

AUDITOR OF COURT LOTHIAN & BORDERS

POINTS OF OBJECTION

for

THE SCOTTISH LEGAL AID BOARD

**In relation to expenses incurred by the
Safeguarder, in the Guardianship of
[REDACTED] EDI-AW16-19**

Diet of Taxation: 7 November 2023 @ 2.30pm

Auditors Reference: LB-76-23-24

The Auditors attention is respectfully drawn to the following Points of Objection made by the Scottish Legal Aid Board in relation to the expenses incurred by the Safeguarder, in the Guardianship of [REDACTED]

Provision for taxation

1. In terms of the interlocutor 13 October 2022, [REDACTED] was appointed to safeguard the interests of the applicant [REDACTED] and to convey her views in the form of a Guardianship report to the Court. The applicant, who is a legally assisted person, was found liable for the reasonable costs and outlays incurred by the Safeguarder.
2. The Safeguarders reasonable costs are therefore chargeable as an outlay in the nominated solicitors legal aid account in terms of regulation 4 of the Civil Legal Aid (Scotland)(Fees) Regulations 1989 (hereinafter referred to as the “Civil Fees Regulations”), which makes provision for “*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.*”
3. Regulation 12 (1) of the Civil Fees Regulations, provides that where any question or dispute arises between the Board and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund under these Regulations, other than regulation 11, the matter shall be referred for taxation by the auditor.
4. Regulation 12 (2) of the Civil Fees Regulations, provides for a reference to the auditor under paragraph (1) at the instance of the solicitor concerned or, where the

question or dispute affects the fees allowable to counsel, of the counsel concerned, or of the Board, and the auditor shall give reasonable notice of the diet of taxation to the solicitor or counsel as appropriate and to the Board.

5. The reference in regulation 12 (2) to the ‘solicitor concerned’ is to the ‘nominated solicitor’. It is recognised that the Safeguarder is not the ‘nominated solicitor’ but nevertheless SLAB would, in the particular circumstances of this case, have no objections for this matter to proceed to taxation in terms of regulation 12 (1) of the Civil Fees Regulations as if it was a reference by the nominated solicitor.

Basis of payment in legal aid cases

6. There is no statutory fees or charges prescribed for regulating the work carried out by a Safeguarder in the preparation of a Guardianship report. The Safeguarder is entitled to be paid a fair and reasonable fee. That applies regardless of whether the account is payable by the legal aid Fund or is payable on an agent and client, client paying basis.
7. SLAB are responsible for payment of the overwhelming majority of Safeguarder accounts and a significant number of other court appointed Reporters. As the stewards of public funds and mindful of the need to bring an element of transparency and certainty as to the basis of payment for such cases a number of taxations took place across various sheriffdoms in the 1990’s and early 2000’s. For the best part of 30 years it is acknowledged that in cases where the costs of a Safeguarder (or Reporter) was payable from the legal aid Fund, SLAB allowed the author of the report the option to charge having regard to the Table of Fees under either:-
 - Chapter III of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) which has now largely been superceded by Schedule 1 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019; or
 - The Table of Fees for Conveyancing and General Business recommended by the Council of the Law Society of Scotland, subject to a negative weighting of 20% applied to the costs involved in the preparation of the Report and 15% in respect of all other work.
8. On a strict interpretation, it is accepted that neither of those Tables of Fees applies to the type of work undertaken by a Safeguarder as an officer of the court in the preparation of a Guardianship report but nevertheless they provided a reference from which you could helpfully look for guidance in arriving at a reasonable fee.
9. The application of negative weighting in relation to cases charged under the Table of Fees for Conveyancing and General Business arises from the reported decision of Sheriff Palmer in the case *Linda Mary Henderson v James Henderson* (1994 SCLR, 553) (**Appendix 1**) wherein he states at page 58 “Given that we are not in the realm of professional services, it seems to me obvious, unless exceptional circumstances exist, that, if the General Table is to be looked at for guidance, considerable negative weighting is appropriate, given that if one was to apply the criteria stated in paragraph 4 of [chapter 1] referred to herein, then arguably only the subparagraphs (e) ‘the time expended’ and (g) ‘the place where and the circumstances in which the services or any part thereof are rendered, including the degree of expedition required’, would in all probability apply”.

Question or dispute which is the subject of taxation

10. The Safeguarder in the particular circumstances of this case has elected to charge on the basis of the Table of Fees for Conveyancing and General Business. That Table of Fees was abolished in 2005. This followed a decision by the European Commission on 24th June 2004, which found that the recommended minimum scale applied by the Order of Belgian Architects ran contrary to European Competition Law. The recommended fee scales published by the Law Society of Scotland used broadly similar principles and were therefore revoked to avoid a similar prohibition decision and fine that had been levied to the Order of Belgian Architects.
11. The abolition of the Table of Fees for Conveyancing and General Business no doubt created a bit of a vacuum. Solicitors had undoubtedly become used to its application, as for many years it had operated as the way much work was charged, having as it did, the backing of the Law Society of Scotland. There is no doubt that despite the formal abolition, for some years and albeit informally, the table provided a reference point for solicitor charges, as many felt there was no other useful reference at least that did not run the risk of friction or challenge.
12. It was probably on that basis that the option to charge on either basis as outlined in paragraph 7, in legal aid cases continued until the 20 April 2017, when the Auditor of Edinburgh Sheriff Court was invited to tax three Guardianship reports which had been prepared by two different Safeguarders in the cases of *JM and others* (**Appendix 2**). Although the sole issue which was the subject of taxation in those cases was the relevant charge out rate for the preparation of the reports, the Safeguarders had also elected to charge on the basis of the Table of Fees for Conveyancing and General Business. In arriving at his decision the auditor stated that *"In my view the basis of charging in terms of the old General Table of Fees is historic and should not apply now"*. He concluded *"that on the balanced view equity would be served were I to apply charge out rates similar to what is allowed in the Table of Fees for solicitors in the sheriff court"*.
13. The inertia that led to the tables use long after its abolition was, in my view, sensibly halted in Edinburgh, but it continued on elsewhere, and SLAB intend to address that, particularly now that in modern times the trend is, as I understand it, away from the historical geographical variations that resulted in different practices being supported by different auditors in different locations. Greater consistency of application across the country will very helpfully set the tone for a wider national approach.
14. Although the current unit rate, which is the equivalent of £180.00 per hour under Schedule 1 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019, is higher than the last recommended hourly rate of £130.00 which was prescribed under the Table of Fees for Conveyancing and General Business before it was abolished in 2005, accounts continue to be charged on the latter basis due to the significantly enhanced fee that becomes chargeable for the framing of the report. That entry will invariably be the single largest charge in any account as chapter 3, paragraph 1(i) of that Table made provision for a drawing fee equivalent to 5 units or £65.00 per sheet (or £52.00 per sheet after the 20% negative weighting reduction is applied) in comparison to the £22.50 per sheet that is now payable under Schedule 1 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019.

15. In this particular case upon receipt of the Safeguarders account we have rejected the account in accordance with the Edinburgh auditors decision in *JM and others* that “*charging in terms of the old General Table of Fees is historic and should not apply now*” and invited her to reframe the account having regard to the fees prescribed under Schedule 1 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019.
16. The 2019 Act of Sederunt is itself a fee regime for solicitors which has been developed in modern times under the auspices of the Lord President, the Scottish Civil Justice Council and its Costs and Funding Committee in the context of court work, and the charges that are recoverable from a paying party of “*expenses as are reasonable for conducting the proceedings in a proper manner*” which is broadly consistent with the test that must be applied in this case in regulation 4 of the Civil Fees Regulations to allow “*outlays actually, necessarily and reasonably incurred, for conducting the proceedings in a proper manner*” albeit as between solicitor and client, third party paying. Whilst recognising that it does not, on a strict interpretation, regulate the work carried out by a Safeguarder in the preparation of a Guardianship report it nevertheless represents an appropriate and up to date model for fee assessment for the way work is now done. It is a table for which the rate is regularly reviewed and uprated to ensure it remains as an appropriate basis for remuneration.
17. Mindful that the Table of Fees for Conveyancing and General Business was abolished in 2005, and aside from any consideration that also arise in modern times as to the fit of the table with the way work is now done, as well as in accordance with the former Edinburgh auditors decision I would respectfully submit it is no longer helpful to draw guidance from an historical Table of Fees in arriving at a reasonable fee and would invite you to tax the account having regard to the fees prescribed under Schedule 1 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019.

Enclosures:-

- Appendix 1 - *Linda Mary Henderson v James Henderson* (1994 SCLR, 553).
- Appendix 2 - Auditor of Edinburgh Sheriff Court in the case of *JM and others*, 20 April 2017.

IN RESPECT WHEREOF

Steven Carrie

Steven Carrie
Senior Technical Specialist
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With regard to the pursuers' averments in article 5 of the condescendence based upon the second branch of the rule in *Hadley v Baxendale*, I have come to the conclusion that they cannot at this stage be said to be irrelevant. It does not seem to me to be necessarily inconsistent to say that a loss under the second branch of the rule is a direct loss in the sense that I have just mentioned. I will accordingly not exclude these averments from probation. . . .

On the whole matter, therefore, I shall allow a proof before answer, leaving both parties' preliminary pleas standing.

SHERIFF COURT—*Dunfermline*
Sheriff C. W. Palmer

8th March 1994

LINDA MARY HENDERSON v JAMES HENDERSON

Expenses—Report by solicitor under Matrimonial Proceedings (Children) Act 1958 (c.40), s.11—Cost of preparation of report as outlay—Fee to which reporter entitled—Whether to be based on Law Society of Scotland's Table of Fees for Conveyancing and General Business, Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1989 (S.I. 1989/434), Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992 (S.I. 1992/1878) or some other standard

Legal aid—Expenses—Report by solicitor under Matrimonial Proceedings (Children) Act 1958 (c.40), s.11—Cost of preparation of report as outlay—Fee to which reporter entitled—Whether to be based on Law Society of Scotland's Table of Fees for Conveyancing and General Business, Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1989 (S. I. 1989/434), Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992 (S.I. 1992/1878) or some other standard—Civil Legal Aid (Scotland) (Fees) Regulations 1989 (S.I. 1989/1490), regs 4,12

Solicitors—Solicitor preparing report under Matrimonial Proceedings (Children) Act 1958 (c.40), s.11—Fee to which solicitor entitled—Whether to be based on Law Society of Scotland's Table of Fees for Conveyancing and General Business, Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1989 (S.I. 1989/434), Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992 (S.I. 1992/1878) or some other standard

In an action in which one of the disputed issues was the upbringing of a child of the parties' marriage the court instructed a solicitor to prepare a report under s.11 of the Matrimonial Proceedings (Children) Act 1958. The solicitor prepared his report. At the conclusion of the case the pursuer's solicitor prepared his account for approval by the Scottish Legal Aid Board. The solicitor who had prepared the report claimed a fee based on the Law Society of Scotland's Table of Fees for Conveyancing and General Business. The pursuer's solicitor claimed this as an outlay. The Scottish Legal Aid Board objected to this, arguing that the reporter's fee should have been based on chapter III of the table of fees in the Schedule to the Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1989. The dispute was referred to the auditor of court in terms of reg.12 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. The auditor issued a report in which he concluded that the reporter was entitled to be paid 'the going rate' and that this could reasonably be based on the Society's Table of Fees. The Scottish Legal Aid Board appealed to the

- A sheriff, who held that a solicitor acting as a reporter was entitled to be paid a fee at such rate in the discretion of the auditor as is fair and reasonable; that although the position of a reporter can in some ways be likened to that of an expert witness whose fee is based on the Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992, the auditor's discretion is wide and he can have regard to all or any of the tables of fees referred to by the parties. The sheriff remitted to the auditor to reconsider the matter and, in so doing, issued the following note.

SHERIFF PALMER. This case called before me as an objection taken to the auditor's report by the Scottish Legal Aid Board (hereinafter referred to as 'the Board'). . . .

- B Briefly the background here is that [the reporter] was appointed . . . in terms of section 11 of the Matrimonial Proceedings (Children) Act 1958 to report on the arrangements as to the care and upbringing of the child of the marriage of the parties in the above case. His taxed account forms an outlay in the account lodged by the nominated solicitor conducting the proceedings under a civil legal aid certificate and in due course the taxation was held in terms of regulation 12 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989, as amended. It is in respect of the auditor's report [that] objection is taken.

- C It was common ground in this hearing that [the reporter], who is a qualified solicitor of some years' experience, had charged in accordance with the [Law Society of Scotland's] Table of Fees for Conveyancing and General Business (hereinafter referred to as 'the General Table').

The stance adopted by [the solicitor] for the Board was that fees should have been allowed in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1989, Table of Fees, chapter III (hereinafter referred to as 'the Sheriff Court Table').

- D The auditor in his report concluded that reference to the Sheriff Court Table was inappropriate and indeed incompetent for the purpose of assessing the fees payable to [the reporter] as chapter III of the said table had been enacted to regulate the rates of charge for litigation work on a party/party basis.

The auditor appears to have gone on to conclude that the reporter should be paid the 'going rate' for a solicitor and, in the absence of any regulation, he has taken the view that the reporter, being a solicitor, should be entitled to charge for such work on the same basis as he would for other business and that, accordingly, he should be able to charge the rates recommended in the said General Table. In stating this he expressed the view that the work involved in preparing and submitting a report is similar to the range of general business covered by the table and as such it provides a useful basis for calculating the reporter's fee.

- E [The Board's solicitor] first of all took issue with the auditor's report. . . . As regards the auditor's conclusion, the purpose of the General Table is to recommend charges for 'professional services' rendered by solicitors in Scotland and in this context [the reporter] was instructed by the court as an officer of the court and was *not* rendering 'professional services'. [As a reporter he] was in no different position from any other reporter appointed by the court. As regards the practice, [the Board's solicitor] advised me that this varied from court to court. In the Court of Session, if an advocate was appointed to prepare a custody report, then the advocate would receive a fee agreed with the Faculty, based on a junior advocate's fee for a day in the Court of Session. As far as the sheriff court was concerned, the practice varied. By far and away the majority of courts seemed to follow the approach recommended by [the Board's solicitor], that is, by allowing charges in terms of chapter III of the Sheriff Court Table. One or two, however, had upheld the usage of the General Table, being the approach under attack here. One particular court, Airdrie Sheriff Court, had a specially negotiated fee with the local [Society] of Solicitors.
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In conclusion [the Board's solicitor] invited me to sustain the objection and to remit the account to the auditor with appropriate directions. A

[The reporter] appeared for himself. The test in his view was not whether or not the account was excessive. The test was whether it was a reasonable outlay in the circumstances. He accepted that both tables of fees were irrelevant in that the position of a solicitor appointed to report to the court in such a situation was not covered. In his submission, however, he had been appointed as a solicitor to prepare this report and he was entitled to proper professional remuneration. These fees had been laid down in the General Table and that is what he was entitled to.

In accordance with [regulation 4 of] the Civil Legal Aid (Scotland) (Fees) Regulations 1989, a solicitor who is a nominated solicitor under a legal aid certificate shall be allowed such fees and outlays as are reasonable for conducting the proceedings in a proper manner, solicitor and client, third party paying. The starting-point is that the reporter's account in this case is an outlay incurred in a sheriff court litigation. The reporter has charged fees for the preparation of said report and, as previously observed, has charged these fees in accordance with the General Table. B

[The Board's solicitor] submitted that chapter III of the Sheriff Court Table was the correct approach and that the auditor had misdirected himself. . . . Following amendment in 1992 [regulation 1 of] the general regulations in said Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1989 states as follows: C

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

The auditor's conclusion is therefore correct. In stating that, this is not a matter of competence. It is a matter of misdirection as regards the exercise of his discretion. D

Paragraph 1 of the General Regulations [i.e. chapter 1] of the General Table states: D

'The purpose of the Table is to *recommend* charges for professional services rendered by Solicitors in Scotland, except in so far as prescribed by or under Statute.'

It is of significance that this table is a *recommended* table only and it is in respect of 'professional services'. As I understand it, it is a matter of concession that no professional services were rendered here and, indeed, the auditor acknowledged that. That said, he appears to have concluded that reference should be made to the General Table inasmuch as a solicitor is entitled to be paid 'the going rate'. I will go on to deal with that expression shortly. Referring to the General Table, this is divided into ten chapters in all and it is unnecessary for me to refer to these in detail. Some relate to specific aspects of a solicitor's work such as conveyancing and executry work and chapter 6 in particular refers to 'General Business'. As I understand the auditor's approach, he has concluded that the work involved in preparing and submitting a report is similar to the range of general business covered by the table. Having regard to chapter 6, general business is first of all to be charged according to circumstances. Under the heading 'General Business' there are a number of sub-headings and, in particular, Partnerships, Mercantile Transactions, Incorporated Companies, Powers of Attorney, Miscellaneous Contracts, Procedure in Calling up Standard Securities, etc., Tax and Other Similar Matters, and Miscellaneous Proceedings. Miscellaneous Proceedings are stated to be: E

'Proceedings before Parliament, local authorities, statutory bodies, administrative tribunals and inquiries, arbitrations, and courts for which professional charges are not otherwise prescribed.' F

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- A Paragraph 4 of [chapter 1 of the General Table] deals with charges according to circumstances and narrates:

‘Where a Solicitor elects to charge any item of business according to circumstances there shall be charged such sum as is fair and reasonable taking into consideration the following factors:

- (a) the importance of the matter to the client;
- (b) the amount or value of any money or property involved;
- (c) the complexity of the matter or the difficulty or novelty of the question raised;
- B (d) the skill, labour, specialised knowledge and responsibility involved on the part of the solicitor or assistant;
- (e) the time expended;
- (f) the length, number and importance of any documents or other papers prepared or perused; and
- (g) the place where and the circumstances in which the services or any part thereof are rendered, including the degree of expedition required. . . .’

Paragraph 5 amplifies the approach to be taken in assessing these criteria.

- C In the Appendix to the General Table headed ‘Guidelines on Charging According to Circumstances’ and, in particular, paragraph 1, it is stated:

‘It is an overriding principle in fee charging that a Solicitor’s fee should be fair and reasonable to both himself and his client. No two cases are identical. *The rate for the job is flexible and adaptable and takes into account all relevant factors in each case*’ (emphasis added).

- D It is also of significance that the Guidelines at paragraphs 2 and 9 in particular (1) stress that the fixing of a fee is a balanced judgment rather than an arithmetical calculation and (2) allow for both negative and positive weighting in appropriate circumstances.

- E The question therefore falls to be addressed, what is the going rate for a solicitor? In my submission there is no such rate and the expression is meaningless. The General Table is a recommended scale only. It is clear from the Guidelines that the rate varies from case to case and [according] to the circumstances of each case. This is all in the context of providing and rendering professional services and, of course, it is conceded that these were not rendered. To charge according to circumstances using the General Table a solicitor is entitled on the face of it to charge at the rate of ten units per hour (as at the date of this account, a total of £75 per hour). Yet, if one examines the various other statutory fees payable to solicitors in different circumstances, one comes out with very different figures. In the Court of Session, for example, the hourly rate would appear to be £47.90; in the sheriff court, £56.40; different rates apply to criminal business and to time taken in advising in terms of legal advice and assistance. I would suggest that the reason why the General Table has been chosen is obvious. It brings out a much higher hourly rate. Moreover, it is plain that nothing in the General Table can be akinned [sic] to the preparation of a report in a case such as this. Thus it follows that I disagree with the auditor’s view that ‘the work involved in preparing and submitting a report is similar to the range of general business covered by this table’. [The reporter’s] position is that he was instructed as a solicitor and as a solicitor he should be paid. A solicitor is appointed as a reporter in a case such as this in order to provide factual information to the court accurately and expeditiously. He is a reporter just in the same way as a social worker, an official of the S.S.P.C.C. or a child psychologist might properly be referred to as a reporter and the fact that he is a qualified solicitor is really neither here nor there. He is, of course, entitled to remuneration and the question falls to be answered, how is this remuneration to be fixed?
- G

[The reporter] in his submission likened the situation to that of an actuary or an accountant who had been invited to prepare a report. In such a situation, an actuary or accountant would be entitled to submit his professional fee and entitled to payment therefor. I am not wholly convinced that that is indeed a correct statement of what occurs in such situations. Instances of the court appointing such professional people are rare but of course such professional persons are frequently instructed in the role of 'expert' witnesses. The position of an expert witness in a sheriff court action is fully covered in the Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992, Schedule 1, paragraph 9, which reads as follows:

'Where it is necessary to employ a skilled person to make investigations prior to a proof in order to qualify him to give evidence, charges therefor, and for attendance at such proof, shall be allowed in addition to the ordinary witness fees of such person at such rate which the Auditor in his discretion shall determine is fair and reasonable. . . .'

Be that as it may, as a matter of practice, it is well known that not all cases go to proof and expert witnesses' fees are on a day-to-day basis frequently assessed by auditors. The test to be applied in such circumstances is, accordingly, 'at such rate which the Auditor in his discretion shall determine is fair and reasonable'.

[The reporter's] contention that an actuary or an accountant would be entitled to submit his professional fee and entitled to payment therefor is not, in my experience, entirely accurate. An expert witness's fee is always liable to taxation by an auditor and while the fee itself can be calculated on the basis of the unfortunate expression used hitherto, i.e. 'the going rate', it does not always automatically follow that the expert witness will be paid at that rate.

Therefore, while a reporter, such as [the present reporter] cannot be likened to an expert witness in all respects, where the similarity does exist is that (a) his charges represent an outlay under the Sheriff Court Table and (b) it has been found necessary to employ him as a skilled person to make investigations prior to a proof. The only distinction between an expert and a reporter is that in the ordinary course of a proof an expert would give evidence for one party or the other, whereas only in very exceptional circumstances and with leave of the court would a reporter give evidence. None the less, the significant point is that, in terms of paragraph 9 of Schedule 1, the said Act of Sederunt appears to require the auditor to tax 'at such rate which the Auditor in his discretion shall determine is fair and reasonable'. That, in my view, is the correct and indeed only approach which an auditor should adopt in taxing an account such as this.

In conclusion therefore [the reporter] is entitled to be paid a fee at such rate in the discretion of the auditor as shall be fair and reasonable. Where the auditor has misdirected himself here is in holding that, in so assessing a fair and reasonable fee, he should have regard to the General Table and simply allow the hourly rate and other charges allowed therein. The account has to be seen for what it is, an outlay in a sheriff court civil litigation. It in no way can be described as provision of professional services by a solicitor to a client.

Thus, the test is not which of the two is the correct charge, the General Table or the Sheriff Court Table. In my view, the auditor has a wide discretion and in the exercise of that discretion can have regard to all or any of the tables of charges. Where I depart from the auditor's view in this case is not by virtue of the fact that he has sought guidance from the General Table, but in (a) his conclusion that preparation of a report is similar to general business in terms of that table, (b) his use of the expression 'going rate' and his interpretation thereof and (c), on the face of it, his acceptance of the hourly charges which would appear to be a simple

A arithmetical calculation and not a 'balanced judgment' (paragraph 2 of the Guidelines to the General Table).

Given that we are not in the realm of professional services, it seems to me obvious, unless exceptional circumstances exist, that, if the General Table is to be looked at for guidance, considerable negative weighting is appropriate, given that if one was to apply the criteria stated in paragraph 4 of [chapter 1] referred to herein, then arguably only sub-paragraphs (e) 'the time expended' and (g) 'the place where and the circumstances in which the services or any part thereof are rendered, including the degree of expedition required', would in all probability

B apply.

Note: The question of what fee should be paid to a solicitor who acts as a reporter is a vexed one. This decision may go some way to resolving difficulties which have arisen in the past.

C *Sheriffdom of Glasgow and Strathkelvin*
Sheriff Principal N. D. MacLeod, Q.C.

9th March 1994

ROYAL BANK OF SCOTLAND PLC v JOHN DOUGLAS MASON AND ANOTHER

Process—Sheriff court—Decree in absence—Decree sought without production of certificate of execution of citation—Certificate produced more than year and day later—Whether pursuer entitled to decree

D

The pursuers raised an action under the Conveyancing and Feudal Reform (Scotland) Act 1970. Both defenders were properly cited. The first defender initially defended the action but then consented to decree. The second defender did not defend the action. The pursuers moved for decree in absence against the second defender but failed to produce a certificate of execution of citation. The motion for decree was therefore not granted. More than a year and a day later the pursuers produced the certificate of execution of citation and renewed their motion for decree in absence. The sheriff (J. K. Mitchell) refused to grant decree on the view that the action had fallen because it had not called within a year and a day of expiry of the period of notice. The pursuers appealed to the Sheriff Principal, arguing that the moving for decree in absence on the first occasion amounted to a calling of the case notwithstanding that the motion could not be granted because of the failure to produce the certificate of execution of citation. In sustaining this argument and allowing the appeal the Sheriff Principal issued the following note.

E

SHERIFF PRINCIPAL MACLEOD. This is an action raised under the Conveyancing and Feudal Reform (Scotland) Act 1970 by a bank, the creditor in a standard security and deed of restriction, against debtor proprietors of subjects over which the standard security and deed of restriction were granted. The debtor proprietors are a husband (the first-named defender) and wife (the second-named defender). What the bank seeks is the right to enter into possession of the subjects.

F

Reference to the writs founded on reveals that the first- and second-named defenders are joint proprietors of the subjects. The first-named defender initially defended the action. The second-named defender did not.

G

On 23rd November 1993 the sheriff interponed authority to a joint minute granting decree as craved against the first-named defender. When the bank's solicitor then moved to be allowed to lodge a certificate of execution of citation and

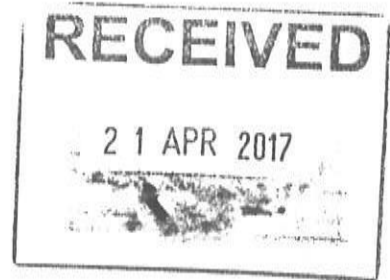
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J. Douglas Haggarty
Scottish Legal Aid Board
DX 555250
Edinburgh

Our Ref: FMcC/FW
Your Ref:
Date: ~~18th~~ April 2017

2017



Dear Mr Haggarty

Guardianship Order - [REDACTED]
Guardianship Order - [REDACTED]
Guardianship Order - [REDACTED]

Further to the recent diet of taxations I now enclose 1) Copies of the Accounts of Expenses as taxed by me and 2) My Supplementary Report.

I have now returned the papers to the Court with the taxed Accounts and my Report.

Yours sincerely

A handwritten signature in black ink, appearing to be "F.M. McConnell", written in a cursive style.

F.M. McConnell
Joint Sheriff Court Auditor

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

REPORT

by

F.M McCONNELL

JOINT AUDITOR

9 MELVILLE CRESCENT
EDINBURGH

in relation to Accounts of Expenses
in the following cases:-

1. Guardianship Order – [REDACTED]
[REDACTED] AW131/16
2. Guardianship Order – [REDACTED]
[REDACTED] AW194/16 and [REDACTED]
3. Guardianship Order – [REDACTED]
[REDACTED] AW40/16

EDINBURGH

DATE

20TH APRIL 2017

Agents in relation to the above mentioned cases lodged in Court their Accounts of Expenses which were remitted to me for taxation. In each case the applicants were in receipt of Legal Aid and a hearing was fixed to enable the Scottish Legal Aid Board (SLAB) to state their objections to the expenses claimed. Put shortly the only issue raised was in relation to the charge out rates which in each case are based on an hourly charge of £200.00.

At the hearing SLAB were represented by Douglas Haggarty and the agents by Ross McGinn Law Accountants who prepared these Accounts.

For SLAB Mr Haggarty helpfully set out his objections in a Note to which I would refer for its whole terms.



In response to these objections the Law Accountant argued that in selecting a charge out rate of £200 per hour could not be criticised in the context of these Applications. This rate properly reflected the high level of skill and responsibility in safeguarders in dispensing the Court's interlocutors. The Court expected a full and factual Report on which they could rely on in determining the Application. She further argued that the safeguarder is in a quite different position to a Reporter or Curator and should be equated with say an expert witness.

SLAB's position is that there is a long line of authority for the current fees allowable to a safeguarder which has resulted in a widely recognised and transparent fee at "a customary rate" and so far as the rate is concerned there is no real distinction between Reporters/Curators and Safeguarders. The submission is expanded upon in Page 3 of the Note of Objections.

In the course of submissions reference was made to an earlier decision of mine where I allowed £200.00 per hour on a safeguarder's account. In that case the paying party was a local authority and has no relevance to these taxations. What here is to be determined is whether the charge out rate of £200 per hour is justified and reasonable in the context of the Legal Aid scheme. In this regard I would refer to Para 4 page 6 of the Note of Objections which sets out the relevant Legal Aid provisions.

On behalf of SLAB it was further submitted that the function of a Reporter is not to be equated with the provision of legal services. The Reporter is appointed by the Court to carry out specific statutory functions. These functions may be carried out by safeguarders who are not solicitors. All safeguarders be they solicitors or non legally qualified persons are under the same duties to the Court. In support of this submission SLAB referred to a long line of authority in their Note of Objections.

It was further submitted that in absence of express agreement (as is the case with these three cases) the safeguarder is to be paid "at the customary rate if a notorious custom can be proved, or a reasonable rate fixed by the Court if necessary.



Turning now to the relevant Legal Aid provisions (see para 4 page 6) it was argued that only outlays, properly incurred can be paid out of the fund and that a solicitor "shall only be allowed such amount of fees and outlays as shall be determined by the Board to be reasonable remuneration for the work actually, necessarily and reasonably done and outlays actually, necessarily and reasonably incurred". In my view the outlay was of course properly incurred and necessary but were the fees charged reasonable? The difficulty here is that there is no prescribed fees or a recognised Table of Fees for paying a safeguarder.

What I am told (see para 6.2 page 9) is that safeguarders charge their accounts on either the fees charged on basis of the Old General Table of Fees. That Table was of course withdrawn by the Law Society of Scotland some years ago. While it was in force the Law Society would, normally on an annual basis, review the unit cost (i.e. 1 unit equalled 1/10th 6 minutes of time). At the last review before the Table was withdrawn the unit was set at £13.00 giving an hourly rate of £130.00. That hourly rate was subject to a negative weighting reduction of 13%.

Alternatively accounts may be charged on the basis of Chapter III to the Table of Fees for Solicitors in the Sheriff Court and that the Board currently pays at the rate of £156.00 per hour with a charge of £19.50 per sheet for framing a Report.

In my view the basis of charging in terms of the old General Table of Fees is historic and should not apply now. While it is true that the Table of Fees for Solicitors in the Sheriff Court regulates party and party Accounts, and these cases clearly are not in that category, it seems to me that it provides a useful starting point in determining what is a "reasonable" level of recommendations for safeguarders. I think it is settled that the Auditor has wide discretion in fixing the charge out rate. While I have some sympathy with the position of the safeguarders in these cases I have come to the conclusion that there is merit in the objections taken by SLAB.



In the case of Hamilton v Hamilton in 1998 to which reference was made in the Note of Objections I said this:-

“However the difficulty faced is that the reporter in this case is not an agent. She is not acting for the client. Her primary duty is to the Court and her fee will either be agreed between the parties or determined either by the Auditor or by the Sheriff. A further difficulty for an auditor is to apply “the customary rate if notorious custom could be proved” because, so far as I am aware there is no such notorious custom; certainly nothing was advanced to me by the parties at the taxation. Therefore the rate has to be fixed by the Court. I also respectfully agree with your Lordship’s observations that because a reporter happens to be a Solicitor it does not mean that she should submit an account as a Solicitor when not acting in that capacity. For practical purposes however, very few Advocates or Solicitors would accept the appointment as a reporter unless they were reasonably remunerated for their trouble. Therefore, it seemed to me, as a general proposition the fee chargeable would have to equiparate with what the Solicitor or Advocate could reasonably expect to earn for work of similar importance taking into account the skill, specialised knowledge, responsibility, time expended, the importance and function of the report prepared and the place or places, where, of necessity, the services had to be performed. In my approach I did not consider any of the Table of Fees should be strictly applied but plainly I had regard to them in determining whether the reporter’s charges were fair and reasonable in the context of her appointment”.

These observations related to a Reporter’s charges but in practical terms I see no real distinction between a Reporter and a Safeguarder so far as remuneration is concerned. I therefore concluded that on a balanced view equity would be served were I to apply charge out rates similar to what is allowed in the Table of Fees for Solicitors in the Sheriff Court.



At the end of the day those who agree to do work which is funded by SLAB, a public authority charged with ensuring that spending does not go out of control have to accept that they will not be paid at commercial levels of remuneration.

A handwritten signature in black ink, consisting of a series of connected, fluid strokes.

JOINT AUDITOR

AW194/16

SHERIFF COURT
LODGED
20 DEC 2016
EDINBURGH

SHERIFFDOM OF LOTHIAN & BORDERS AT EDINBURGH

AW194.16

Edinburgh 1st September, 2016

The Sheriff appoints [REDACTED] One St Colme Street, Edinburgh EH3 6AA to safeguard the interest of [REDACTED] and convey his views insofar as ascertainable to the court; Finds the expenses and outlays of the safeguarder to be borne by the applicant and recoverable as an outlay in the cause on his Legal Aid Certificate.

ACCOUNT OF EXPENSES

Incurred by

[REDACTED], Safeguarder to [REDACTED]
[REDACTED]

In respect of an application by

[REDACTED]
[REDACTED] for their appointment as financial and welfare guardians to [REDACTED] in terms of Section 57 of the Adults with Incapacity (Scotland) Act 2000

2016
Aug

26 Emailing the AWI Clerk at Court in reply, noting appointment as safeguarder and arranging for a copy of the Interlocutor to be forwarded to us.

10 00 ✓

Emailing the applicants solicitors with regard to our appointment as Safeguarder and requesting copy of the pleadings to date.

10 00 ✓

Emailing the applicants solicitors with regard to the safeguarder proposed expenses.

N/C

31 Perusing and considering warrant received from the AWI Clerk at Court.

20 00 ✓

25p

Sep

1 Short telephone call to the Pentland Ward making arrangements to meet with the adult

10 00

Safeguarder engaged perusing and considering copy of the summary application, statutory reports and further productions from 20.30 until 21.10 Eng. 40 mins.

140 00

2 Safeguarder engaged travelling to and from the Pentland Ward at the Royal Edinburgh Hospital from 13.00 until 13.30 and 14.00 until 16.30 (apportioned with files for [redacted] and file for [redacted] 6700307116 and 6688340816 (1/3)

66 67

6 miles at 40p per mile (1/3) (1)
VAT thereon.

0 80
0 16

Attendance at the Ward, meeting with the adult which was difficult due to the adults hearing impairment, discussing the guardianship application which was being made, discussing the implications thereof and also discussing matters with staff nurse [redacted] From 14.05 until 14.10

220 00

25.00

6 Short telephone call to the applicant [redacted] confirming appointment as safeguarder and explaining details of the information required arranging for her to revert.

10 00

25p

7 Short telephone call from the applicant [redacted] with regard to the safeguarders remit and noting she would revert.

10 00

25p

Short telephone call later with [redacted] making arrangements to meet.

N/C

25p

9 Attendance meeting with [redacted] discussing the application, explaining the safeguarder has met with the adult and obtaining further background information eng. 1 hr. 10 mins.

240 00

45.00

C/Fwd...£..

0 96 736 67

2016
 Sep
 7.50
 1.50
 1.00
 617.50
 10.25
 25p
 22.00
 61.50
 10.50
 832.17

20 Short telephone call to the MHO with regard to the safeguarders enquiries and arranging for her to revert

Short telephone call with [redacted] Junior confirming remit as safeguarder explaining the safeguarders view regarding capacity and obtaining further background information from him

22 Telephone call with the MHO discussing the application for guardianship confirming appointment as safeguarder, providing details with regard to the investigations undertaken and noting the MHOs view From 12.28 until 12.50.

26 Framing safeguarders report (wc 4588) 19 shts. (under deduction of negative weighting at 20%)

Certifying report

Emailing the AWI Clerk at court attaching copy of the safeguarders report

Attendance preparing to appear at court as safeguarder 30 mins.

Advocacy attendance appearing at court as safeguarder from 11.00 to 11.06.

Attended meeting with the solicitor for the applicants following court, confirming the safeguarders opinion from 11.06 until 11.10

Framing Safeguarders Account of Expenses.

Submitting Account of Expenses to the applicants solicitors for payment. 3 shts.

Less negative weighting being 15% of total fees under deduction of fee for framing of the report

Add VAT on Fees and Posts @ 20.00 %

Sub-total

Add Outlays

TOTAL

Edinburst

0	96	1,981	07
		1276	50
		255	30
		396	21
		2,377	28
		1531	80
		0	96
		2,378	24
		1532	76
		115	00
		43	00
		31	60
		1722	36

Add Auditor
 hodgson dunn
 & Atkinson

The Auditor taxes the foregoing Account at: —
 ONE THOUSAND SEVEN HUNDRED AND EIGHTY TWO
 POUNDS AND THIRTY SIX PENCE (1722.36)

[Signature]
 JOINT AUDITOR
 9 MALVILLE CRESCENT
 EDINBURGH

LIST OF OUTLAYS

Account Id: LRR1432

Account Title: XXXXXXXXXX

Tag No	Narrative	
1	6 miles at 40p per mile (1/3) VAT thereon	0.80 0.16

SHERIFFDOM OF LoTHIAN AND BORDERS
 AW131/16
 ACCOUNT OF EXPENSES

Incurred by

[REDACTED]

As

SAFEGUARDER

To

[REDACTED]

In the

SUMMARY APPLICATION UNDER THE ADULTS WITH INCAPACITY (SCOTLAND)
 ACT 2000

By

[REDACTED]

Edinburgh

23 June 2016

AW121/16

The Sheriff, *inter alia* appoints [REDACTED]
 [REDACTED] to safeguard the interests of [REDACTED] and to convey her views
 insofar as ascertainable to the court; finds the expenses and outlays of the
 safeguarder to be borne by the applicant and recoverable as an outlay in the
 cause on her legal aid certificate

2016 24 June	Perusing interlocutor appointing safeguarder		20.00
	Perusing letter form applicant's agents and noting contact details		10.00
	Perusing summary application and accompanying medical reports 34 shts Eng 40 mins		140.00
	Attend at tel the applicant. Noting brief details and arranging to meet on 27 June		10.00
		C/FWD	180.00

f 23.00
259

2016				
		B/FWD		180.00
27 June	Travel to the applicant's home. Meet the applicant and obtain details relevant to the application. Noting the care she has given the adult over many years. Noting difficulty in obtaining appropriate care for the adult. Noting other relevant details. Travel with the applicant to the Adult's home (nearby). Meet the Adult. Meet [REDACTED] who will stay with the Adult during the safeguarder's visit. Obtaining as far as possible the Adult's views. Noting limited capacity.			
		Eng in all 2 hrs		400.00
	Return travel from home 3 hrs (charge 1 hr)			200.00
	108 mls @ 40ppm	43.20		
	Parking	4.00		
30 June	Travel to Edinburgh Sheriff Court for hearing on interim orders. To include waiting			40.00
	Eng 10 mins			
	Parking charge	5.00		
	Return travel from home 3 hrs (charge 1 hr)			
	108 mls (charge 60 mls @ 40ppm)	24.00		
30 June	Attend at tel [REDACTED] Obtaining details re the applicant's care of the adult relevant to report			10.00
15 July	Travel to meet MHO [REDACTED] Discuss MHO report and queries thereof relevant to the application Eng 30 mins (don't charge travel)			100.00
	Attend at tel [REDACTED] leaving message			10.00
	Email to [REDACTED] explaining role of safeguarder and request he respond			10.00
15 July	Attend at tel interview [REDACTED] social worker. Obtaining details of his involvement and his views Eng 13 mins			40.00
19 July	Perusing and considering lengthy email from applicant's agents re access to funds and letter from OPG			20.00
	Drafting report 11 shts			1100.00
		C/FWD	76.20	2110.00

£ 28.00

£ 44.00

£ 1.00

25p

22.00

25p

25p

1.00

1.00

885.50

2016		B/FWD	76.20	2110.00	
25p	19 July	Lodging report		10.00	
22.00	21 July	Attend at ESC. Sheriff Corke. To include waiting and advocacy 30 mins		100.00	
22.00		Travel from home 3 hrs (charge 1 hr) 108 mls @ 40ppm charge 60 mls	24.00	100.00	
31.50	28 Sept	Framing account 3 shts		90.00	
<u>1142.25</u>		Sub-total		2410.00	1267.75
		Add outlays	100.20	100.20	100.20
		TOTAL		2510.20	<u>1367.65</u>
			Add Audit fee		125.00
			lodging dues		43.00
			VAT thereon		33.60
					<u>1569.55</u>

EDINBURGH

The Auditor taxes the foregoing Account at:-
 ONE THOUSAND FIVE HUNDRED AND SIXTY
 NINE POUNDS AND FIFTY FIVE PENCE
 (£1569.55)



JOINT AUDITOR
 9 MELVILLE CRESCENT
 EDINBURGH

• EDINBURGH •

THE CITY OF EDINBURGH COUNCIL

DATE

EXPIRY TIME

27/06/16

12:18

TIME OF PURCHASE

MACHINE ID

10:46

4.00 0174
FEE PAID (IN POUNDS STERLING)

USE STICKER ON BACK
TO FIX TO WINDSCREEN 15 733781
NOT TRANSFERABLE

• EDINBURGH •

THE CITY OF EDINBURGH COUNCIL

DATE

EXPIRY TIME

30/06/16

13:19

TIME OF PURCHASE

MACHINE ID

11:24

5.00 0356

FEE PAID (IN POUNDS STERLING)

USE STICKER ON BACK
TO FIX TO WINDSCREEN
NOT TRANSFERABLE

16 1734239

SHERIFFDOM OF LOTHIAN & BORDERS AT EDINBURGH

CASE NO – AW40/16

Edinburgh: 21st April, 2016

Sheriff Reith QC

Act : [REDACTED] on behalf of the Applicant

[REDACTED] neighbour of the adult.

The Sheriff, having heard the applicant's solicitor and [REDACTED] continues consideration of the application to 19th May, 2016 at 2pm; appoints [REDACTED] Solicitor, [REDACTED] to safeguard the interests of [REDACTED] the Adult and to convey her views, in so far as ascertainable, to the Court: finds the expenses and outlays of the safeguarder to be borne by the applicant and recoverable as an outlay in the cause of his Legal Aid Certificate

ACCOUNT OF EXPENSES

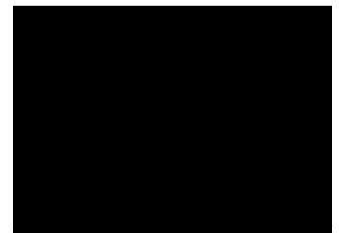
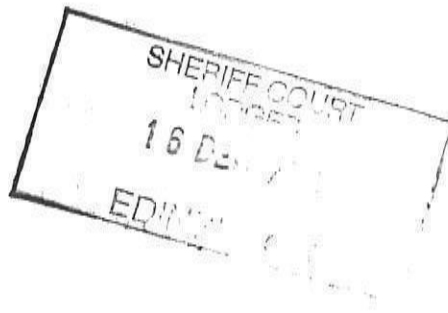
Incurred by

[REDACTED] AS
SAFEGUARDER.

TO

[REDACTED]

In respect of an application to the Sheriff in terms of Section 57 of the Adults with Incapacity (Scotland) Act 2000.



2016
Apr

11 Short telephone attendance with the Sheriff Clerk accepting appointment as Safeguarder

N/C

50P

21 Telephone attendance with Hughes Walker (Adults Agents) noting the appointment of safeguarder and discussing briefly Eng. from 2.49 until 2.54 - 5 mins

20 00

23 Perusing Court Interlocutor received

20 00

75P

27 Brief email to the adults agents, discussing contact information and requesting details to be made available.

10 00

May

4 Telephone attendance with [redacted] (concerned for adult) advising of our appointment as safeguarder and noting preliminary details Eng. from 2.42 until 2.49 - 7 mins.

40 00

1.00

50P

Short telephone attendance with the concerned friend, [redacted] noting arrangements had been made and noting his position. Eng. 4.27 until 4.28 - 1 min.

10 00

23.00⁵

Perusing copy summary application and associated papers. Eng. from 9.00 until 9.40 - 40 mins

140 00

67.00

6 [redacted] engaged travelling to the Western General Hospital meeting with [redacted] obtaining preliminary details, thereafter meeting with the adult, noting limitations on capacity and discussing the application as best possible discussing with staff nurse [redacted] and obtaining full information, returning to chambers. Eng. 2.35 until 4.15 - 1 hr 40 mins

340 00

Travel expenses 4 miles at 40p per mile (1) VAT thereon.

1 60
0 32

12 Short telephone attendance with the Social Worker noting her enquiry

N/C

50P

Email to the adults agents, in reply, noting comments with regard to the Social Worker enquiring for information on the plans to return the adult to home and discussing medical notes

20 00

25P

13 Short telephone attendance with the Social Worker intimating our position. Eng. 11.30 until 11.31 1 mins

10 00

1.00

Telephone attendance with the adults Social Worker discussing the case, noting the Department had not in fact received a copy of the application advising on the current position and arranging to revert. Eng. from 3.15 until 3.24 - 9 mins.

40 00

C/Fwd..£..

1	92	650	00
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2016

May 13

Short telephone attendance with [redacted] noting her visits with the adult and discussing a possible referral to [redacted] Eng. 4.17 until 4.19 - 2 mins

10.25

20 00

Email to the adults agents, advising of our discussions with the Social Worker, noting their position with regard to the application and advising on the necessary steps to be taken 2pp

1.00

40 00

Email to [redacted] (son of the adult) advising of our appointment and Safeguarder, discussing the adults current whereabouts and going over the possibility of information being provided and discussing availability

50p

20 00

16

Email to [redacted] (son of the adult) advising of our appointment as Safeguarder as independent Third Party, advising on the steps taken, going over the need to meet with him considering the information to be provided and advising of intentions 2pp

1.00

40 00

Telephone attendance with [redacted] Mental Health Officer, discussing the case and obtaining information for the report, engaged 11.22 until 11.32. - 10 mins.

1.00

40 00

Telephone attendance with [redacted] (the applicant) discussing the case and time scales and obtaining information in respect of the Report Eng. from 11.34 until 11.49 - 15 mins.

1.50

60 00

Telephone attendance with [redacted] noting that he was currently located in South Africa discussing the case and obtaining details for inclusion within the report. Eng. from 12.16 until 12.21 - 5 mins.

50p

20 00

17

Email to the Court Service, advising of our appointment as Safeguarder discussing the delays and explaining investigations are well advanced but not quite concluded, enquiring for a continuation and requesting the Sheriff be addressing the point.

5.50

25 00

19

Attendance prior to the hearing consulting with the applicants agents and noting their position Eng. from 1.50 until 2.00pm. - 10 mins.

1.00

40 00

Attendance awaiting the calling of the case, engaged from 2.00 until 2.12 - 12 mins. (apportioned to 1 unit)

20 00

Advocacy attendance conducting the hearing when the case was continued for conclusion of the Safeguarders Investigations. Eng. from 2.12 until 2.14 - 2 mins.

24 00

20

Perusing and considering the terms of the Court Interlocutor.

20 00

2016

May 30

Short telephone attendance with [redacted] (nominated guardian) intimating our position engaged from 1.27 until 1.28 - 1 mins.

10 00

25p

Telephone attendance with [redacted] (Manager of Lindoch House) discussing the case and obtaining details for inclusion within the report engaged 1.28 until 1.37 - 9 mins.

40 00

1.00

Short telephone attendance with [redacted] intimating our position - engaged from 1.38 until 1.39 - 1 mins.

10 00

25p

Telephone call with [redacted] discussing the case and obtaining details for information within the report, engaged from 1.55 until 2.05 - 10 mins

40 00

1.00

1187.00

Framing Report as Safeguarder, 14 shts.

1,400 00

Jun 25p 1

Lodging Report

10 00

5.12

Intimating Report to Applicants Agents

10 00

50p

Telephone attendance with [redacted] discussing her involvement, obtaining details and noting contact with the adult - Eng. from 11.16 until 11.21 - 5 mins.

20 00

16

Attendance prior to the hearing, discussing with the applicants agents, engaged from 1.50 until 2.00pm - 10 mins

40 00

1.00

Attendance awaiting the calling of the case, engaged from 2.00 until 2.19 - 19 mins (apportioned to 18 mins)

60 00

Advocacy attendance conducting the hearing when the application was granted and the case was found. Eng. from 2.19 until 2.24 - 5 mins

24 00

25p

17

Short telephone attendance with [redacted] intimating the position. Eng. from 12.35 until 12.36 - 1 mins.

10 00

22

Perusing the terms of the Court Interlocutor engaged. 9.24 until 9.30 - 6 mins.

20 00

Short telephone attendance attempting to contact [redacted] when there was no response and no voicemail service. Eng. 9.23 until 9.24 1 mins.

N/C

Jul 11

Framing Business Account. - 5 shts.

150 00

52.50

5.12

Submitting Account for Payment.

10 00

1370.49

M.D. Account

Sub-total

Add VAT

Sub-total

Add Outlays

TOTAL

2,873	00
1502	51
125	73
3,016	65
1577	64
315	52
603	35
2,619	98
1893	76
1	92
3,621	90
1895	08
185	00
43	00
45	60
2168	68

Add Audit fee
 lodging dues
 VAT Return

EDINBURGH

The Auditor taxes the foregoing Account at: -
 TWO THOUSAND ONE HUNDRED AND SIXTY EIGHT
 POUNDS AND SIXTY EIGHT Pence (£2168.68)

[Signature]
 9 Melville Crescent
 EDINBURGH

LIST OF OUTLAYS

Account Id: LRR937

Account Title: [REDACTED]

Tag No	Narrative	
1	Travel expenses 4 miles at 40p per mile VAT thereon	1.60 0.32

RESPONSE TO POINTS OF OBJECTION

lodged by

THE SCOTTISH LEGAL AID BOARD

**In relation to expenses incurred by the Safeguarder, in the Guardianship of [REDACTED]
[REDACTED] – EDI-AW16-19**

DIET OF TAXATION – Tuesday, 7 November 2023 @ 2.30pm

AUDITORS REFERENCE – LB-76-23-24

Alex Quinn & Partners Ltd, Law Accountants, have been instructed by [REDACTED] Solicitor, to represent her interests as Safeguarder at Taxation.

The Auditor's attention is respectfully drawn to the following responses to the Points of Objection lodged:

PROVISION FOR TAXATION:

The Safeguarder takes no issue with the submissions made in relation to the taxation process.

BASIS OF PAYMENT IN LEGAL AID CASES:

It is accepted and acknowledged that there is no statutory basis for feeing work undertaken by Safeguarders or Reporters. The Safeguarder or Reporter is entitled to be paid a fair and reasonable fee for the work undertaken.

We note the Board's concession that they have, for the best part of 30 years, allowed Reporters and Safeguarders to charge in terms of the Act of Sederunt (Fees of Solicitors in the Sheriff Court), now (Taxation of Judicial Expenses Rules) 2019, or on a solicitor/client, third party paying basis assessed in terms of the former General Business Table of Fees for Conveyancing and General Business subject to negative weighting as highlighted by SLAB.

The application of negative weighting was applied to reflect the fact that this was not strictly a solicitor client/client paying situation, following the decision referred to by SLAB, that practice was accepted and adopted as between SLAB and Safeguarders/Reporters generally.

QUESTION OR DISPUTE WHICH IS THE SUBJECT OF TAXATION:

There are a number of issues of fundamental importance to the approach to taxation of the Safeguarder's costs as follows:

1. The Table of Fees for Conveyancing and General Business have not been in force for nearly 30 years. It was abolished, following the decision of the European Commission in relation to the Order of Belgian Architects to reflect the fact that it was no longer appropriate for a professional body to provide recommended fee scales. Following abolishment of the Table, solicitors were free to charge at such rates that were considered appropriate for the work undertaken based on expertise, specialism, importance, value etc. A substantial number of solicitors, to this day, continue to utilise the guidance previously available in the General Business Table in applying the agreed rates to ensure that any fee brought out is fair and reasonable to both the solicitor and the client. To this day, many firms of solicitors, have, and continue to, adopt the basis for feeing set out in the former General Business Table. They are **not** charging under the Table of Fees for Conveyancing and General Business, as that does not exist. There is however a wide acceptance throughout the profession, that this is a fair and reasonable approach to feeing.
2. Similarly, with Safeguarders and Reporters there is a clear acceptance between them and SLAB that the approach to feeing utilising the former General Business Table as a basis for applying the agreed rate, is a reasonable approach to feeing such work. As indicated by SLAB the practise of charging this way has been accepted as reasonable for the last 30 years or so and continues to be accepted as reasonable to this day whereby SLAB continue to pay Safeguarders on this basis.
3. Any suggestion that the fees are being charged in terms of the Table of Fees for Conveyancing and General Business is inaccurate. As a matter of fact, there is no such Table. There is however a convention or practice whereby the former table is used as a template, in essence to ensure that a fair and reasonable fee is brought out, and in particular to ensure that inefficiency is not rewarded by charging solely on a time basis.
4. The approach to Safeguarders and Reporters fees over the past 30 years has therefore, more accurately been to charge in terms of the **former** General Business Table at a unit rate of £13.00. As noted that has been a practice and approach which has, and is accepted by SLAB as reasonable.
5. The Table of Fees of Solicitor in the Sheriff Court, and it's successor, The Taxation of Judicial Expenses Rules 2019, make clear that those Tables are applicable solely to taxations between parties. This is not a party/party situation and the statutory Tables can therefore not apply unless there is an agreement between the payer and payee to accept payment on that basis.

6. The decision of the Auditor dated 20 April 2017 referred to by SLAB in their Objections and included at Appendix 2, states, at the bottom of page 4:

“I therefore concluded that on a balanced view equity would be served were I to apply charge out rates similar to what is allowed in the Table of Fees of Solicitors in the Sheriff Court.”

What the Auditor does not state is that the Sheriff Court Table of Fees should be applied, but that a similar **charge out rate** (sic), should be applied. In this case the fees were charged at £200 per hour and he in essence determined that £156 per hour would be reasonable. Whilst that appears to be the crux of his decision, that is not the basis upon which he has taxed the account, thus he appears to have fallen in to error in that regard. He further falls in to error in suggesting that charges are being rendered in terms of the Table of Fees for Conveyancing and General Business. They are not. The former Table is being utilised solely as a template at such rate as is considered appropriate.

7. Whilst SLAB are suggesting that from April 2017 they have only allowed Safeguarders in Edinburgh to charge in terms of the Statutory Table of Fees for Solicitors in the Sheriff Court, that is factually not the case. Safeguarders have continued to be paid by SLAB in terms of the former Table of Fees for Conveyancing and General Business at a unit rate of £130 per hour. It is only very recently that SLAB appear to have adopted the approach to try and restrict this particular Safeguarder’s charges to the Table of Fees of Solicitors in the Sheriff Court.
8. What is of significant concern is the approach being adopted by SLAB that only Safeguarders in Edinburgh should not be allowed the option to charge on either basis where Safeguarders and reporters elsewhere continue to be allowed the choice to charge either on the basis of the former Table of Fees for General Business or the Table of Fees for Solicitors in the Sheriff Court. That approach is fundamentally flawed. The Scottish Legal Aid Board is a national organisation. It is wholly inappropriate for them to be applying different tests based on jurisdiction.
9. The applicable test, as highlighted by SLAB in their objections at paragraph 6 is that the Safeguarder is **entitled** to be paid a reasonable fee. On the basis they have been paying such accounts on this basis for nearly 30 years, and continue to pay accounts on this basis to this day, they cannot suggest that these charges are unreasonable.
10. If one goes back to 1993 (30 years ago) and applies inflation, the rate of £130 per hour which SLAB considered reasonable then, in today’s money, would be in the region of £275 per hour. In essence, allowing for inflation, Safeguarders are being paid now at less than half of what was considered reasonable in 1993.
11. If one considers the decision of the Auditor at Appendix 2, and applies the current judicial rate of £180 per hour which appears to be what the Auditor considers is reasonable to the template for charging as set out in the former Table of Fees for

Conveyancing and General Business, which is recognised throughout the profession, and by SLAB, as a reasonable approach, one would, in our submission bring out a reasonable fee for the work undertaken by the Safeguarder. That would still reflect a marked reduction in what was considered reasonable in 1993 however it would bring out a fair and reasonable compromise fee moving forward.

12. Finally, the importance of the input from a Safeguarder and the skill and expertise involved in preparation of Reports and providing input to the Court and other decision making bodies in relation to the welfare of vulnerable adults and children should not be underestimated. The preparation of a report is not simply a framing exercise. Considerable thought and consideration requires to be given to the best interests of the vulnerable person. This skill, expertise and importance are all issues which would justify an increase in a standard hourly rate and not a restriction.
13. In our submission, it is the function of the Auditor, in taxing any account, to determine the reasonable fee applicable. It is entirely within the Auditor's discretion to increase a charge or rate on taxation as it is to modify that rate. Against that background we would submit that the account should be taxed on the basis rendered but with an increased rate of £18 per unit to tie in with the decision of the Auditor to apply a similar rate to the Judicial Rate to the work undertaken.

Alex Quinn & Partners Limited
07/11/23

Note by Auditor of Court –

Account of Expenses incurred by Scottish Legal Aid Board to [REDACTED] Solicitor in relation to her appointment as Safeguarder to [REDACTED]

Taxation in this case took place on 7 November 2023. The Scottish Legal Aid Board (SLAB) were represented by Steven Carrie, Senior Technical Specialist, and Mark Traynor, Law Accountant represented [REDACTED] also remotely attended the taxation. I reserved judgment on 7 November 2023.

Having considered all written documents produced to me and the oral submissions made at the taxation I have taxed the account in the sum of Two Thousand Five Hundred and Sixteen Pounds -97 pence only (£2516.97) inclusive of SCTS Taxation Fee and fee for preparation for the taxation and the application of an amount of negative weighting, all as noted on the attached account.

Submissions

In his written submission Mr Carrie accepted that there was no table of fees dealing specifically with fees for Safeguarders. He stated that for the best part of 30 years in cases where the costs of a Safeguarder were payable from the Legal Aid Fund SLAB allowed fees under either

Chapter III of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) now largely superseded by the 2019 Taxation Rules or

The Table of Fees for Conveyancing and General Business recommended by the Council of the Law Society of Scotland subject to negative weighting of 20% re report and 15% for all other work.

The application of negative weighting in relation to charges under the latter table was referred to by Sheriff Palmer in the reported decision in Linda Henderson v James Henderson (1994 SCLR 553). I am grateful to Mr Carrie for providing me with a copy of this case.

The Table of fees for Conveyancing and General Business was abolished in 2005.

The Auditor of Court at Edinburgh Sheriff Court in April 2017 was invited to tax 3 accounts prepared by two different safeguarders. The sole issue relative to these taxations was the relevant charge out rate. The Auditor concluded on a balanced view that equity would be served if he were to apply the charge out rates that were similar to what was allowed in the Table of Fees for Solicitors in the Sheriff Court.

Comparisons were drawn by Mr Carrie, relative to charges for the Report, between the now abolished Table of Fees for Conveyancing and General Business and Schedule 1 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019.

I was invited by Mr Carrie to tax the account in terms of the 2019 Rules.

In his written response Mr Traynor noted that the Table of Fees for General Business was abolished many years ago. A substantial number of solicitors to this day it was submitted continue to utilise the guidance previously available in the General Business Table but at rates agreed with the client.

They are not charging under that table – it is there for guidance. It is within my knowledge that is indeed the case from accounts that I tax when the Sheriff awards expenses on a solicitor/client – client paying basis.

Mr Traynor drew my attention to the impact of inflation on the £130 per hour rate under the Table of Fees for Conveyancing and General Business that SLAB considered reasonable years ago.

It was also inappropriate that there was not a national approach to Safeguarder/Reports rates. Safeguarders/Reporters out with Edinburgh Sheriff Court were being allowed a choice of the former Table of Fees for General Business or the Table of Fees for solicitors in the Sheriff Court (now 2019 Rules).

He submitted to me that when taxing a reasonable fee the preparation of the report was not simply a framing exercise – considerable thought needs to be given as to the content.

I was invited to tax the account on the basis rendered but allowing £16.40/£18 per unit.

The test I had to apply was the allowance of a fair and reasonable fee.

Both parties endorsed and supplemented their submissions at the Hearing on 7 November 2023.

Mr Carrie confirmed that SLAB were looking for guidance here. He submitted that I give very careful consideration relative to the cost for the report.

Decision

In coming to my decision I have considered the case of Henderson v Henderson, referred to earlier by Mr Carrie. In that case Sheriff Palmer stated that the test was not which table was the correct one to apply – General Business or Sheriff Court. The Auditor has a wide discretion. Sheriff Palmer stated in Henderson that if the General Table was utilised then considerable negative weighting would need to be applied as in all probability only two of the factors referred to in Paragraph 4 of the General Regulations set out in the Table of Fees for General Business would apply.

Sheriff Palmer in this case referred to “What is the going rate for a solicitor?” He stated that there is no such rate and the expression is meaningless. The General Table is a recommended scale only and the rate varies from case to case and according to circumstances. Paragraph 5 of the General Business Table confirms this.

Reading Chapter 6 of the General table, the Chapter has a number of sub headings. One of the sub headings is Miscellaneous Proceedings. This is stated to be “Proceedings before Parliament, local authorities, statutory bodies, administrative tribunals and inquiries, arbitraries and Courts for which professional charges are not prescribed.”

Such an account as I am dealing with here has to be seen for what it is – an outlay in Civil Proceedings . It is not provision of professional services. The fixing of a fee is a balanced judgment rather than an arithmetical calculation and allows for both negative and positive weighting in appropriate circumstances.

In coming to my decision I firstly have had regard to Section 1.2 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019. This sets out clearly what the Rules apply to. Section 1.2(1) (c) states “the taxation is pursuant to a finding that a party (“the paying party”) is liable in expenses to another party (“the entitled party”).

This is clearly not the situation here and in my view the account cannot therefore be taxed in terms of these Rules. These Rules are only applicable to an award of expenses against a party in a litigation. This account is an outlay in proceedings before the Court.

In the absence of any Fees Schedule applicable in the matter I am taxing, in my view the only possible framework that could be used for these accounts is the now abolished Table of Fees for Conveyancing and General Business. I appreciate said Table has now been abolished but it can still be used as a charging framework ignoring the monetary unit rate. It is widely used through the Profession and is well established. This is used by the Profession as a frame work for private client terms of business letters. Clearly Private Client charges are not appropriate here and taking into account, the rate previously allowed by SLAB years ago, inflationary increase since then, the allowance of a fee that is fair and reasonable and SLAB’s responsibilities relative to payments from the Legal Aid Fund I am of the view that this account and similar accounts should be taxed under the above mentioned frame work with the substitution of a Unit Rate of £16.40 or £18 (for work after 30 June 2023). I have considered the number of Units that I feel would be appropriate for the completion of the Report. Having regard to Part 1 of Chapter 3 of the Table of Fees for General Business I am of the view that this should be charged at 3 units per sheet as opposed to 5 Units per sheet set out in the account that has been presented to me.

As far as negative weighting is concerned , given the factors that I have referred to earlier , I am of the view that negative weighting is appropriate and that should be 20% for all works including the report.

ALAN PIRIE

Auditor of Court

Tayside Central & Fife

18 December 2023.

LB 76- 23/24
CROSSMURCH 12/16/19

LM/31074/AJB

SHERIFFDOM OF LOTHIAN
AND BORDERS AT
EDINBURGH

At Edinburgh
On 13 October 2022
Court Ref. No.: EDI-AWI6-19

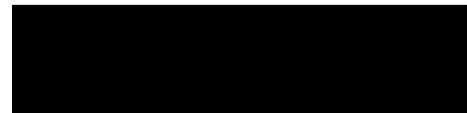
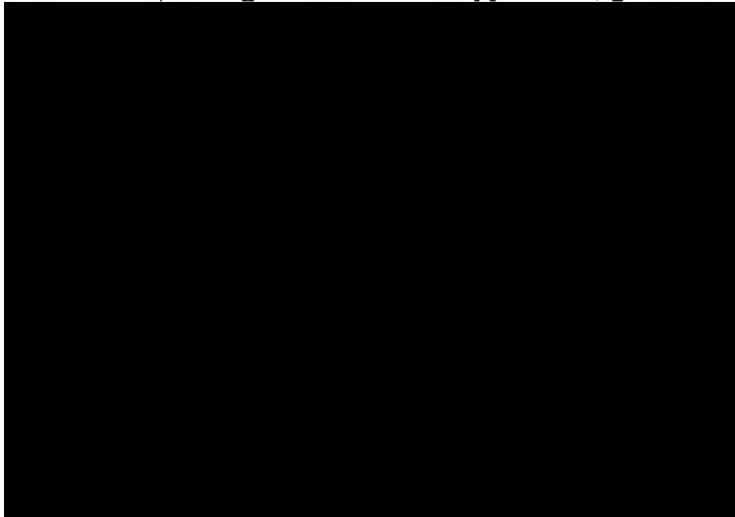
ACCOUNT OF EXPENSES

incurred by

THE SCOTTISH LEGAL AID
BOARD

to

The Sheriff, having considered the Application, grants



In relation to her appointment as
Safeguarder

to

the Application, together with the accompanying reports
and Warrant, together with Notice in Form 20 and, in



Rules) 1999, as amended, upon a period of notice of
twenty-one days and appoints them, if so advised, to
lodge Answers within twenty-one days of the date of
service and to appear or be represented within the Sheriff
Court at Edinburgh Sheriff Courthouse, 27 Chambers
Street, Edinburgh, EH1 1LB, on 10 November 2022 at
10.00am; said Hearing will be conducted by remote
means; unless otherwise directed by the Court; appoints
the parties to provide to
edinburghawi@scotcourts.gov.uk or on 0131 2252525
not later than two days prior to said Hearing, a telephone
number and e-mail address where they can be contacted
prior to said diet with the relevant dial-in details or
weblink to allow parties to access the remote Hearing by
video or teleconference; appoints [redacted] c/o
the Sheriff Clerk's Office, 27 Chambers Street,

Edinburgh, to safeguard the interests of [REDACTED]

[REDACTED]
her views, insofar as ascertainable, to the Court; finds the applicant liable for the reasonable costs and outlays incurred by the Safeguarder.

(Sgd.) "SHERIFF TAIT"
Sheriff

2022						
Oct	13	Writing McDougall McQueen to advise them as to our instructions and requesting they forward to us the papers and contact details for their client, also requesting they confirm that there is Legal Aid cover in place to meet reasonable fees and outlays				Q16 25 20 50
	19	Perusing and considering papers - 1 hr				164 00 Q30 00
		Attendance on telephone with Morningside Manor, advising them as to [REDACTED] appointment and making arrangements to visit the adult - 5 mins - long call				Q13 00 16 40
	25	Attendance visiting Morningside Manor, meeting with adult and nurse, [REDACTED] noting details for report. Engaged, to include travelling time, 2 hrs				Q60 00 328 00
		Paid mileage - 36.4 miles	16	38	✓	
		VAT	3	28	✓	
	28	Attendance on telephone with [REDACTED] noting details for report - 30 mins				Q65 00 82 00
		Attendance on telephone with [REDACTED] noting details for report - 10 mins				Q26 00 32 80
	31	Attendance on telephone with [REDACTED] noting details for report - 20 mins				Q52 00 65 60
Nov	07	Framing interim report - 3,642 words - brought out at 15 sheets (3 mins / 18 mins)				Q75 00 738 00
		Agency signing report			<u>NO FEE</u>	Q6 50
		Writing Edinburgh Sheriff Court with report				Q6 50 8 20
		Writing McDougall McQueen with report				Q6 50 8 20
	10	Attendance at Court by WebEx, waiting for case to call, thereafter appearing. Engaged 10.00am - 10.32am. Time engaged 32 mins				Q78 00 98 40
		Perusing and considering Court's Interlocutor once received - 15 mins				Q39 00 49 20
		Writing McDougall McQueen acknowledging receipt of Interlocutors, [REDACTED] is happy with the amendments although she did mean former 1(i) to be deleted in its entirety as she does not think the adult will require any occupancy rights				Q16 25 20 50
						1631 80
		Carried Forward £	19	66		Q1690 00

Brought Forward £

19 66

~~1690 00~~

2022

1631 80

Nov 21

Framing Account of Expenses - 2 sheets @ £39.00 per sheet

~~178 00~~

98 40

Writing McDougall McQueen with Account

~~106 50~~

8 20

LESS: 20% negative weighting to be applied to preparation of Report

~~195 00~~

LESS: 15% negative weighting to be applied to remainder of account

~~130 92~~

1738 40

NEGATIVE WEIGHTING

Posts & Incidentals @ 5%

~~30 68~~

~~172 98~~

1390.72

6954

19 66

Add VAT @ 20% on 1532.56

~~332 56~~

1460 26

Add Outlays

~~306 51~~

~~19 68~~

£

~~1858 73~~

MEMORIAL FEE

~~540 00~~

2000 26

VAT

400 05

2400 31

CURRENT MEMORIAL FEE

19 66

97 00

2516 97

FINAL 18 October 2023 (Awarded 8 January 2024)
 Having further considered the account and all submission made to me in writing and at hearing I find the account is the sum of Two thousand five hundred and sixteen pds - 97 pence only (£2516.97) inclusive of SC3 Taxable fee.

ACCOUNTANT