[redacted]

SCOTTISH COURT SERVICE
Sheriffdom of South Strathclyde, Dumfries & Galloway
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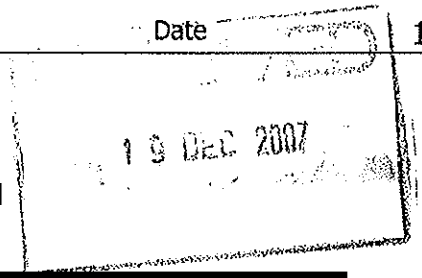
[redacted]
Scottish Legal Aid Board
LP 1
Edinburgh - 1

Your reference

Our reference OMcS/JM

When calling ask Mrs McShane
Direct dial 01292 292200

Date 18 December 2007



Dear Sir

AH v EH

JUDICIAL TAXATION
F184/06 – [redacted]
AYR SHERIFF COURT – 18 OCTOBER 2007

I enclose herewith my decision in the above case. Please note that you have seven days to lodge objections to the decision taken.

Yours faithfully

MRS O McSHANE
Sheriff Clerk

Copied to SC
UC
RM
For info.
15/1/08

[redacted]

18th October 2007

Act – Ms Walker, on behalf of Mr Shaw, A C White, Solicitors
Alt – [redacted] Scottish legal Aid Board

1) **Background to the case**

In November 2005 [redacted] applied for a simplified divorce application relying on the fact that parties had been separated for a period of five years. On the 14th December 2006 Mr Shaw, Solicitor who had been consulted by the Respondent informed the court that the Defender had a mental illness and that there was the potential for a financial claim. The action was dismissed by order of court on that date.

On the 30th May 2006 The McKinstry Company lodged an Ordinary Divorce writ on behalf of [redacted] which sought an order for service on the Defender and the Medical Director of the Ailsa Hospital given the mental health of the Defender. A Warrant was granted in those terms on the 19th of June 2006. The Court also appointed Mr Shaw as the Curator Ad Litem to the Defender. When carrying out his investigations Mr Shaw identified that there was the potential for a financial claim by [redacted] and thus intimated this fact to the court. A minute was lodged by Mr Shaw on the 28th August 2006 which narrated the investigations carried out by Mr Shaw in his capacity as the Curator and informed the court that he did not intend to enter the process as his investigations had been exhausted and no financial claim had been identified.

Affidavits were lodged and decree granted on the 23rd October 2006.

Mr Shaw lodged his Curator Ad Litem account with the Scottish Legal Aid Board for consideration and payment.

After consideration of the account the Legal Aid Board agreed to pay the account submitted – but subject to negative weighting. Mr Shaw applied for a decision from the Auditor of Court on the question of negative weighting.

2) **The Taxation hearing.**

- **The objection stated**

At the hearing Ms Walker advanced arguments on behalf of Mr Shaw and [redacted] on behalf of the legal Aid Board.

The hearing commenced with Ms Walker stating why objection was being taken to the decision taken by the Legal Aid Board.

In argument against the application of negative weighting Ms Walker was of the opinion that such weighting should only be applied to an account lodged by a person appointed by the Court as a reporting officer. A reporting officer in this context being an officer appointed by the court responsible for conducting interviews with parents and children who are the subject of a family court action and reporting back to the court in writing.

Such reports are normally ordered in terms of the Ordinary Cause Rules 1993 (as amended) and are normally prepared by a member of the local faculty.

Ms Walker went on to argue that Mr Shaw was acting as a Curator Ad Litem who required to investigate the legal position of the Defender and ensure that her case was properly considered from all appropriate angles. In particular it was highlighted that with this case there was the potential for a financial claim which had to be fully investigated.

- **In response**

[redacted] on behalf of the Legal Aid Board, responded to the objections tendered by referring to a reported case Linda Henderson versus James Henderson 1994 SCLR (copy produced). This case resulted from a hearing on objections to an Auditors decision which took place in Dunfermline Sheriff Court – the presiding Sheriff was Charles W Palmer.

This case had as its subject matter a solicitor's account which was submitted following the preparation and submission of a report under the Matrimonial Proceeding (Scotland) Act 1958 where there were disputed issues relating to the upbringing of a child. The argument in this case was whether it was appropriate for the Solicitor to charge the account tendered based on the Law Society of Scotland's Table of Fees for Conveyancing and General Business or whether it should be on some other standard. The Auditor allowed the account as charged under the general Table of Fees. The Legal Aid Board objected to the ruling on the basis that Chapter 111 of the Table of Fees for Solicitors in the Sheriff Court would have been a more appropriate charge.

Having heard objections in full Sheriff Palmer remitted the case back to the Auditor to reconsider with direction.

When I asked whether when a Solicitor would be allowed to charge fees under the General Table of Fees or otherwise on Solicitor based rates the view of the Legal Aid Board was only when a Curator enters process and becomes a party to the action as that is when they would become entitled to Legal Aid.

In further argument the Board submitted that the application of negative waiting was appropriate as Mr Shaw who was acting as Curator ad Litem which did not involve the application of any legal knowledge or expertise. In essence the Solicitor was merely ingathering facts and reporting to the court on the circumstances surrounding the case.

A copy of the report which ruled on negative waiting was also produced and referred to by [redacted] This report has not been tested in any court and was written by Mr F M McConnell, Auditor of Court. The case that gave rise to this report was the level of fee charged for the preparation and submission of a report prepared by a Solicitor in a disputed Family action. This case had as its subject matter the care and upbringing of a child. The arguments against this account by the legal aid board were extensive and boiled down to the same argument being tendered by [redacted] at this taxation. In short to charge a fee at the level of at which a Solicitor would charge is not appropriate if no legal expertise is required. In respect of the case referred to the Auditor ruled in favour of the Legal Aid Board and applied negative waiting to the account in question. Negative waiting has since been applied in most circumstances where such an account has to be paid by the legal Aid Board. The percentage reduction in accounts submitted

is 15% to general work and 20% to all work in connection with drawing the report for accounts which are charged under the General Table of Fees for Solicitors.

- **Further Objections**

In final response to the arguments by the Legal Aid Board Ms Walker contested that the Henderson ruling produced by Sheriff Palmer

- has not as yet been tested –
- Was issued at Dunfermline in the Sheriffdom of Tayside Central and Fife and is not binding in the Sheriffdom of South Strathclyde Dumfries and Galloway.

Further that in her submission the cases relied upon by SLAB are not cases which fall on all fours with the account before the Auditor at this taxation and that the account is reasonably charged given the work that was carried out. [redacted] the subject of the report prepared was incapacitated by a mental health problem caused by brain damage which resulted in amnesia – as such several meetings were required with her and her son. In addition as a result of his findings Mr Shaw required to speak to a pension administrator who represented an employer that [redacted] previously worked for to ascertain whether the Defender had a claim on any pension that there may be. Until this position was made clear Mr Shaw was required to act in a legal capacity and protect the interests of the Defender. Finally whilst it is suggested by the Legal Aid Board that professional services were not provided Ms Walker argued the opposite in that Mr Shaw required to apply his professional knowledge to make determinations and decide whether entry to the court action was necessary.

- **Further response**

In final response to the additional information provided by Ms Walker [redacted] argued that the fee is charged against the General Table of fees for Solicitors, using the current recommended unit rate. The unit rate is based on the minimum level of hourly rate which a solicitor would require to charge to keep their business afloat. The account rendered was not for Mr Shaw acting in his capacity as a solicitor but acting in his capacity as a Curator Ad Litem appointed by the court and this being the case the application of negative waiting is appropriate.

3 Auditors Decision

The cases tendered on behalf of the Legal Aid board each refer to circumstances where the solicitor is appointed as a reporting officer in a family action which requires that solicitor to interview the appropriate persons and draw up a report for consideration by the court. This case in not on all fours with these cases and the circumstances of this case are different.

[redacted] argued that Mr Shaw was not acting in a legal capacity but as a person that was charged with reporting to the court. The arguments tendered on behalf of Mr Shaw tend to show otherwise.

What must be considered by me as the person before whom these objections have been taken is what would have happened if Mr Shaw had been appointed as the Curator but did not have any legal knowledge. Appointments as reporters in family actions – as have been referred to in the reported cases placed before me – require the person appointed to report to the court on the circumstances of the child and no more and this duty does not require legal knowledge. The ordinary cause rule which specifically deals

with Family actions and Defenders who have a mental illness require that a Curator Ad Litem be appointed to decide on whether to

- lodge an intention to defend and/or defences,
- a minute adopting the defences already lodged or
- A minute stating that there are to be no defences lodged.

Prior to taking this decision the person appointed would require to consider all matters such as what is in the best interests of the Defender. The decision of what was in the best interests of the Defender could only be taken by someone who is aware of what the defender could be entitled to in the way of a financial claim etc. None of these decisions could be taken without reference to a solicitor which would of course incur legal costs. In my view no one other a person legally qualified could do this. (See MacPhail 22.24 to 22.26 and OCR 33.16).

In view of all of the above I recommend that the account be allowed as drawn without the application of negative waiting.

O McShane
Auditor of Court
Ayr Sheriff court
18/12/07

APPENDIX 3

NOTE BY SENIOR COUNSEL

For

THE SCOTTISH LEGAL AID BOARD

[redacted]

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1. I refer to [redacted] letter of 8 March 2011. In my opinion: (1) the motion which has been enrolled insofar as it seeks an award against the Board is incompetent; but (2) the curator's remuneration is an outlay which may properly be charged to the Fund under the Legal Aid Certificate.

2. The motion bears to find the Board liable for "the expenses occasioned by the Curator ad litem under the Defender's Legal Aid Certificate", which failing to find the Pursuers so liable. Although the motion refers to "expenses" in general, it would appear that the purpose is to obtain a ruling in respect of the payment of the curator's own fees in respect of her work as curator ad litem.

3. In my opinion, the first part of the motion is incompetent. The Board is not party to the proceedings and, by statute, is not to be regarded as a dominus litis: cp *Meekison v. Uniroyal Englebert Tyres Ltd* 1995 SLT (Sh. Ct.) 63. If the motion indeed has the purpose of challenging the decision intimated in the Board's letter of 23 August 2010, then it should be pursued by way of an application to the supervisory jurisdiction of the Court by way of petition for judicial review.

4. The present motion, at least insofar as directed against the Board, may be refused on this ground. But this would not dispose of the underlying issue – namely whether or not the fees of a curator ad litem who has been appointed to a legally assisted litigant in a civil action may properly be paid from the Fund. In my opinion, such fees may properly be paid from the Fund as outlays incurred in terms of section 33(1) of the 1986 Act.

5. A curator ad litem is entitled to receive professional remuneration for the work undertaken qua curator: McLaren, *Expenses,* p. 238. The curator's fee may properly be included in a party and party account of expenses: *Collie v. Collie* (1851) 13D 841. It follows, it seems to me, that the curator's fee might properly, for example, be included in an award in favour of an unassisted party against the Fund under section 19 of the 1986 Act.

6. There is a strong judicial policy in favour of securing that a curator ad litem is properly remunerated: *F v. W* (2010) Fam L.R. 127. In *L Petitioners (No. 4)* 1997 SLT 44, the First Division was motivated by this policy to make an order to seucre that such part of the curator ad litem's remuneration which was not covered by legal aid should be paid from public funds. What is striking about that case in the present context is that the Court proceeded (in a case in which the Board was represented) on the basis that the curator ad litem's remuneration

would be met from the Fund in respect of any period covered by the certificate.

7. If, of course, on a proper analysis, the curator ad litem's fees were not properly encompassed within the payments which the Board is empowered to make by way of civil legal aid, then this would not matter – though if that were to be the case, it would mean that the Division proceeded on an erroneous basis in *L, Petitioner (No. 4)*. I agree that the role of the curator, as an officer of the court, in safeguarding the interests of the ward, is analytically quite different from the role of solicitor and counsel instructed in the case. In the present case, indeed, it would be quite improper, it seems to me, for the curator, who is an advocate, in effect to arrange for her own instruction as counsel in the case (although I appreciate that in the sheriff court, solicitors may, it would appear, undertake both roles).

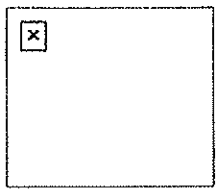
8. But it does not, in my view, follow that the curator's fees cannot properly be charged to the Fund. In certain types of case, the Court will order that the curator's fee be met by some other party – or, as in *L, Petitioner (No. 4)*, from public funds. However, in the absence of any such order, the curator would, in my view, be entitled to recover his or her fee from the ward's estate. In practice, no doubt the solicitor might pay the fee on behalf of the ward: cp the position of a reporter's fee discussed in *Catto v. Lindsay & Kirk* 1995 SCLR 541. In such an event, it seems to me, the curator's fee may properly be regarded as an outlay properly incurred by the solicitor to the ward in acting for the ward, for the purposes of section 33(1) of the 1986 Act. Given that the curator's fee may be included in a party and party account, I rather think that it could, in such an event, properly be included in an account of "such fees and outlays as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying": regulation 4 of the Civil Legal Aid (Scotland) Fees Regulations 1989. This is, after all, a more favourable basis of taxation than taxation between party and party: McLaren, *Expenses*, p. 511.

9. I do not read any of the cases to which I have been referred as contradicting such an analysis. *L v. Kennedy*, 25 July 1995, and *Nugent v. Nugent*, 19 August 1998, were concerned, as I read them, with the question of whether an uplift could competently be made on that part of the solicitor's fee which related to his work as a curator, as opposed to his work qua solicitor. But I do not read them as suggesting that his fees for work as a curator were not recoverable from the Fund at all.

W. James Wolffe QC

Advocates Library
11 March 2011

APPENDIX 4



COPY FOR YOUR INFORMATION

OUTER HOUSE, COURT OF SESSION

[2006] CSOH 14

P914/03

OPINION OF LADY SMITH

in the Petitions of

ABERDEENSHIRE COUNCIL

Petitioner;

for

An Order freeing the children A, B and C for Adoption
Hearing on a Note of Objections to the Auditor's Report

Petitioners: J J Mitchell, Q.C., Digby Brown
Reporting Officer and curator *ad litem*: Howie, Q.C., Anderson Strathern

31 January 2006

Background

[1] In these petitions, the petitioners sought orders to have three children from the same family declared free for adoption. In accordance with the normal procedure, an advocate was appointed as reporting officer and curator *ad litem* (together referred to in this opinion as "curator") in terms of the Adoption Act 1978 and Rule of Court 67.11. That appointment was made by interlocutor dated 27 June 2003 which required him to lodge the necessary reports within six weeks. The appropriate reports were prepared by the curator and lodged late, on 22 December 2003. Further procedure, including a contested proof, followed. Freeing orders were thereafter pronounced in respect of all three children in terms of interlocutors dated 22 June 2004.

Introduction

[2] The petitioners are liable for the fees of the curator. Two items of correspondence in which the

matter of the curator's fee is mentioned passed between the petitioners and the curator were before the Auditor. In a letter dated 17 September 2003 addressed to the curator's clerk, Mr Stobie, a solicitor employed by the petitioners wrote:

> " I said that I would get back to you this week about the fee in relation to (the curator's) appointment. I am advised by my Council's Edinburgh agents that there is no set rate for this appointment, but they do advise that in other cases an hourly rate of £100 has been applied. I understand you may wish to consider this matter and come back to me. It may be that we could seek assistance from a Law Accountant to prepare a fee note, if this would assist. In the meantime, I am happy to consider any comments you wish to make."

[3] The clerk responded advising that the letter had been passed to the curator but nothing further passed between him and the petitioners regarding the matter of his fee until he presented his account to the petitioners, on 3 February 2004. It amounted to a total of £19,723.70 exclusive of VAT which is substantially in excess of what, in the experience of the petitioners' agents is the norm for such reports where the parties and children are situated within Scotland. That norm is, I was advised, of the order of £1,500 to £3,500 and a fee of £5,000 was "not unheard of". A fee of the order of magnitude of this fee was, however, I was advised, quite unheard of. The petitioners accordingly submitted it for taxation by the Auditor of Court.

[4] The petitioners lodged a document with the Auditor headed "Points of Objection" for the purposes of the taxation hearing (No. 6/137 of process) in which they stated general observations and specific objections. The general observations included the following:

> "The Counsel (*sic*) must express considerable surprise and concern at the number of hours spent in investigating and preparing the Reports in this case resulting in an ultimate fee approaching £20,000 plus VAT. The fee has been split up to reflect 112 hours 15 minutes investigations and 79 hours 15 minutes preparing the Report. In the experience of Aberdeenshire Council and their Law Accountants who have considerable experience of preparation of Accounts involving Curator ad Litem and Welfare Reports the number of hours engaged in this case substantially exceed the level they would expect to find in a case of this nature. Generally speaking the standard fee for such a Report would be somewhere in the region of £1,500 to £2,500 plus VAT. The time engaged drafting such a Report would normally be somewhere in the region of 3 to 5 hours."

At taxation , the Auditor taxed off £2523.70 the effect of which was to reduce the recoverable fee to the sum of £17,200 exclusive of VAT.

[5] The petitioners lodged a Note of Objections (No..32 of process) thereafter and Rule of Court 42.4 (2)(c) was applied so as to require the Auditor to state by Minute the reasons for his decision, all in terms of an interlocutor dated 9 February 2005. The Auditor responded in a Minute which was lodged on 30 March 2005 (No.34 of process).

[6] This opinion follows a hearing in respect of the Petitioners' Note of Objections to the Auditor's Report relating to the account of expenses submitted by the curator.

The Auditors' Minute

[7] In his Minute, the Auditor states, at p.3:

> "(The curator) charged his account based on an hourly rate of £100, which the Auditor understands was the rate suggested by the Petitioners. The Auditor is, therefore, satisfied that the rate of £100 per hour is reasonable in this case. No attempt was made by the agents to agree a global fee with (the curator's) clerk."

At p. 4 , he remarks :

> "The Auditor accepts it was reasonable for (the curator) to decide on and follow the course of action he considered best for safeguarding the interests of the children and reporting to the Court. The Court's interlocutor of 27 June 2003 imposed a strict timetable."

As I have already observed, the curator did not adhere to the Court's timetable. Rather than reporting in six weeks, he took almost six months. The Auditor remarked further at p.4:

> "Not having agreed a global fee, nor timetable for perusal of documents and attendance on witnesses, it is unreasonable to criticize (the curator's) approach."

At p.5 he explains:

> "Having been satisfied as to the reasonableness of the hourly rate, the Auditor required to satisfy himself that the time spent ....was reasonable in preparing for and drafting the reports. The Petitioners submit that the time expended ...in preparation of the reports is excessive (79 hrs 15 mins). The Auditor does not doubt that the time spent ....is accurate . .....it is not a matter for him to comment on how long the Reporting Officer and Curator *ad litem* should have taken in the preparation of his reports. No attempt was made by the agents to agree a

global fee..."

[8] In respect that the Auditor restricted the fee by the sum to which I have referred, that was on account of his finding that the time element for travel to interview various persons had been overcharged against the actual time spent, that there was duplication in certain respects of the work carried out and that where a period of 3pm to 1.30am had been charged for in connection with report writing, the assumption required to be made that the curator would have had some break from work during that period.

Submissions for the Petitioners

[9] Senior counsel for the petitioner, Mr Mitchell QC, recognised at the outset of his submissions that the Rules of Court made no express provision for the approach to be adopted when determining what is an appropriate fee for counsel to charge when acting as Reporting and Curator *ad litem* in a case such as the present. When acting in such role counsel was not, however acting *qua* counsel and his position was, he said, more comparable to that of a solicitor carrying out work on a party/party basis, which failing a solicitor carrying out work on an agent/client third party paying basis. He submitted that the underlying principle must logically be the same as that which underlies Rule of Court 42.10, which appears in the part of the rules that governs fees for solicitors and provides:

"42.10-(1) Only such expenses as are reasonable for conducting the cause in a proper manner shall be allowed."

That being so, only fees which were reasonable in connection with conducting the work in a proper manner were recoverable. Such an approach also seemed appropriate when the fact that the curator was an officer of the court was taken into account.

[10] Mr Mitchell also drew attention to the provisions of Rule of Court 42.7 which applies to the taxation of a solicitor's account as between agent and client. He relied in particular on the parts of that rule which provide only for recovery of such outlays as have been "reasonably incurred", for such fees as are considered to be "fair and reasonable" and, where an unusual fee is charged, that it is to be presumed that it was not reasonably incurred unless the contrary is demonstrated (see rule 42.7 (6)(a), (b) and (d)(iii)) .

[11] Moving on his submission, he referred to the case of *Dingley* v *Chief Constable of Strathclyde Police* 2003 SCLR 160 and the Report of the House of Lords Select Committee on Appeal 1998 [HL 145] referred to in *Dingley*. He drew on these in three respects. Firstly, it was evident that, so far as

counsel's fees were concerned, the correct approach was to ascertain what was the usual or ordinary fee for the type of work in question, colloquially "the going rate". Secondly, the position of the third party payer who has no control over the fee required to be considered. Thirdly, that the question of what amounts to a reasonable fee should not be answered by taking the hours spent and multiplying it by an hourly rate. In that latter respect, he referred in particular to paragraphs 40- 42 of the House of Lords report which states:

> " 40. It is clear from the evidence put in on behalf of the individual counsel that their clerks attributed great weight to the number of hours worked in preparing the brief and then multiplied those hours by an hourly rate to produce the brief fee claimed. The hourly rate did not appear to be a rate always charged by that counsel for all his work but a rate adopted by the clerk for the purposes of fixing the brief fee on that appeal. This despite Direction 9(d) 'the hours spent by counsel in preparation are not generally of assistance to the Taxing Officer ....'.
>
> 41. The use of hours worked multiplied by an hourly rate will seldom be helpful in taxing counsel's fees. Regulation 4(2)(a) requires the appropriate authority to have regard to 'the time involved' and TONG 1.11(e) repeats this requirement. But the time expended by counsel is not necessarily the time to be remunerated. Only the time reasonably expended is to be remunerated: otherwise the inefficient, slow worker, gets better pay for the same work than the efficient worker. Add to this the risk (not a feature of these present cases) of counsel consciously or unconsciously exaggerating the time expended and the limitation on the hours worked approach becomes even more apparent. When the hours worked out of court are then multiplied by an hourly rate substantially higher than that payable as refreshers for hours spent in court, the dangers of the system are very obvious.
>
> 42. In our view the policy that hours spent by counsel in preparation are not generally of assistance is a sound one and should be re-affirmed".

[12] Mr Mitchell submitted that the present case raised the question of the propriety and reasonableness of a time and line account that had the effect of rewarding the inefficient worker. The fee required to be considered "in the round". Although the amount of time taken was a relevant factor, it was not a simple question of looking at how many hours were spent and applying an hourly rate. He drew attention, by way of example, to the fact that the fee included an hourly charge for

over 79 hours spent in writing up the reports and submitted that that was an example of where a reward for inefficiency was clearly being produced. Similarly, over 18 hours was charged for as having been spent considering the papers, namely the various reports that had been written regarding the family, yet, to the petitioners' knowledge (since it was done in their office), it had taken the respondents' counsel only one day to do so. He pointed out that a time and line basis had never been agreed. Further, it would not, Mr Mitchell said, have been appropriate for a local authority, given their public spending constraints, to agree a global fee in advance.

[13] Mr Mitchell also drew attention to the wide disparity not only between the "going rate" for such reports and the fee charged by the curator in this case but between that fee and the fees charged by counsel for the petitioners which were, I was advised, considerably less in circumstances where her job was difficult, time consuming and involved a high degree of responsibility.

[14] Regarding the Auditor's approach, Mr Mitchell submitted that whilst he began by asking the correct question as to what was a reasonable fee, he never answered it. He had, in the approach that he adopted, abdicated his function. It was not as if he had actually applied a time and line approach since it would be normal, in such a case, for the Auditor to comment on whether the time spent on a particular task was reasonable or not. The time and line approach did not mean that it was simply a question of asking how many hours were in fact spent and multiplying it by a rate.

Further, he seemed to have assumed that a rate of £100 per hour was agreed when it was not or at least not on the basis that it be used as part of a time and line account approach.

[15] Mr Mitchell submitted that the note of objections should be allowed, that it should be held that the curator is entitled to charge only what constitutes a reasonable fee for work conducted in a proper manner, not on a time and line basis and taking account of what is the current "going rate" for fees for the preparation of such reports. There should then, he said, be a further remit to the Auditor to determine the fee accordingly.

Submissions for the Curator

[16] Mr Howie submitted that the Note of Objections should be refused. The Auditor had a wide discretion and he had exercised it. Whilst he had proceeded on a time and line basis, that was not a misdirection since it was the petitioners who had suggested the rate of £100 per hour. He was not suggesting that the adoption of a time and line approach meant that the Auditor had nothing to do but count the number of hours spent. He did still require, he accepted, to form a view about the time

taken and had done so. The nearest equivalent basis in the solicitor / client context was, he submitted, agent/client third party paying.

[17] He submitted further that, in many such cases, the reporter and curator *ad litem* is reporting in the context of an unopposed petition, the inference being that the job is an easier one in that event and a lower fee is then appropriate. He did, though, accept that the Auditor requires, in any such case, to consider reasonableness. Further, he accepted that the petitioners were correct to identify the risk, in the time and line approach, of rewarding inefficiency, it was also important to avoid penalising thoroughness. The Auditor had not, he submitted, erred. He had, in his discretion, taken account of whether the fees were proper charges and whether they were reasonable. He had certified them as being reasonable and proper fees. He considered the reasonableness of the time spent as was evident from the terms of his Minute. Whilst one interpretation of the passage at p.5 which is quoted above was, he accepted, that the Auditor had abdicated his responsibilities, the alternative and correct view was that he simply meant that it was not for him to decide how much work the curator required to do in preparing his reports. He did, though, seem to accept that the reference to a global fee was problematic given the nature of the case and of the petitioners.

Discussion

[18] The quantification and payment of lawyers' fees has been the source of regular and unremitting anxiety, grief, frustration and even anger, for generations. This case seems to be no exception. The fact of the gulf that exists between the going rate for such reports and the fee charged by the curator and between that fee and the fees that I was told were charged by counsel for the petitioner makes the petitioners' reaction to the curator's fee entirely understandable. Further, I note that their assessment of the going rate, as advised to the Auditor in their "Points of Objection" document was on the basis not only of their own experience but that of their Law Accountants. Their reaction is, accordingly, clearly prompted by credible and reliable information.

[19] The "going rate" may not, however, seem fair in an individual case. Whilst it can clearly serve as an important benchmark, it may appear as overgenerous in some cases and insufficient in others. It is, accordingly, important to identify the relevant applicable principle. It seems to me that, for the purposes of assessing the appropriate fee for a Reporting Officer and Curator *ad litem*, it would be right to adopt the principle enshrined in Rule of Court 42.10 namely that only such fees should be allowed as are reasonable for carrying out the required work in a proper manner.

[20] Regarding the suggestion that the rate could be equiparated to party/party or solicitor/client basis, I am not convinced that it would necessarily be helpful to do so. I would though observe that I can see that there must be some similarities with the approach that requires to be taken in a case where the basis of taxation is solicitor/ client, third party paying basis. That is because that approach, whilst it takes account of work being done in the context of the provision of a professional service, it also takes account of the interests of a payer who has no control over the work done. The Auditor ought to have regard, in my view, to the interests of the local authority payer in a case such as the present in the same way that it is relevant in his assessment of counsel's fees where they are being taxed in a party/party account to have regard to the interests of the paying third party(see: *Dingley* at p.171). The key is the payer's lack of control. A local authority in a case such as the present has no control over the work carried out by the Reporting Officer and Curator *ad litem*, nor should it have. It would be quite wrong for it to attempt to do so. Such a person is an officer of the court , independent of the parties. It would, for instance, have been wrong for the petitioners to seek to control the timetabling for the curator's perusal of documents or attendance on witnesses, notwithstanding the apparent suggestion by the Auditor, at p.4 of his Minute (see the foregoing quotation) that they should have done so. Similarly, I accept Mr Mitchell's submission that it would appear to be inappropriate, given their public funding constraints, for a local authority to agree, in advance, a global fee.

[21] Does the application of the above principle exclude the use of a time and line approach? It seems to me that the answer to that question must be a rather unsatisfactory "maybe". I can see that, on the facts and circumstances of a particular case, a time and line approach might produce a reasonable fee for carrying out the required work in a proper manner. It must, though, always be necessary, in my view , to have regard nonetheless to the underlying principle to which I have referred, to the going rate, to the interests of the third party payer and to the risk of rewarding inefficiency if a time and line approach is used.

[22] Turning to the Auditor's Minute, I regret that I feel bound to conclude that it is unsatisfactory and demonstrative of fundamental error in his approach. He has proceeded on the basis of a time and line approach which does not even seem to have involved checking whether the time spent was a reasonable amount of time in the circumstances. He has, as was submitted, abdicated that

responsibility by expressly refraining from commenting on how long the work should have taken (see p.5). His only deductions from the account were not on the basis of exercising that responsibility but were as a result of him having noted an overcharging in the calculations and a duplication of some work. It is as if he thought that parties had agreed that the curator would be paid at £100 per hour for however many hours he in fact spent yet that was patently not the case.

[23] Further, the Auditor appears to have been heavily influenced by the fact that the petitioners did not agree a global fee in advance with the curator. He mentions it three times in his Minute. That, however, was an irrelevant consideration. It would not have been appropriate for them to do so. Even if they could have done, I do not see that that would relieve the Auditor of the responsibility of determining what was a reasonable fee for carrying out the required work in a proper manner.

[24] The Auditor has also wholly failed to take account of a relevant consideration, namely, the level of the "going rate" for such reports. As I have already indicated, that rate will not necessarily be determinative but where evidence of it is put before the Auditor as it was in this case, he is bound to take it into account or at least explain, if he has not done so, his reasons for discounting it.

[25] In these circumstances, there is no alternative but to remit to the Auditor to tax the curator's account again, using as his basis for taxation the principle that the curator is entitled to a reasonable fee for carrying out the required work in a proper manner, taking account of the whole relevant facts and circumstances which include the "going rate" for such reports.

APPENDIX 5

SHERIFFDOM OF TAYSIDE CENTRAL & FIFE

AT DUNDEE

NOTE BY

SHERIFF AG McCULLOCH

Dundee City Council -v- F D & Anr B319/06

Dundee City Council -v- V W B550/06 & B551/06

Dundee, 12 Nov. 07

Act McCrae, for the curator *ad litem* and reporting officer

Alt Smillie, for the petitioners

The Sheriff having resumed consideration of the cause refuses the motions on behalf of the curator *ad litem* and reporting officer.

NOTE :

[1]. This decision follows on from a dispute that has unfortunately arisen regarding the fees and outlays incurred by a curator *ad litem* and reporting officer appointed by the Court, in a number of applications for parental responsibility orders by the local authority. This decision covers three petitions for such orders.

[2]. The solicitor appointed to these roles carried out his statutory duties, and in due course lodged his reports. As it happened, the matters were not contested, and orders were granted as sought by the Council, the Court having regard to the content of the reports, as well as other documentation.

[3]. In due course, the solicitor submitted his detailed accounts to the Council, as not only were they the Petitioners, on whose motion he had been appointed, but they were also the relevant local authority who are charged with the responsibility to make payment of such fees.

[4]. The council have refused to pay the fees as rendered, and have now opposed a motion lodged on behalf of the solicitor, to have the Council found liable in the fees incurred, and to remit the account to the Auditor of Court to tax. Instead, the Council have offered a very much smaller fee, citing certain regulations in support of their position.

[5]. I had previously heard argument on a similar point, save that the proceedings were adoption rather than parental rights, and after some discussion, the motion was dropped. The agent for the solicitor sought to distinguish the parental rights cases from the adoption cases, by reference to the regulations. It is helpful to consider the statutory background. In both adoption cases and parental rights applications, the Court appoints a curator *ad litem* and reporting officer from a panel set up for that purpose. Regulations made under section 101 of the Children (Scotland) Act 1995 make the necessary provisions. S101 is in the following terms:-

> "(1) The Scottish Ministers may by regulations make provision for the establishment of one or more of each of the following--

(a) a panel of persons from which curators *ad litem* may be appointed under section 58 of the Adoption (Scotland) Act 1978 or under section 87(4) of this Act;

(b) a panel of persons from which reporting officers may be appointed under either of those sections; and

(c) a panel of persons from which appointments may be made under section 41(1) of this Act.

(2) Regulations under subsection (1) above may provide, without prejudice to the generality of that subsection--

(a) for the appointment, qualifications and training of persons who may be appointed to those panels; and

(b) for the management and organisation of persons available for appointment from those panels.

(3) Regulations under subsection (1) above may provide--

(a) for the defrayment by local authorities of expenses incurred by members of any panel established by virtue of that subsection; and

(b) for the payment by local authorities of fees and allowances for such members.

(4) Paragraphs 9 and 10(b) of Schedule 1 to this Act shall apply in relation to any panel established by virtue of subsection (1)(c) above as they apply in relation to children's panels."

[6]. The local authority draws up a list, which is submitted to the Sheriff Principal for approval. At the relevant time, all members of the Panel in this Sheriff Court district were solicitors. The procedure is regulated by SSI 477/2001, The Curators *ad litem* and Reporting Officers (Panels) (Scotland) Regulations 2001, (hereafter "the 2001 regulations"). Regulation 10 deals with fees, expenses and allowances in the following terms:- "10 (1). In the case of-

(a) an application under section 18 or section 20 of the 1978 Act; or

(b) an application for an adoption order or order under section 49 of the 1978 Act

where the child was placed with an applicant by an adoption agency; or
(c) an application for an adoption order or order under section 49 of the 1978 Act which is made by a court, a local authority shall defray the expenses incurred by a member of a panel established for their area and shall pay to that member such fees and allowances as they think fit.
(2) In the case of an appointment made under the 1995 Act or the Children's Hearings (Legal Representation) (Scotland) Rules 2001 a local authority shall defray the expenses incurred by a member of a panel established for their area and shall pay to the panel member such fees and allowances as the Scottish Ministers shall determine."

[7]. I was also referred to the Act of Sederunt (Child Care and Maintenance Rules) 1997, also a Statutory Instrument (291/1997), (hereafter "the 1997 rules"). These rules were made by authority of several Acts, including section 91, (but not section 101), of the Children (Scotland) Act 1995. These rules set out the procedure to be adopted for applications under the various Acts, such as the duties of a reporting officer, and curator *ad litem*, the fixing of a hearing, confidentiality, and the like. But it also, at rule 2.2, purports to deal with expenses, thus :-
" The sheriff may make such an order with regard to the expenses, including the expenses of a reporting officer and a curator *ad litem* or any other person who attended a hearing, of an application under this Chapter as he thinks fit, and may modify such expenses or direct them to be taxed on such scale as he may determine." Clearly, this rule is in conflict with rule 10 of the 2001 Regulations. I would respectfully suggest that it would appear not to be within their Lordships powers to have made Rule 2.2, at least insofar as it can be applied to applications for parental responsibilities orders in terms of s86 of the 1995 Act. It is clear that it is s101(3) that founds the authority for the regulation of fees and expenses of panel members. But the 1997 rules are made, inter alia, under s91 of the 1995 act, and not under s101. Section 91 does not deal with fees, nor does it give authority for the making of rules other than as described in that section, namely procedural rules for the appointment of safeguarders. The 1997 rules were amended in 2006,

by SSI 2006/411, but the amendments did not include rule 2.2, which remained as originally introduced.

[8]. I was urged by the agent for the solicitor to remit the account for taxation, and order that the petitioners be liable for the fees and outlays of the solicitor, as curator *ad litem* and reporting officer, as taxed. It was explained to me that for some years, solicitors acting as court appointed reporting officers and curators *ad litem* had submitted accounts to local authorities for payment, and they had either agreed a fee, or an account was sent to the auditor for taxation. That latter course of action had been taken in the case of the Petitions of Aberdeenshire Council for Freeing Orders in respect of the children A,B, and C. There, a dispute on the approach taken by the auditor was the subject of discussion on a Hearing on Objections before Lady Smith. Her decision, dated 31 January 2006 was shown to me. However, in that case no reference was made to either of the conflicting rules or regulations. I assume that Rule 2.2 (or its Court of Session equivalent, if any) had been followed, given there was a remit to an auditor. This case therefore does not assist in determining whether the 2001 regulations prevent a finding of liability for expenses, and a remit for taxation.

[9]. I was advised on behalf of the local authority that the Panels referred to were introduced principally because Parliament had recognised the need for children to have representation at Children's Hearings, where they were charged with criminal conduct. This function was different to the other functions carried out by curators, under other statutory provisions. Thus s 10(1) dealt with applications under the Adoption (Scotland) Act 1978, and required " a local authority to defray the expenses incurred by a member of a Panel established for their area, and to pay such fees and allowances as they think fit". The local authority therefore determined how much was to be paid for the reports required in applications under the 1978 Act. This had clearly been recognised by the agent for the solicitor in the previous motions, who had dropped his applications for findings of expenses. There could be no remit in such cases, and those appointed as curators *ad litem* and reporting officers had to accept the expenses, fees and allowances offered to

them by a local authority, or seek Judicial Review. The offer was at a rate approved by COSLA.

[10]. Attention then turned to s 10(2) of the 2001 Regulations. This dealt with an appointment "under the 1995 Act", and required a local authority to "defray the expenses incurred by a member of a panel established for their area and shall pay to the panel member such fees and allowances as the Scottish Ministers shall determine". The terms of this section contrast with the previous section in that although in both sets of circumstances the local authority has to pay, in the latter it is at a rate as determined by Scottish Ministers. Sadly, and perhaps inevitably, Scottish Ministers have failed to determine such fees and allowances. Thus those appointed by the court in parental responsibilities cases, to undertake the important statutory functions of reporting officer and curator *ad litem* have not merited consideration by Scottish Ministers for suitable remuneration since 2001. There is therefore no rate to be paid by the local authority. The agent for the solicitor argued that as s10(2) had not been implemented, I should be free to make the order under Rule 2.2. The Council argued that the effect of s 10 as a whole was to remove fees from the Courts, and place it with the local authority for adoptions, and Scottish Ministers for 1995 Act orders. A finding of liability coupled with a remit to the auditor was not competent.

[11]. I find it disturbing that some months after appointment, and after the work has been done, the local authority seeks to escape liability for fees and outlays incurred by a solicitor in this way. I was advised that an offer had been made, but it bore no resemblance to the fees charged, nor to the value of the work done. In one of the cases, (FD) the solicitor had required to see one parent at HMP Shotts, then travel to Lincolnshire to see the other parent and a sibling. Enquiries were also made of Social workers and other relevant parties. The child and foster carers were also seen, in Stirlingshire. Clearly a substantial amount of time had to be taken to carry out the essential functions set out by the legislation. I was advised that, in that case the solicitor's fee, calculated in accordance with Chapter 3 of the table of fees for solicitors in the Sheriff Court, amounted to just over £4000, to

which VAT and outlays would be added. The offer of payment from the Petitioners was £150 plus VAT and outlays. In the other case, where there were two petitions as there were two children, the fee was £1140, and the fee offered was £150 per petition. The court is being asked to make far reaching decisions about a child, and requires to rely on reports from experienced and responsible reporters. For there to be such a fundamental dispute on fees is liable to bring the whole issue into focus, with the distinct possibility that existing members of the panel will refuse appointment, heralding a crisis in these cases. For my part, I find the reports prepared in this court, both in adoption and parental rights cases, to be of the highest quality, accurately and promptly prepared. The children, who are the unvoiced subjects of the orders require and deserve nothing less. Be that as it may, the 2001 regulations appear to me to be binding, and I do not have the power to grant the motion lodged, despite the terms of Rule 2.2. I would construe that rule being operational where there was a formal hearing, at which evidence was taken, and in those circumstances it would be competent to make an order regulating expenses.

[12]. It would appear therefore that as Scottish Ministers have not determined the fees, and as the court cannot make an order, it is up to the Council to make such payments as they think fit. I regard the whole situation as less than satisfactory, and urge that it is remedied as soon as possible. It is inappropriate to expect a curator *ad litem* to seek to resolve the failure of Scottish Ministers by Judicial Review, nor do I consider it fair and reasonable for a local authority, often also petitioners, to pay, in adoption cases, a fee which they alone think fit. Presumably, their offer of a fee could also be the subject of a Judicial Review. But that is a sledgehammer approach, and it seems to me that the route suggested by Rule 2.2 ought to be preferred, were that competent. The adoption of a "one fee fits all" approach is unwarranted, especially in the few cases where one or more parties are outwith the local authority area. It is essential that the duties required of reporting officers and curators *ad litem* are properly carried out, and that requires proper remuneration. Quoting Lady Smith, at para 25, "... the curator is entitled to a

reasonable fee for carrying out the required work in a proper manner, taking account of the whole relevant facts and circumstances which include the 'going rate' for such reports." It is something which requires action and I would urge COSLA, the Law Society of Scotland and Scottish Ministers to discuss and remedy the issue before there follows delay and prejudice in all these types of proceedings, to the detriment of the well-being of the children involved.

Sheriff A G McCulloch.

SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES & GALLOWAY AT AYR

NOTE OF OBJECTIONS

by

THE SCOTTISH LEGAL AID BOARD

to

The Auditor's Report of 18 December 2007 upon the outlays incurred under the pursuer's account in respect of the fees of the curator *ad litem* in the preparation of a Report

in the cause

[redacted]

Pursuer

Against

[redacted]

Defender

COURT REF: F184/06

1. The Scottish Legal Aid Board ("the Board") objects to the Report by the Auditor of Court, Ayr Sheriff Court, dated 18 December 2007 in relation to the fees and outlays claimed by Thomas E Shaw as curator *ad litem* appointed in terms of interlocutor dated 9 June 2006, for the following reasons.

2. By interlocutor at Ayr on 19 June 2006, Thomas E Shaw, Solicitor, Ayr was appointed as curator *ad litem* for the defender in terms of Rules 33.13 and 33.16 of the Sheriff Court (Scotland) Act 1907 and the Ordinary Cause Rules 1993. The curator *ad litem* duly reported to the court, in terms of the interlocutor, on 26 August 2006. An account of expenses was lodged by the McKinstry Company, Solicitors, Ayr which included, as an outlay, the fees, VAT and outlays incurred by Thomas E Shaw, Solicitors, Ayr as curator *ad litem*.

3. The account prepared by the curator *ad litem* and lodged on his behalf was charged on the basis of the former Table of Fees for Conveyancing and General Business ("the General Table"). This Table of Fees prescribes recommended charges for professional services rendered by solicitors in Scotland. The Board took the view that professional services *qua* solicitor had not been provided or rendered but rather that the role of curator *ad litem* had been undertaken for which, as a skilled person, reasonable remuneration is due. As is practice in the circumstances, and in line with the decision of Sheriff Palmer in *Henderson –v- Henderson SCLR* 553, the Board proposed to apply a "negative weighting" to the fees chargeable under the General Table.

4. By way of explanation, although the case of *Henderson* related to a reporter appointed as an officer of the court, the *ratio decidendi*, in the Board's submission, applies equally to a curator *ad litem*, in that:-

   - the curator *ad litem*, although a qualified solicitor, was not rendering professional services. Indeed the defender does not appear to have been in a position to instruct a solicitor;
   - the work involved in preparing and submitting a report, whether as reporter or curator *ad litem*, is not similar to the range of general business covered by this Table;
   - as a skilled person, whose charges represent an outlay in the court process, the curator is entitled to a reasonable fee;
   - to the extent that the General Table is to be looked at for guidance, negative weighting is appropriate.

5. The curator *ad litem* was not prepared to accept the Board's offer in settlement of his account and accordingly a question or dispute arose between the Board and the curator *ad litem* as to the amount of fees allowable to him from the Fund. In consequence the matter was referred for taxation to the Auditor of Court, Ayr Sheriff Court, in terms of regulation 12(1) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. Regulation 4 provides that "a solicitor shall be allowed such amount of fees and outlays as shall be determined by the Board to be reasonable remuneration for work actually, necessarily and reasonably done and outlays actually, necessarily and reasonably incurred, for conducting the proceedings in a proper manner, as between solicitor and client, third party paying".

6. In her Report of 18 December 2007, the Auditor appears to have concluded, although it is not entirely clear (see paragraphs 9 and 11 below), that since the curator was legally qualified and required to apply a level of legal knowledge to the task, that the curator was providing or rendering professional services such as would justify an unqualified charge under the General Table without the application of any negative weighting. The Auditor, in the Board's submission, should have allowed such fees and outlays as are reasonable for conducting the proceedings in a proper manner and, to the extent that she looked to the General Table for guidance, arrived at a fee which was fair and reasonable taking into account, *inter alios*, the factors set out in paragraph 4 of said Table.

7. The Auditor erred in law and, separately, misdirected herself by failing to distinguish the role of a curator *ad litem* from the provision or rendering of professional services as a solicitor. The offices of a curator *ad litem* and solicitor are distinct and do not merge even when those offices coincide in the one person, notwithstanding the legal knowledge of the incumbent or the application of such knowledge in the circumstances of the case.

8. The Auditor misdirected herself in assuming that the appointment of a reporter does not require legal knowledge. Whilst this may be true in some cases, reporters tend to be solicitors because of their knowledge of the court and its processes and the ability to identify the material issues in the pleadings in the preparation of a report and any recommendations therein, including the possible disposals by the court. This does not amount to the rendering of legal services.

9. The Auditor misdirected herself by concluding that since no-one other than a person legally qualified to do so could have performed the function of curator *ad litem* in the circumstances of the case, that a charge under the General Table, a Table designed for a solicitor rendering professional services, the value of the unit based on the annual cost of time survey, should be applied without qualification. In so doing the Auditor appears to have held that the preparation of a report is similar to general business in terms of that Table and by the acceptance of such charges, particularly in relation to the relatively generous charges for the framing of documents, has applied an arithmetical calculation rather than a balanced judgement as to what is an appropriate fee (see *Henderson* page 557, paragraph G). The Auditor has failed to take into account the apparent lack of relevant factors set out in paragraph 4 of said Table and the fact that a lot of the work, including ingathering information, required no legal ability. Nor did the Auditor address how the curator *ad litem* actually applied his legal knowledge in the circumstances of the case.

10. The Auditor has misdirected herself or, separately, taken into account an irrelevant consideration in relying on the terms of Ordinary Cause Rule 33.16 to distinguish this case. There is a difference between identifying the potential for a financial claim in the form of heritable property, the existence of a pension etc and the process of lodging the appropriate intention to defend, minute etc. For the avoidance of doubt, the relevant account relates solely to the preparation of a report.

11. *Separatim*, the Auditor failed to provide adequate reasons for her decision and, in particular,

- Failed to set out the link between her finding that no-one other than a person legally qualified could prepare the report, whether this, in itself, amounted to the rendering of professional services or not, and the allowance of the fees as claimed in terms of the General Table without qualification or negative weighting.
- Failed to set out the circumstances in which she considered the unqualified application of the recommended fees set out in the General Table to be applicable by reference to the factors, if any, set out in paragraph 4 of the said Table, nor the process of the application of any balanced judgement on which she arrived at the fees allowed.
- Failed to set out how she arrived at the fees as claimed as being a reasonable fee in the circumstances.

12. *Esto,* the curator *ad litem* was providing professional services, which is disputed, the Auditor has failed to provide adequate reasons for her decision by reference to the process of arriving at a balanced judgement or by reference to the factors set out in paragraph 4 of the said Table.

13. *Separatim,* the decision of the Auditor was unreasonable in all the circumstances.

The Board maintains that the objections should be sustained. In that event it seeks the expenses of this note and the procedure hereon

IN RESPECT WHEREOF

Solicitor
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Solicitor for the Scottish Legal Aid Board