

If the sheriff grants the application the sheriff clerk requires to intimate this to the Scottish Legal Aid Board⁶.

In practice, the legal aid application that has been granted is sent to the Board who, in turn, registers this grant and intimates this to the solicitor and applicant along with an allocated legal aid reference number for any subsequent sanction applications made to the Board and for submission of the legal aid account.

Although not required by regulation, it is also of great statistical assistance to the Board to receive notification from the court of refusals of legal aid applications. The "CHILD/APP" form at PART F provides a box to be ticked if legal aid is refused. If it is at all possible it would also be of great assistance to the Board if a brief reason could be provided for this although again it is appreciated that this information is not required by regulation.

Aid Board

³ Regulation 4 Legal Aid (Scotland) (Children) Regulations 1997 [S.I. 1997 No. 690]

⁴ Regulation 4 (2) Legal Aid (Scotland) (Children) Regulations 1997

⁵ Rule 3 (2) Act of Sederunt (Legal Aid Rules) (Children) 1987

⁶ Rule 4 Act of Sederunt (Legal Aid Rules) (Children) 1987

Supporting Documentation

Any such written legal aid application should, where possible, be considered alongside other court papers relating to the proceedings.

In an application for legal aid concerning a grounds for referral finding, for example, the application could be considered alongside the application to the sheriff by the Principal Reporter under Section 65 Children (Scotland) Act 1995⁷, and the copy of the grounds for the referral or, alternatively, alongside the applicant's service copy of the Reporter's application. The sheriff requires to be satisfied that an application under S65 is actually being made by the Reporter, as opposed to simply being contemplated.

In an application for legal aid concerning an appeal against a children's hearing decision, for example, the application could be considered alongside a copy of the decision that is being appealed.

It is important that a sheriff is persuaded that the application for legal aid does indeed relate to a live children's court proceeding in order to prevent fraud.

During 2004-2005⁸, the Board uncovered a children's legal aid fraud where a solicitor had fabricated documents including legal aid accounts and some children's legal aid applications to fraudulently obtain £1.8 million from the Legal Aid Fund over a seven year period.

This particular solicitor, who was often appointed to act as safeguarder and/or curator *ad litem* to the child, had on various occasions submitted children's legal aid applications to the court which were granted. On further examination of the accounts then submitted to the Board for payment it became apparent from checking court records that there was no trace of any such case having taken place in court.

It is therefore essential that courts are aware of this potential for abuse and try to take steps to minimise this possibility. The Legal Aid Board has now introduced further verification checks at the accounts stage to minimise future risk of fraud in this area.

Number of Applications Required

If an application for children's legal aid is being made by a solicitor on behalf of a relevant person who has more than one child subject to the court proceedings in question, the Board does not expect to receive separate grants of legal aid by the sheriff for each child as this can distort statistics, cause unnecessary administration for all concerned and can lead to

⁷ Form 60

⁸ Scottish Legal Aid Board Annual Report 2006-2007, page 36

duplication of charges by solicitors when submitting multiple accounts for payment to the Board.

Only **one** application on behalf of the relevant person therefore requires to be submitted to the sheriff irrespective of the number of children subject to court proceedings assuming, of course, that the proceedings in respect of each child will be conjoined or held simultaneously or concurrently.

An applicant, however, requires to make a separate children's legal aid application for each distinct court proceeding.

For the purposes of children's legal aid, the following types of cases are treated as distinct proceedings⁹:

- (a) an application to the sheriff for a child assessment order under section 55;
- (b) an application to the sheriff for a child protection order under section 57;
- (c) an application to the sheriff to vary or recall a child assessment order;
- (d) an application to the sheriff to vary, recall or set aside a child protection order under section 60;
- (e) an application to the sheriff for a finding under section 65(7) or (9);
- (f) an application to the sheriff for a review of a finding under section 85;
- (g) an application to the sheriff for an exclusion order under section 76;
- (h) an application to the sheriff to vary or recall an exclusion order under section 79;
- (i) an appeal to the sheriff under section 51(1) against a decision of a children's hearing to grant a warrant as mentioned in section 51(5)(a);
- (j) an appeal to the sheriff under section 51(1) against a decision of a children's hearing, other than an appeal to which sub-paragraph (i) above applies;
- (k) an appeal to the sheriff principal under section 51(11)(a) (including proceedings following a remit to the sheriff under subsection (14) of that section, which proceedings shall accordingly not be treated as distinct proceedings);
- (l) an appeal to the Court of Session under section 51(11)(b) (including proceedings following a remit to the sheriff under subsection (14) of that section, which proceedings shall accordingly not be treated as distinct proceedings);
- (m) an appeal to the sheriff principal from a decision of the sheriff on an application for an exclusion order or for the variation or recall of an exclusion order;
- (n) an appeal to the Court of Session from a decision of the sheriff or the sheriff principal on an application for an exclusion order or for the variation or recall of an exclusion order.

So, for example, if the child's mother wishes to appeal against a decision of a children's hearing to grant warrants in respect of her three children and also wishes to defend an application to the sheriff by the Reporter for a finding regarding grounds for referral relating to her three children, she would require to submit two legal aid application forms to the sheriff court. One in respect of the warrant appeal and the other in respect of the grounds of referral proof. It is explained later that the sheriff may have to consider different statutory tests¹⁰ depending on the type of proceeding and accordingly, separate legal aid

⁹ Regulation 3 Legal Aid (Scotland) (Children) Regulations 1997

¹⁰ See paragraph C

applications are required. One application for each proceeding is, however, sufficient as opposed to requiring three for each of her three children.

Capacity to Instruct

It is also important to ensure that if an application is made by a solicitor purporting to directly represent the child, the sheriff requires to be satisfied that the child in question has sufficient capacity to directly instruct that solicitor.

In the past the Board has received notification of grants of legal aid to children who are under three years of age and clearly do not have sufficient capacity to directly instruct a solicitor in respect of the proceedings in question. In such circumstances the Board has registered the grant of legal aid but refused to pay the account submitted by the solicitor as legal services cannot be provided to a child that lacks sufficient capacity to instruct a solicitor.

C. The Statutory Tests Upon Which a Sheriff Requires To Be Satisfied Before Granting Children’s Legal Aid

- Interests of the child
- Undue hardship
- No other rights or facilities.

D. Interests of the Child

Except where the case concerns an exclusion order¹¹ or an appeal against a decision of a children’s hearing to grant a warrant for the detention of a child,¹² the sheriff must be satisfied that it is in the interests of the **child** that legal aid be made available to the applicant who may not necessarily be the child himself/herself.¹³

The extent to which it may be in the interests of the applicant or any other person(s), other than the child or children in question, that legal aid may be made available should never therefore be a relevant consideration for the sheriff.

The Act does not define what “the interests of the child” means or specify any factors to be taken into account in considering this. The sheriff therefore has complete discretion in this connection.

¹¹ S29 (8) Legal Aid (Scotland) Act 1986 and see Paragraph H

¹² S29 (3) and (4) of the Legal Aid (Scotland) Act 1986 and see Paragraph G

¹³ S29 (4) (a) Legal Aid (Scotland) Act 1986

However, it is fair to say that the greater the number of parties in a proceeding, the greater amount of court time is likely to be expended due to, for example, lengthier cross-examination, increased number of witnesses etc, contrary to the aim of these proceedings.

In terms of S16 (1) of the Children (Scotland) Act 1995 the welfare of the child should be the court's paramount consideration.

Also, it is widely accepted in this respect that such proceedings should be dealt with expeditiously.

In offence-based grounds of referral in terms of S52 (2) (i) of the Children (Scotland) Act 1995, for example, where the Reporter is attempting to establish that the child has committed a criminal offence, the sheriff should ask himself/herself if it is in the interests of the child (who is in receipt of legal aid and therefore has legal representation) for both his parents, in addition, to be granted legal aid when they are not implicated in and probably have no knowledge of the alleged grounds for referral?

In truancy grounds of referral in terms of S52 (2) (h) of the Children (Scotland) Act 1995, for example, if both parents' positions are identical then is it in the child's interest that both parents be granted legal aid and have separate legal representation, thus potentially adding to the length of the proceedings?

E. Undue Hardship

Except where the case concerns an appeal against a decision of a children's hearing to grant a warrant for the detention of a child¹⁴ the sheriff must also be satisfied, after considering the financial circumstances of the child and any other relevant person, that the expenses of the case cannot be met without undue hardship to the child or any relevant person in relation to him/her or the dependants of any of them¹⁵. This undue hardship test is also applied where the case concerns an application for an Exclusion Order (or for the variation or recall of such an order) in terms of S76 and S79 of the Children (Scotland) Act 1995.¹⁶

The Act does not define what "undue hardship" means and once again the sheriff has complete discretion in this matter.

The children's legal aid application form requires the applicant to provide information as to his/her financial circumstances which should assist the sheriff here. The sheriff may

¹⁴ S29(3) Legal Aid (Scotland) Act 1986 and see Paragraph G

¹⁵ S29 (4) (b) Legal Aid (Scotland) Act 1986

¹⁶ S29(8) Legal Aid (Scotland) Act 1986 and see Paragraph H

however require the applicant to provide additional information in this respect and, if considered appropriate, he can require that this information be given on oath¹⁷.

If the applicant is the child, the financial conditions will almost invariably be satisfied; however the sheriff must still consider whether the child has any income or capital. The fact that the applicant is a child does not automatically entitle the child to meet the undue hardship test. A child could for example have capital and/or income from a trust fund.

In 2006-2007 the average children's case cost was £1,126 per applicant¹⁸. However, there continues to be a small number of very expensive cases where the cost of each party in receipt of legal aid¹⁹ was over £50,000. In 2006-2007 there were nine such cases. One case concerned a S85²⁰ fresh evidence proof and the others concerned S65²¹ grounds for referral proofs involving S52 (2) (c) (d) (e) and (f)²² grounds for referral. All of these nine parties were represented by counsel.

Once the sheriff has been satisfied regarding the undue hardship test then he does not require to be satisfied again in respect of a further application from the applicant in any subsequent proceedings arising from such proceedings for which children's legal aid was originally granted²³. This does not, however, apply for proceedings concerning an appeal against a decision of a children's hearing to grant a warrant.

If it arises, the Act does not define what is meant by "any subsequent proceedings arising from such proceedings for which children's legal aid was originally granted". Accordingly, this is again left to the sheriff's discretion.

F. No Other Rights or Facilities

In all applications for legal aid, other than applications for legal aid to appeal a decision of the children's hearing to grant a warrant²⁴, where it appears to the sheriff that an applicant has available to him rights and facilities making it unnecessary for him to obtain legal aid, or where he has a reasonable expectation of receiving financial or other help from a body of which he, or, if a child, any relevant person is a member, the sheriff shall not, unless he is satisfied that there are special reasons for doing so, make legal aid available²⁵.

¹⁷ See paragraph I

¹⁸ Scottish Legal Aid Board Annual Report 2006-2007 page 72

¹⁹ Scottish Legal Aid Board Annual Report 2006-2007 page 31

²⁰ S85 Children (Scotland) Act 1995

²¹ Children (Scotland) Act 1995

²² Children (Scotland) Act 1995

²³ S29 (10) Legal Aid (Scotland) Act 1986

²⁴ See paragraph G

²⁵ Regulation 7 Legal Aid (Scotland) (Children) Regulations 1997

Other rights or facilities could include, for example, legal expenses insurance and, the Local Authority if the relevant person is a foster carer. Other bodies could include, for example, trade unions and the Police Federation.

Unfortunately, the current legal aid form does not specifically ask if the applicant has other rights or facilities or if he can obtain help from a body of which he is a member. The Board is however in the process of designing a new form which will specifically ask this question.

Therefore the sheriff will require to consider requesting further information from the applicant where it appears that this may be an appropriate consideration. An example could be where the applicant is the child's foster parent or where the relevant person's profession makes it likely that they are a member of a professional body. Information contained within any disputed supporting facts regarding the relevant person's occupation/employment status contained within the grounds for referral can sometimes assist in this respect.

The Regulations do not define what "special reasons" means or specify any factors to be taken into account in considering this. Again, the sheriff therefore has complete discretion in this connection.

An example, however, could be where the applicant is a foster carer and is applying for legal aid in relation to seeking a recall of a child protection order which has been sought by the Local Authority. The applicant could argue that it would not be appropriate for the Local Authority to fund their court application on the basis of the Local Authority's perceived lack of impartiality.

Where the sheriff makes legal aid available to a person who is a member or (if a child) whose relevant person is a member of a body which might reasonably have been expected to give financial help towards the cost of the proceedings, the sheriff must require him, or as the case may be his relevant person, to undertake in writing to pay to the Board any sum received from that body on account of the expenses of the proceedings²⁶.

G. Appeals Against Children's Hearing Warrants

Applications for legal aid to appeal a decision of the children's hearing to grant a warrant for the detention of a child can be made orally or otherwise²⁷.

On such an application being made to the sheriff, the sheriff does not have to make any enquiry into the child's or relevant person's resources²⁸ and the sheriff does not require to satisfy himself/herself that it is in the interests of the child that legal aid be granted.²⁹ In

²⁶ Regulation 7 (2) Legal Aid (Scotland) (Children) Regulations 1997.

²⁷ Regulation 4 (1) Legal Aid (Scotland) (Children) Regulations 1997.

²⁸ S29 (3) Legal Aid (Scotland) Act 1986.

²⁹ S29(4) Legal Aid (Scotland) Act 1995

addition to the absence of any financial and merits test the sheriff does not require to consider whether the child or relevant person may have other rights of facilities etc. available making it unnecessary to be granted legal aid³⁰.

In other words, for these proceedings the sheriff must grant the application without considering any statutory tests unless of course there is something fundamentally wrong with the application for example an incomplete written application by an applicant or where the appeal hearing has already taken place. **A sheriff cannot grant legal aid retrospectively.**

If an application is made orally and granted by the sheriff, the **applicant** thereafter requires to provide the Board in writing with details of the grant so that this can be registered accordingly.

It would, however, assist the Board if the sheriff clerk could write to or telephone the Board's Children's Administration Team³¹ to advise of this grant providing the name, date of birth of the applicant and the date legal aid was granted.

H. Exclusion Orders

Children's legal aid is available in proceedings before the sheriff concerning applications, variations and recall of Exclusion Orders described in S76 to S79 of the Children (Scotland) Act 1995³².

Children's legal aid is available not only to the child and any relevant person in relation to him/her but also to:-

- o a person who is a named person, or will be such a person if the application is granted;
- o a spouse or partner of a person mentioned above;
- o a person who is an appropriate person, or will be such a person if the application is granted³³.

A "named person" is a person named in an application for an Exclusion Order as the person who will be excluded from the child's family home if the order is granted.

³⁰ Regulation 7 (1) Legal Aid (Scotland) (Children) Regulations 1997.

³¹ Direct dial number – 0131-240-2171

³² Children's legal aid is not available for Exclusion Orders sought by an individual in terms of S4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 where an application to the Board for civil legal aid is required

³³ S29 (7) (a), (b), (c), (d) and (e)

An "appropriate person" is a person specified in the application for an Exclusion Order who is capable of taking responsibility for the provision of appropriate care for the child and any other member of the family who requires such care and who is , or will be , residing in the family home.

Where the case concerns an Exclusion Order, the sheriff does not have to consider whether it is in the child's interests to grant legal aid to the applicant. The sheriff still, however, has to consider the undue hardship test.³⁴

The sheriff requires to be satisfied, after consideration of the financial circumstances of the applicant and, where the applicant is a child, of any relevant person or appropriate person in relation to him/her, that the expenses of the case cannot be met without undue hardship to the applicant or any dependant of the applicant.³⁵

The sheriff must also be satisfied as to whether the applicant has other rights or facilities available to him/her making it unnecessary for him/her to obtain legal aid or if the applicant has a reasonable expectation of receiving financial or other help from a body of which he/she or, if a child, his relevant person, is a member.³⁶

Once legal aid has been granted in these Exclusion Order proceedings then it shall not be necessary for the undue hardship test to be satisfied again in respect of a further application from the applicant in subsequent proceedings arising from such proceedings³⁷.

I. Statements on Oath

The sheriff has statutory authority to require an applicant to make a statement on oath for the purpose of ascertaining or verifying any fact material to the applicant's entitlement to legal aid³⁸.

Where the possible existence of other rights or facilities, for example, appears to be a consideration then the sheriff could require an applicant to provide further information on oath regarding this issue.

J. Termination of Legal Aid

Both the sheriff court and the Court of Session have wide powers to direct that legal aid shall cease to be made available to an assisted person³⁹.

³⁴ S29 (8) Legal Aid (Scotland) Act 1986

³⁵ See Paragraph E

³⁶ Regulation 7(1) Legal Aid (Scotland) Children Regulations 1997 and paragraph F

³⁷ S29 (10) Legal Aid (Scotland) Act 1986

³⁸ Rule 6 Act of Sederunt (Legal Aid Rules) (Children) 1987

³⁹ Rule 5 Act of Sederunt (Legal Aid Rules) (Children) 1987

The court, after hearing from the assisted person, can terminate their entitlement to children's legal aid where it is satisfied that the assisted person has:

- o failed, without reasonable cause, to comply with a proper request from his/her solicitor to supply any information relevant to the proceedings;
- o delayed unreasonably to comply with a proper request from his/her solicitor to supply any information relevant to the proceedings;
- o wilfully given false information in connection with the proceedings to his/her solicitor or wilfully or deliberately concealed from him/her any information relevant to the proceedings;
- o failed, without reasonable cause, to attend any proceedings at which he/she has been required to attend or any meeting with his/her solicitor or counsel which he/she has reasonably and properly been required to attend; or
- o conducted himself/herself in connection with the proceedings in such a way as to make it appear unreasonable to the court that he/she should continue to receive legal aid.

Where the court directs that the assisted person shall cease to receive children's legal aid, the sheriff clerk or the Deputy Principal Clerk of Session, as the case may be, must send a copy of that direction to the Scottish Legal Aid Board⁴⁰.

⁴⁰ Rule 5 (2) Act of Sederunt (Legal Aid Rules) (Children) 1987