

The Auditor of Court
Sheriff Court
Beckford Street
Hamilton
ML3 0BT

[REDACTED]
Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh
EH3 7SW

10th July 2001



Dear Mr Haggarty


CHILDREN'S REFERRAL - [REDACTED]
ACCOUNT OF EXPENSES INCURRED BY COUNSEL

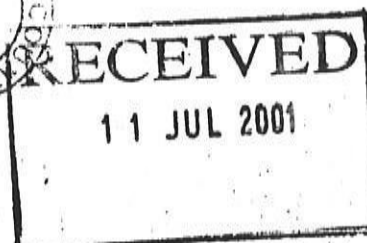
I refer to our telephone conversation of today in connection with the taxation of the Account of Expenses on 22nd June. As arranged I enclose a copy of the Account duly taxed by me, together with a Note thereon.

You will note that, as agreed at taxation (and subsequently confirmed by yourself and Mr Milne), The Board will pay my fee in full, and deduct the amount to be paid by each counsel from their respective fees. I have written in similar terms to Mr Milne today.

I look forward to receiving your cheque in settlement of my fee in due course, and wish to thank you for your assistance in this matter.

Yours sincerely


P. Feeney
Auditor of Court
Hamilton



ACCOUNT OF EXPENSES

Incurred by

COUNSEL

In CausaReferral by the Reporter to the Children's
Panel

to

HAMILTON SHERIFF COURT

and

M

MRS. MARIA A. CLARKE, ADVOCATE1999

June	30	Consultation at Glasgow (2 hours in length)	380-00	600.00
July	2	Hearing at Hamilton Sheriff Court	900-00	900.00
		VAT thereon	210-00	262.50
		Note on various medical experts required	300-00	300.00
		Note advising on further procedure	150-00	150.00
		VAT thereon	78-75	78.75
Sept	14	Consultation in Glasgow (1½ hours in length) relating to complex medical issues in respect of the injuries to the 2 young children	225-00	600.00
		Making appropriate internet research to identify suitable experts on Brittle Bone Disease	- - -	150.00
		VAT thereon	39-37	131.25

C/F £ 2,203-12 ~~3,172.50~~

<u>1999</u>		B/F	£41,260-62	76,811.25
Dec	20	Opposing parties to discuss further procedures	5,400-00	10,000.00
		VAT on the above	3,071-25	5,250.00
<u>2000</u>				
Jan	7	Consultation at Dundee with expert (5/6 hours) (5 ¹ / ₂ hours)	825-00	1,000.00
	8	Consultation at Dumfries with expert (3 hours)	450-00	1,000.00
	10	8 ⁴ / ₅ days Hearing at Hamilton Sheriff Court	5,400-00	10,000.00
	14	Consultation in Wales with expert	1,000-00	1,000.00
	17	4 ⁵ / ₈ days Hearing at Hamilton Sheriff Court	6,750-00	8,000.00
	24	8 ⁴ / ₅ days Hearing at Hamilton Sheriff Court (case adjourned)	5,400-00	10,000.00
		Note for experts (4 Notes at £120 each)	480-00	480.00
		VAT thereon	3,553-37	5,509.00
Feb	1	Preparation for submissions (40 volumes of evidence) - 42 written pages of submissions including consultation in Glasgow on the 21st of February with the Agents and Counsel for the other party (2 ¹ / ₂ days)	3,375-00	10,000.00
		VAT thereon	590-62	1,750.00
	9	Consultation in Glasgow with Agents (1½ hours)	225-00	600.00
	22	2 days Hearing at Hamilton Sheriff Court	2,700-00	4,000.00
Mar	6	5 days Hearing at Hamilton Sheriff Court	6,750-00	10,000.00
		VAT thereon	1,693-12	2,555.00
Sept	8	Hearing at Hamilton Sheriff Court (judgement)	1,000-00	1,000.00
		VAT thereon	175-00	175.00
Oct	31	Attendance at Hearing at Hamilton Sheriff Court	1,000-00	1,000.00
		VAT thereon	175-00	175.00
Total of Fees and VAT claimed by Mrs. Maria A. Clarke, Advocate			£91,273-98	160,305.25

101 261-25

D.P. Cheyne, Advocate1999

Nov 15 Two consultations with client - 2½ hours each consultation 750-00 ~~1,000.00~~

Dec 22 Preparation for and attendance at Inquiry at Hamilton Sheriff Court - 26 days charged at £1,500 per day (no charge made for 2nd and 3rd December when the Inquiry did not sit) - exceptionally complex case involving complex medical evidence in the areas of radiology, paediatric neurology, forensic dental pathology, clinical genetics (Mr. Cheyne was instructed at short notice due to the late non availability of the original Counsel and therefore worked intensely and exclusively on this case 35,100-00 ~~39,000.00~~

VAT thereon 6,273-75 ~~7,000.00~~

23 Attendance at Hamilton Sheriff Court conducting further 14 days of Inquiry 18,900-00 ~~21,000.00~~

VAT thereon 3,307-50 ~~3,675.00~~

2000

Feb 28 Attendance at lengthy consultation (one half day) 450-00 ~~500.00~~

29 Attendance at further consultation 225-00 ~~250.00~~

Mar 2 Meeting with Counsel for the mother to agree to joint written submissions relating to fax and preparation of written submissions - ~~750.00~~

Further 6 days of Inquiry at Hamilton Sheriff Court 8,100-00 ~~9,000.00~~

VAT thereon 1,535-62 ~~1,837.50~~

Total fees claimed by D.B. Cheyne, Advocate £ 74,641-87 ~~84,012.50~~

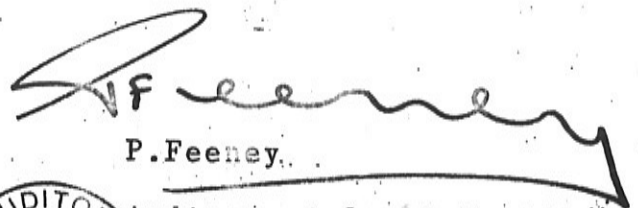
Total fees claimed by Maria A. Clarke, Advocate £ 91,273-98 ~~150,000.00~~

£ 165,915-85 £ 244,012.50

I have examined the foregoing Account of Expenses and hereby tax same as set out therein. I find Mrs.M. Clarke, Advocate entitled to payment from The Scottish Legal Board (The Board) in the sum of £91,273.98 and Mr. D.Cheyne, Advocate entitled to payment in the sum of £74,641.87.

In respect of my fee as Auditor of Court I fix same at the sum of £9772.00, based on said Account of Expenses as originally submitted. At taxation I agreed to deduct 10% from said fee to take account of the acceptance at taxation of such a reduction in the fees claimed by both counsel. In these circumstances my fee is now fixed at the sum of £8794.00.

It was agreed at taxation that The Board would be responsible in the first instance for payment of my fee, and would deduct from the fees payable to counsel the proportion which I determined was due to be paid by them. In respect of Mrs.M. Clarke the total amount payable by The Board is £5770.00 with the sum of £2120.00 being deducted from the fee payable to her by The Board. In respect of Mr.D.Cheyne the total amount payable by The Board is £3024.00 with the sum of £38.00 being deducted from the fee payable to him by The Board. I have appended hereto a Note of my reasons for arriving at my decision.


P. Feeney.



Auditor of Court Hamilton
20 July 2001.

NOTE BY THE AUDITOR OF COURT AT HAMILTON
in the
TAXATION OF THE ACCOUNT OF EXPENSES OF
MRS MARIA A CLARKE, ADVOCATE
and
MR DESMOND P CHEYNE, ADVOCATE
in causa
APPLICATION UNDER SECTION 68 OF
THE CHILDREN (SCOTLAND) ACT 1995
BY THE AUTHORITY REPORTER FOR
SOUTH LANARKSHIRE COUNCIL -V- THE PARENTS OF R AND J
RESPONDENTS

1. This taxation which took place before me on 22nd June 2001 related to the fees claimed by Mrs M A Clarke, Advocate representing the mother of said children and Mr D P Cheyne, Advocate representing the father. Both parents were legally aided in this matter, and counsel's fees are payable by the Scottish Legal Aid Board ("The Board"). The matter was referred to me as Auditor of Court, Hamilton on a joint remit between The Board and Counsel, per the letter from The Board dated 19 March to Faculty Services Limited and the letter to me dated 3 April from Faculty Services Limited. The remit was under Regulation 12 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (S.I. 1989 No.1490), a dispute having arisen between The Board and Counsel as to the amount of fees allowable. At the taxation both counsel were represented by Mr Alex Milne, Law Accountant and the Board was represented by [REDACTED]
2. In advance of the taxation Mr Milne in order to assist at the taxation had provided me with an Account of Expenses which I assume was based on the Fee Notes submitted on behalf of both counsel to the Board; together with a Note of Submissions on behalf of both counsel, and at the diet lodged a further Note in respect of the fees claimed.

3. [REDACTED] again in advance of the taxation had provided me with the Boards Guidelines re. Counsel's Fees in the Sheriff Court; Report by the Joint Auditor at Edinburgh re. John Moir, Advocate (C.I. (AP)); Report by the Auditor at Paisley re. Mr John Munday, Advocate (W.I. (AP)); Report by the Joint Auditor at Edinburgh re. Mr Daniel Kelly, Advocate (K.F. (AP)); and at the diet lodged a Report by the Auditor at Paisley re. Mr John Moir, Advocate (representing the parents of child J.S.).
4. I wish it to be noted that I found the provision of these papers in advance to be most helpful and in addition it enabled both Mr Milne and [REDACTED] to address me on the various points that they wished to raise with reference to the submissions and reports lodged by them, and consequently obviated the need for lengthy statements and submissions at the diet. As a result the issues that both parties wished to raise were much more focused, and thus saved a great deal of time, and no doubt energy at the taxation. I have attempted, where appropriate, to highlight the various points raised by both Mr Milne and Mr [REDACTED] with reference to their Submissions; Notes; and Reports by the Auditors.
5. (i) The question of the basis upon which the taxation should proceed was discussed at the outset and [REDACTED] submitted that the account should be taxed on an "agent client third party paying" basis and referred me to the Note by the Auditor at Paisley in 1997 (re. John Munday) page 3 para 3 which set out a general guide to the approach to be taken.

"He referred me to McLaren on taxation part C, at page 508, as a general guide to the approach I should adopt, and in particular, he referred me to three specific statements. On page 509, seventh line, it is stated –

"Taxation as between agent and client varies according to whether the account is charged (1) against the agent's own client or (2) against the opposite side. In the former case the rule is that the client is liable for all expenses reasonably incurred by the agent even although

such expenses cannot be recovered from the opposite party. The client is, of course, also liable for any expenses which he had specially authorised; and it is proper and prudent that agents should have their client's authority before incurring expenses of an extraordinary character."

On the same page, 13th last line, dealing with payment by a third party, it is stated –

"That principle is, that while taxation as prescribed by the statute be as between agent and client, yet as the expenses have to be paid by a third party, must yet be different from that applied in the ordinary case of agent and client."

and Lord McLaren's view was that –

"Where a statute authorises the taxation of expenses as between agent and client what is given is the expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed."

I was further referred to page 511, the middle paragraph, which states –

"In taxing the account of an agent against a third party on the basis of agent and client the fact that the agent has done the work for his own client (sic) and may be a good charge against the latter does not conclude the matter in a question with a third party, as many items may be modified or taxed off, though not to so great an extent as in a taxation between party and party." "

(ii) [REDACTED] submitted that the phrase "taxation as between solicitor and client, third party paying" should be construed as a standard that fell between a straightforward account between solicitor and client and an account between party and party.

- (iii) Mr Milne argued that the reference to "third party paying" was out of date and that the Act of Sederunt (Solicitor and Client Accounts in the Sheriff Court) 1992 (he did not produce this at the taxation but undertook to do so as soon as possible) had deleted such a reference as a scale of taxation from the Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1989 and as a result the account fell to be taxed on an agent/client basis.
- (iv) [REDACTED] opposed this and submitted that even if "solicitor and client third party paying" is no longer included in The General Regulations it continues as a concept. He also submitted that this was a statutory remit under the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (The Regulations) and that the fee determined by me at taxation should be subject to the Regulations. However, he did not seek to argue that this meant that the account should be taxed on a "party and party" basis.
6. After further discussion it was agreed that the figure arrived at by me at the taxation would be subject to The Regulations, and that after hearing submissions on the question of what a "reasonable fee" actually meant it would be a matter for me to decide this at taxation.

Regulation 9 states that –

"Subject to the provisions of Regulation 10 regarding calculation of fees, Counsel may be allowed such fees as are reasonable for conducting the proceedings in a proper manner, as between Solicitor and Client, Third Party paying", and

Regulation 10(2) that –

"Counsel's fees for any work in relation to Proceedings in the Sheriff Court shall be 90% of the amount of the fees which would be

allowed for that work on a Taxation of Expenses between Solicitor and Client, Third Party paying, if the work were not Legal Aid."

7. (i) Having now had the opportunity to look at and consider the provisions of both Acts of Sederunt referred to, I agree that Mr Milne's submission re: the 1992 Act of Sederunt is correct. As I understand it, the effect of the amendment is simply that the terms of Schedule 1 of the General Regulations, paragraph 1, now reads:-

"The table of Fees in this Schedule shall regulate the taxation of accounts between party and party; and shall.....fees."

- (ii) Interesting though this apparent lacuna between the Regulations and the Act of Sederunt may be, I do not consider that it means that the account should be taxed on either a "party and party" basis nor on an "agent and client" basis. I take the view that in the context of this taxation its effect is neutral and that it should be taxed on an "agent and client, third party paying" basis. Having said that, I consider that my view on this matter was reinforced by the manner in which this taxation proceeded and in line with the submissions made by both parties at the taxation.

8. (i) At this stage, it may also be appropriate to underline that it was agreed that the main issue to be decided at taxation was what was meant by "a fee that was reasonable for conducting the proceedings in a proper manner" in the circumstances pertaining to this particular case. The various cases referred to deal with this matter and the Auditor in each of these cases, after hearing parties and considering the facts relative to the particular case arrived at what he considered to be a "reasonable fee" in relation to the matters before him.

- (ii) The question of a "reasonable fee" in respect of the conduct of proceedings by counsel can be expressed as a "daily rate", and in this case the matter in dispute appeared to me to come down to what I considered an appropriate "daily rate" for the preparation and conduct

of this case was for both counsel. [REDACTED] submitted that the rate set should include preparation of the case and that in accordance with normal practice the charges made by counsel for such preparation should be subsumed within the "daily rate". Mr Milne accepted that the usual practice was that counsel's fee included preparation. However, he submitted that this was far from the normal type of case, and due to its complexity etc. this case could be distinguished from other cases, and as such the separate charges claimed by counsel for preparation were justified and should therefore be allowed in addition to the "daily rate". It was agreed that whatever rate I arrived at then the same rate should apply to both counsel. However, if the rate fixed by me exceeded that claimed by Mr Cheyne then his fee would, of course, be restricted to the amount claimed by him and would not be increased to the rate fixed by me.

- (iii) The Account of Expenses lodged on behalf of both counsel prior to the taxation shows the "daily rate" claimed by Mrs Clarke to be £2,000.00 per day and by Mr Cheyne £1,500.00 per day. Mr Haggerty advised that prior to taxation, The Board had been prepared to settle with each Counsel at £900.00 per day. Mr Milne accepted that the sums claimed by counsel in their account if awarded in full at taxation would be subject to a reduction of 10% in terms of Regulation 10(2) of the Regulations. The effect, if this were to happen, would be to reduce the "daily rate" payable to Mrs Clark to £1,800.00 per day and £1,350.00 per day for Mr Cheyne.

- 9. (i) Mr Milne began by rehearsing the background etc. in this case in considerable detail, as well as the involvement of counsel therein. He advised that counsels' charges relate to a referral from the reporter to the Children's Panel to the Sheriff at Hamilton (Sheriff Stewart), involving two children who were allegedly suffering from non-accidental injuries including *inter alia* subdural haematomas and subdural haemorrhage. These proceedings he said were immensely complicated in which different circumstances applied to each child; that they involved a medical controversy of the utmost complexity; and

that this controversy sparked literature in medical journals, contentious debate in the medical world; widespread media coverage in newspapers, radio and television programmes.

(ii) The case had taken a total of forty eight days of court time and the Reporter had cited 16 witnesses in support of the application, including a substantial number of expert witnesses:- 3 Consultant Radiologists; 2 Consultant Paediatric Neurologists; a Consultant Geneticist; a Paediatrician; a Biochemist; and a Dentist as well as an expert report from the leading authority on genetics and the bone disease Osteogenesis Imperfecta. The Safeguarder called an internationally renowned authority on bone biochemistry and a Consultant Dentist. In addition, the Reporter also called further medical evidence, partly of fact and partly by nature of the source expert, from a Paediatric Registrar; a Consultant Orthopaedic Surgeon; General Practitioner; Health Visitor; a Physiotherapist, and a number of Social Workers. Expert reports were produced from each expert witness.

(iii) The Reporter lodged a substantial number of productions including the Childrens Medical Records; Health Visitor Records, etc. and a substantial number of articles from medical journals and photographs. The Safeguarder lodged a production containing 40 articles from various medical journals.

(iv) On behalf of the parents a Biochemist from Dundee and from Ohio, USA were called as experts with attendant expert reports. A report was also obtained relevant in general to issues of child abuse involving fractures from a Consultant in Arkansas, USA.

(v) Mr Milne advised that because of the nature of the proceedings the complexity and novelty of many of the unique issues raised, that counsel had been required to work between 15 and 16 hours per day preparing and conducting the case and that from receiving instructions until the conclusion of the case had devoted their time solely to this case; that there was an enormous volume of work generated by the necessity of having a good understanding of all of the foregoing, familiarity with all the productions

including the various medical journal articles. In addition, there were 40 volumes of evidence, the bulk of which contained expert evidence, which required substantial preparation for the hearing on evidence fixed by the Sheriff. Mr Milne submitted that it would be very difficult to overstate the complexity and difficulties attendant in this case and the heavy responsibility given the consequences for the parents and children if the grounds of the referral were established.

(vi) He argued that the fees submitted (subject to the agreed 10% reduction) were fair and reasonable having regard to the very complex nature of the case, coupled with the importance to each of the parents; the effort and time expended in the conduct and the degree of responsibility attached to this case, which he contended was entirely unique in its circumstances.

10. (i) [REDACTED] did not seek to argue at any length that this case was not complex, and accepted that it may indeed have raised many novel and complex issues of a medical and legal nature. It appeared to me that he did not demur from the proposition that given all the attendant circumstances it may well have been unique at the time it was being presented. He consequently restricted his argument and submissions to the question of what should be an appropriate "daily rate" for preparation and conduct of the case.

(ii) He referred me to the Guideline issued by the Board to their Assessment Officers, which sought to provide them with guidance on how to arrive at a reasonable fee for counsel in cases such as this, given that there is no legal aid table of fees for counsel in the Sheriff Court. This guidance makes reference to various cases where the Auditor had arrived at a decision in such circumstances, and results in a table of fees being prescribed.

(iii) The table deals with fees for junior counsel conducting a case "of average complexity" in various locations in Scotland and of "unusually complex or novel issues", and suggests a "daily rate" in this locale in 1997 of £750.00 (scaled down to £675.00); for 1999 it suggests a rate of £850.00 (scaled down to £765.00) for "average complexity" and £900.00 (scaled down

to £810.00) for "unusually complex etc". [REDACTED] accepted, indeed the Guidance so states, that the fees prescribed are benchmark figures only, and the level of fees arrived at depends on the exercise of discretion by the Assessment Officers in the particular circumstances of the case under consideration.

(iv) He did, of course, entirely accept that when the question of the appropriate level of fees was before an Auditor at taxation, then it was for the Auditor to decide the level of fees and fix the rate accordingly. However, he submitted that this should not be done in isolation and that, as well as exercising my own knowledge and experience gained over many years as an Auditor of Court, I should take account of the fees arrived at by my fellow Auditors in the cases referred to in the Guidance and produced at the taxation.

(v) [REDACTED] thereafter addressed me on what in his opinion a "private fee" was in cases of this nature, which I understood to mean a "reasonable fee". He contended that it was:-

- Not an enhanced legal aid fee.
- Not an Agent/Client fee.
- Not what Counsel chooses to charge. Knowing what the Board will pay. (The existence of legal aid did not create a separate market).
- Not what the Solicitor considers appropriate.

(vi) He submitted that although "complexity" was undoubtedly a factor (as per the Board's Guidance) it was not the only matter to be considered, and that the fee arrived at it must reflect the "market rate". He referred to the case of Cassidy -v- Celtic Football & Athletic Co Ltd SLT 1995 Sh. Ct. p.95 in particular to the reference therein at P.97G where the Sheriff suggested that the test is essentially a market one, and gave his view on how an extravagant fee may be recognised.

(vii) [REDACTED] argued that the fee charged must reflect reality and equate with a fee that could be charged in "the private world", ie. the ability of people in general to pay and not only in the context of the price that one private individual has paid in a similar case. He suggested that it was a bit of a false market in that when legal aid is available no one thinks of the cost at the first instance, or what the fee might have been if an attempt were made to ascertain whether there was a choice of Counsel available to conduct the case and consequently negotiate a fee for same. In plain terms there was no element of "shopping around". In conclusion, he suggested that the fees claimed particularly by Mrs Clarke were of an extraordinary level, and that in his experience taken in conjunction with the fees allowed in the various cases produced that they were, to say the least, unreasonable and should be reduced to a level which more accurately reflected the "market rate".

(viii) At this stage Mr Milne, submitted that he did not accept that in this case, the fees had been arrived at retrospectively, and advised that at an early stage discussions and correspondence had taken place between counsel and the Board and that the Board had sanctioned counsel's charges for a consultation in Ohio, USA at £1,000.00 per day (excluding travelling and accommodation costs etc). He argued that whilst the consultation in Ohio was important the responsibility element alone in attending the consultation paled into insignificance with the responsibility required for conducting the case in court. It seemed to him to make no sense to offer a higher sum for attending at consultation than the sum offered for actually conducting this highly complex and unique case.

11. [REDACTED] thereafter referred briefly to the cases produced by him in what I understood to be an attempt to establish a "ball park" figure for cases of this nature, which consequently would enable the Board to settle fees without the necessity of taxation and to arrive at a range of fees which were considered to be fair and reasonable.

(i) In the case of "Cassidy" which he submitted dealt with a large claim; complex and detailed issues; all very much in the public eye, "a figure of

£1,200.00 per day had been arrived at for Senior Counsel. However, he did accept that this was in 1994 and suggested that taking inflation into account this would at today's rates produce a figure of £1,450.00 per day.

(ii) In the case involving Mr Daniel Kelly, Advocate (K.F. (AP)) which in [REDACTED] view set down the way in which Auditors should look at such cases when determining the fee, the Auditor had arrived at a figure of £750.00 per day including all preparation (scaled down to £675.00). This case had involved the conduct of a five day proof relating to the assumption of parental rights by the local authority. The fee in this case arrived at by the Auditor at taxation was in 1997, [REDACTED] did not suggest what this would produce at today's rate.

(iii) In the case involving Mr Munday, Advocate (W.I. (AP)) in connection with a case dealing with the revocation of a Freeing For Adoption Order conducted at proof over twelve days in court. The fee arrived at by the Auditor at taxation in 1997 was £675.00 per day including all preparation (scaled down to £607.50). Again there was no "present day" figure suggested.

(iv) In the case involving Mr Moir, Advocate (C.I. (AP)) in connection with an appeal under Section 51 of the Children (Scotland) Act 1995 involving sexual abuse of a girl conducted over one day in court, the fee arrived at by the Auditor at taxation in 1999 was £900.00 including all preparation (scaled down to £810.00), again with no "present day" figure suggested.

(v) In the case involving Mr Moir, Advocate (representing the parents of child J.S.) in a Freeing For Adoption Petition conducted over four days in court, the fee arrived at by the Auditor at taxation in 2000 was £1,000.00 per day, including some preparation with a separate fee allowed for other preparation, (scaled down to £900.00), again with no "present day" figure suggested.

12. (i) In conclusion [REDACTED] submitted that whilst he accepted that the cases referred to were not on all fours either with each other or with the case

under consideration at this taxation, nonetheless they provided an indicator of the range in which the "daily rate" was considered to be and were in effect a "market test". He also submitted that all of these cases involved a degree of complexity and dealt with issues not dissimilar to this case.

(ii) He stated that in his opinion the uplift of the Solicitors' fees of 50% allowed by the Sheriff in this case did not confer an automatic increase (of whatever percentage) on Counsel's fees, and that it was implicit by the sanctioning of use of counsel that there was complexity or difficulty to some extent. In addition, he contended that because solicitors and counsel are performing different tasks there may not in fact be an invariable relationship between the complexities of their respective tasks. Finally, in his view the gap between the fees claimed by counsel in this case (particularly by Mrs Clarke) was far too wide in comparison to the fees allowed at taxation in the cases referred to, which more accurately reflect the "daily rate" for junior counsel in proceedings of this nature.

13. In conclusion, Mr Milne submitted that the cases referred to, in the main, dealt with matters of law within counsels field of expertise.

(i) That this case could be distinguished from the cases referred to in that counsel had to spend weeks considering a substantial number of matters directly outwith their field of expertise. In effect, this case had raised unique and complex medical matters which necessitated of counsel having a good understanding of such matters, becoming familiar with all the productions and reports including the various medical journal articles and understanding the potential possibility and the application thereof to the proceedings. He further contended that there was little or no case law etc. available dealing with the matters raised.

(ii) Mr Milne also submitted that in relation to the point made by Mr Haggerty re. the availability and choice of counsel, in effect "shopping around" to obtain the services of counsel, possibly at a reduced rate, that this could not be applied in this case. He contended that this case required counsel

with a degree of specialist knowledge in the area of work similar to the area covered by this case, and that very few of them had such knowledge or experience. He advised that Mrs Clarke specialised in Family Law and Mr Cheyne in Medical Negligence.

(iii) He referred briefly to the case of Cassidy and in particular to the stipulation by the Sheriff that –

“in litigation of some complexity and difficulty it is proper for the presiding Judge who is best acquainted with its features, to determine the appropriate level at which Counsel’s fees are to be allowed.”

The learned Sheriff when referring to Counsel’s charges stated “it is essentially a market test, but one which is applied to cases similar to that under consideration, rather than to cases generally. Unless a fee is shown to be extravagant it should be allowed.

(iv) Mr Milne stated that in his opinion there was no doubt that complexity has been established in this case and that in dealing with an uplift in the Solicitors fees “the presiding Judge”. Sheriff Stewart had allowed the maximum of 50% under Regulation 5(4) (under heads (a) to (e) inclusive) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989.

(v) Finally he submitted that, in view of the importance; the complexity; the responsibility; the consequences for the children and the parents if the case was to have succeeded; coupled with the level of involvement required of counsel to the exclusion of other work; that the fees claimed were not extravagant and reflected “a reasonable” fee for the work etc. undertaken by both counsel.

14. (i) The question of determining counsel’s fees in this case was presented by both [REDACTED] and Mr Milne at taxation in a limited area ie. that I should decide what the “daily rate” was for the preparation and conduct of the proceedings. At the taxation it was thought that the other charges claimed in

the Account of Expenses eg. Consultations etc. with some minor exceptions could be adjusted and agreement reached between both counsel and The Board.

(ii) The basis on which the taxation should proceed had been argued at the diet as previously referred to herein. It was agreed that the same rate would apply to both counsel, subject to the qualification re Mr Cheyne's fee referred to earlier, and that the rate determined by me would be subject to a deduction of 10% under Regulation 10(2) of the Regulations.

(iii) I have considered all of the submissions and the points referred to in the various Notes by fellow Auditors provided by the Board, and I am most grateful to [REDACTED] and Mr Milne for the manner in which they presented their arguments. I have reached the view that a number of factors fall to be considered when determining counsel's fees:-

Firstly, I share the view expressed by the Auditor at Paisley (when determining the case in the revocation of Freeing For Adoption Order) "that there is little of certainty in the whole question of counsel's fees".

Secondly, that I should take account of the view of the Sheriff in the case of Cassidy when he quotes the opinion of Lord Mackintosh in the case of Elas -v- SMT Coal Co 1950 SC 570 as follows:-

"In my opinion it was the duty of the Auditor in the exercise of his own skilled discretion to determine what was a fair and reasonable fee to be paid to Counsel in this particular case and circumstances of the present time, and not to have been deflected from that aim by the Faculty of Advocates there is not and never has been any rigid scale of fees for Counsel. As was stated by Lord President Clyde in Caledonian Railway Company -v- Greenock Corporation 1922 SC 299, 1922 SLT 30 "both" the 'normal' fee in an ordinary case and the 'proper' fee in a big and difficult one are just such fees as a practising

law agent finds sufficient in order to command the services of a competent counsel in cases of a similar character”.

Thirdly, in determining a fair and reasonable fee each case must be considered on its merits, but not in isolation, and that in exercising my discretion I should take into account the fees determined in similar cases. The question of determining whether such cases are of a similar nature is obviously not an easy decision for an Auditor, and it seems to me that this can only be arrived at by the Auditor exercising his own judgement again with due consideration to; the nature of the proceedings; the complexity; the duration of the proceedings; whether the proceedings raised exceptionally complex and or novel issues; the experience required by counsel to conduct such proceedings; the consequences or impact on the party or parties represented by counsel; and the degree in which the proceedings are “in the public eye”; which I have done in this case.

Fourthly, the question of the “market test”, featured prominently in Mr [REDACTED] submissions when he referred to the various cases and the Board’s Guidelines. I understand the approach taken by the Board in seeking to establish a “going rate” in cases such as these and do not take issue with them drawing up Guidelines. However, as I understand it, since there is no scale or table of fees prescribed in either primary or secondary legislation, in cases such as this, then in my opinion they must remain as stated ie. Guidelines. In fairness, I did not understand [REDACTED] to argue otherwise. Nevertheless, I am of the opinion that the Guidelines when taken in conjunction with the decisions in various other cases do assist an Auditor to determine what he considers to be a “reasonable fee”, and consequently give an auditor an indication of the “market rate”; and I have taken this into consideration in this case.

15. In conclusion, taking all of the submissions etc and the various factors mentioned into account I have formed the view that this particular case

can be distinguished from the other cases referred to. In these circumstances and exercising my own skill and discretion based on taxing accounts over a considerable number of years, and being aware of the level of fees charged by Counsel when conducting litigation before this court (which is the third busiest court in Scotland) I have reached the view that a sum of £1,500.00 per day is a fair and reasonable fee for the preparation and conduct of this case by junior counsel on an "agent and client third party paying" basis (subject to the qualification aftermentioned quoad preparation).

16. As stated herein (and as agreed at taxation) this figure is subject to a reduction of 10%. The effect of this is that the daily rate claimed by Mrs Clark in respect of the above will be reduced from £1,800.00 per day (the original claim for £2,000.00 per day being reduced by 10% as agreed at taxation) to £1,350.00 per day (I have restricted the daily rate to the days when the proceedings were actually conducted by counsel in court:- in the case of Mrs Clarke a total of 48 days and 46 days for Mr Cheyne) similarly, in respect of Mr Cheyne his claim of £1,350.00 per day (the original claim of £1,500.00 per day being reduced by 10% as agreed at taxation) has been sustained and he should therefore be paid at this rate.

17. I think that I am obliged to state that I considered this to be an exceptionally complex case and in many ways quite unique. I also felt that it could be considered as being on quite a different level from that which junior counsel would normally be expected to conduct. I am therefore of the opinion that the fairly substantial increase in fees in this case in comparison to the level of fees that I am familiar with as an Auditor, and with the fees fixed by the Auditors in the cases referred to during the course of the taxation is justified. However, I do not consider that this rate should be regarded as the norm, or used to establish the "market rate".

18. (i) At the conclusion of the taxation it was agreed that Mr Milne and The Board would seek to adjust/agree "one or two items" claimed in the Account of Expenses eg. fees for consultation etc. and that Mr Milne would advise me of same as soon as possible.

(ii) They also agreed that I did not need to await this information before arriving at a decision on the main issue as argued at taxation (and as set out herein). Indeed, they both requested that I endeavour to arrive at a decision as soon as possible, and I undertook to do so. I had managed to comply with this request, and had arrived at my decision as set out above prior to the receipt (by fax) of the first letter from Mr Milne on 26 June. I also received letters from him dated 28 June and 3 July.

(iii) The position, as understood at the conclusion of the taxation has altered somewhat and to quote [REDACTED] in his letter dated 29 June "the process of dealing with the remainder of the fees turned out to be not as simple as earlier thought."

(iv) As I understand the situation (as advised by both parties) the areas in dispute, apart from the main issue as referred to herein are:

(a) The four separate claims for preparation on 14 September; 14 October, 8 November 1999; and on 1 February 2000. I do not intend to set out the submissions contained in the correspondence in any detail as the question of preparation was raised at the taxation and is referred to herein.

(b) Consultations, again this matter was set out at some length in the correspondence, and I see little benefit in re-iterating same. It seems to me that in the end of the day it is for me to exercise my skill and discretion in determining the fee for this area of work, and whether such fees should be

subject to abatement pro rata with the level of fee fixed by me for the "daily rate".

(c) Notes; both parties seemed to me to be agreed that I should have regard to the work involved and fix a fee for same accordingly. I am satisfied that the fees claimed for same are justified.

(v) I was advised that the fees claimed for the Note on 2 July and 8 November 1999 were agreed.

19. (i) In respect of the matters raised above, I am of the view that having taken all of the circumstances of this case into account that the fee of £1500.00 fixed by me (as referred to herein) has taken account of the exceptional nature of this case and the level of preparation required by counsel to enable them to conduct it properly. With the exception of the preparation required for the submissions to the Sheriff (entry of 1 February) on the account submitted by Mrs Clarke.

(ii) In relation to the preparation of the aforesaid joint submissions which amounted to 58 typewritten pages, I consider that this does merit some remuneration but I am of the view that the level of preparation (albeit it involved consultation with counsel for the other party and agents) is excessive. The sum claimed is equivalent to 5 days in court at the original rate claimed by Mrs Clarke of £2,000.00 per day. Again, exercising my own skill and discretion I consider that (including the consultation) a fee at the "daily rate" fixed by me at 2½ days would be sufficient to remunerate counsel for her involvement in same.

(iii) In relation to the consultations, again exercising my own skill and discretion I have decided to abate the fees pro rata with the "daily rate", and have fixed the fees for same accordingly. However, in respect of the consultations in Ohio and Wales, given all the attendant circumstances and the exceptional nature and locale of the

consultations I consider that the fees claimed for these are reasonable and I have allowed same.

(iv) In relation to the various Notes I have fixed the fee for same.

20. In conclusion, I have amended the Account of Expenses lodged prior to taxation to take account of the fees fixed by me herein. My own fee for taxation is also set out therein, as agreed at the diet of taxation.