

## 10 SAFEGUARDERS AND CURATORS AD LITEM

# CHAPTER 10: SAFEGUARDERS AND CURATORS AD LITEM IN PROCEEDINGS UNDER PART II CHAPTERS 2 AND 3 OF THE CHILDREN (SCOTLAND) ACT 1995

*Unless otherwise stated, "the Act" or "the 1986 Act" means the Legal Aid (Scotland) Act 1986, and "the regulations" means the Legal Aid (Scotland) (Children) Regulations 1997.*

## 10.1 Introduction

The office of a safeguarder and/or a curator *ad litem* appointed by a sheriff to safeguard the child's interests in the proceedings is distinct from the office of solicitor even when those offices coincide in the one person (*Nugent –v- Nugent Glasgow Sheriff Court 1998 unreported* and *Henderson –v- Henderson 1994 SCLR 553*).

A person appointed to act as a safeguarder and/or curator *ad litem* in children's proceedings need not be a practising solicitor, as such persons do not provide legal services, even if they so happen to be a practising solicitor.

Children's legal aid is defined in section 29(11) of the 1986 Act and consists of representation by a **solicitor** and, where appropriate, **counsel** in any proceedings (including appeals) that are listed at section 29(1) of the 1986 Act. It includes all assistance a **solicitor** or **counsel** usually gives in the steps preliminary or incidental to such proceedings.

We can, therefore, only pay for the provision of legal services (legal representation and assistance) by a solicitor or counsel. We cannot pay for work carried out by a safeguarder or a curator even where that person happens to be a practising solicitor.

In terms of section 41(4) of the Children (Scotland) Act 1995 (the 1995 Act), a safeguarder can be paid for their work by the local authority.

There is no statutory payment mechanism for a curator *ad litem*.

## 10.2 Appointment as safeguarder

Where the safeguarder appointed by the sheriff happens to be a practising solicitor, then in terms of rule 3.9(2) of the Act of Sederunt (Child Care and Maintenance Rules) 1997 that safeguarder cannot also act as a solicitor for the child.

Rule 3.9 states

- (1) A safeguarder may appear personally in the proceedings or instruct an advocate or solicitor to appear on his behalf.
- (2) Where an advocate or a solicitor is appointed to act as a safeguarder, he shall not also act as advocate or solicitor for the child in the proceedings.

Therefore if the solicitor safeguarder concludes that, in addition to their role, the child needs legal representation, the safeguarder must instruct another solicitor to represent the child. Equally if the safeguarder is not a practising solicitor and decides the child needs legal representation, the safeguarder can instruct a solicitor to represent the child.

In an application for legal aid in the above circumstances, therefore:

- the nominated solicitor will be the name of the solicitor who has been instructed by the safeguarder to represent the child
- the name of the nominated solicitor cannot therefore be the same name as the safeguarder appointed by the sheriff
- the safeguarder can, however, sign the legal aid application on behalf of the child.

If legal aid is granted, the nominated solicitor instructed by the safeguarder to represent the child can send us an account. We will meet the cost of all reasonable and necessary work carried out by the solicitor acting for the child.

We cannot and will not, however, pay any charge for work carried out by the safeguarder even if the safeguarder so happens to be a solicitor. The safeguarder can obtain payment from the local authority in terms of section 41(4) of the 1995 Act.

### **10.3 Non-payment of accounts**

If a sheriff grants a legal aid application made by a solicitor acting in a dual capacity as both safeguarder and solicitor to the child, despite this being in clear breach of rule 3.9(2) and therefore incompetent, we have to register the grant of legal aid but we will not pay any of the account.

A flowchart at the end of this chapter sets out the circumstances in which we can and cannot pay a solicitor for work done where a safeguarder has been appointed to a child.

### **10.4 Solicitors representing the safeguarder**

There is nothing to prevent safeguarders, whether practising solicitors or not, from instructing solicitors to represent them, as opposed to the child, in terms of the Child Care and Maintenance Rules.

If the safeguarder is a practising solicitor there is equally nothing in these rules to prevent one person acting in these two different capacities.

However, in terms of section 29(2) of the 1986 Act children's legal aid is only available to a child and to relevant persons. It is not available to anyone else, irrespective of any office that they hold.

### **10.5 Non-payment of accounts**

If a sheriff grants a legal aid application by a solicitor acting for a safeguarder despite this being incompetent in terms of section 29(2) of the 1986 Act we must register the grant but we will not pay any of the account.

A flowchart at the end of this chapter sets out the circumstances in which we can and cannot pay a solicitor for work done where a safeguarder has been appointed to a child.

### **10.6 Solicitor acting as a safeguarder to the child and separate solicitor acting as solicitor to the child**

There is nothing to prevent safeguarders, whether practising solicitors or not, from instructing solicitors to act for children in terms of the Child Care and Maintenance Rules.

In such a circumstance, the solicitor acting for the child applies to the sheriff for legal aid on behalf of the child and that solicitor will be the nominated solicitor. The safeguarder appointed to the child can, however, sign the legal aid application on behalf of the child. Such an application is competent in terms of both section 29(2) of the 1986 Act and the Child Care and Maintenance Rules.

When determining the application the sheriff must apply the statutory merits test laid down in section 29(4) (a) of the 1986 Act – that is, whether it is in the child’s interests to grant legal aid.

The solicitor making the application will have to satisfy the sheriff that this test has been met despite a safeguarder, who is a practising solicitor, having been already appointed in the proceedings to safeguard the interests of the child.

If the sheriff is so satisfied and grants legal aid to the child, the nominated solicitor instructed by the safeguarder to act for the child can send us their account. We will pay for all reasonable and necessary work the solicitor acting for the child carries out.

However, none of the work carried out by the safeguarder will be paid from the Fund. The safeguarder can seek payment for the work they have carried out from the local authority in terms of section 41(4) of the 1995 Act.

A flowchart at the end of this chapter sets out the circumstances in which we can and cannot pay a solicitor for work done where a safeguarder has been appointed to a child.

## **10.7 Appointment as curator ad litem**

Where, as sometimes happens, the curator *ad litem* appointed by the sheriff in the proceedings so happens to be a practising solicitor and decides to act in dual capacity as both curator and solicitor to the child, that curator can make an application, in their capacity as a solicitor, for legal aid on behalf of the child to the sheriff. On such an application this person will be both the nominated solicitor and the child’s representative by virtue of their appointment as a curator *ad litem*.

However, for the reasons explained in paragraph 10.1

- we can only pay those charges applicable to actual legal representation (that is, the provision of legal services by a solicitor) to the child
- we cannot pay any charges that relate to work carried out in the capacity of curator.

For example:

- Charges relating to drafting a written report for the sheriff will not be met from the Fund as this is clearly work carried out in the capacity of a curator and does not amount to provision of legal services to the child.
- Charges associated with observing contact visits will be considered to be curatorial in nature and are not considered to amount to legal representation of the child.
- Charges associated with spending time with relevant persons or carers (unless the time is spent obtaining precognitions from these people because they are witnesses or potential witnesses) will not be met from the Fund as, again, we consider these charges to be curatorial in nature. It is open to a relevant person to apply for legal aid and have their own solicitor to keep them apprised of the court proceedings and advise them accordingly.

We will also take the above approach where a sheriff appoints a curator *ad litem* to act for an incapable adult relevant person who lacks capacity to directly instruct their own solicitor.

A flowchart at the end of this chapter sets out the circumstances in which we can and cannot pay a solicitor for work done where a curator *ad litem* has been appointed to a child.

## **10.8 Solicitors representing a curator**

There is nothing to prevent a curator, whether a practising solicitor or not, from instructing a solicitor to represent them, as opposed to the child.

However, in terms of section 29(2) of the 1986 Act, children’s legal aid is only available to a child and to relevant persons. It is not available to any other person or office.

## **10.9 Non-payment of accounts**

If a sheriff grants a legal aid application by a solicitor representing a curator despite this being incompetent in terms of section 29(2) of the 1986 Act, we have to register the grant of legal aid but we will not pay any of the account.

A flowchart at the end of this chapter sets out the circumstances in which we can and cannot pay a solicitor for work done where a curator *ad litem* has been appointed to a child.

### **10.10 Curator to child instructing separate solicitor to act as solicitor to child**

A curator to the child, whether a practising solicitor or not, can instruct a solicitor to act for the child.

In such a circumstance, the solicitor acting for the child applies to the sheriff for legal aid on behalf of the child and that solicitor will be the nominated solicitor. The curator appointed to the child can, however, sign the legal aid application on behalf of the child. Such an application is competent in terms of both section 29(2) of the 1986 Act and the Child Care and Maintenance Rules.

When determining the application the sheriff must apply the statutory merits test laid down in section 29(4) (a) of the 1986 Act – that is, whether it is in the child's interests to grant legal aid.

The solicitor making the application will have to satisfy the sheriff that this test has been met despite a curator, who is a practising solicitor, having been already appointed in the proceedings to safeguard the interests of the child.

If the sheriff is so satisfied and grants legal aid to the child, the nominated solicitor instructed by the curator to act for the child can send us their account. We will pay for all reasonable and necessary work the solicitor acting for the child carries out.

However, none of the work carried out by the curator will be paid from the Fund. Unlike the position for safeguarders, there is currently no statutory payment mechanism for curators.

A flowchart at the end of this chapter sets out the circumstances in which we can and cannot pay a solicitor for work done where a curator *ad litem* has been appointed to a child.

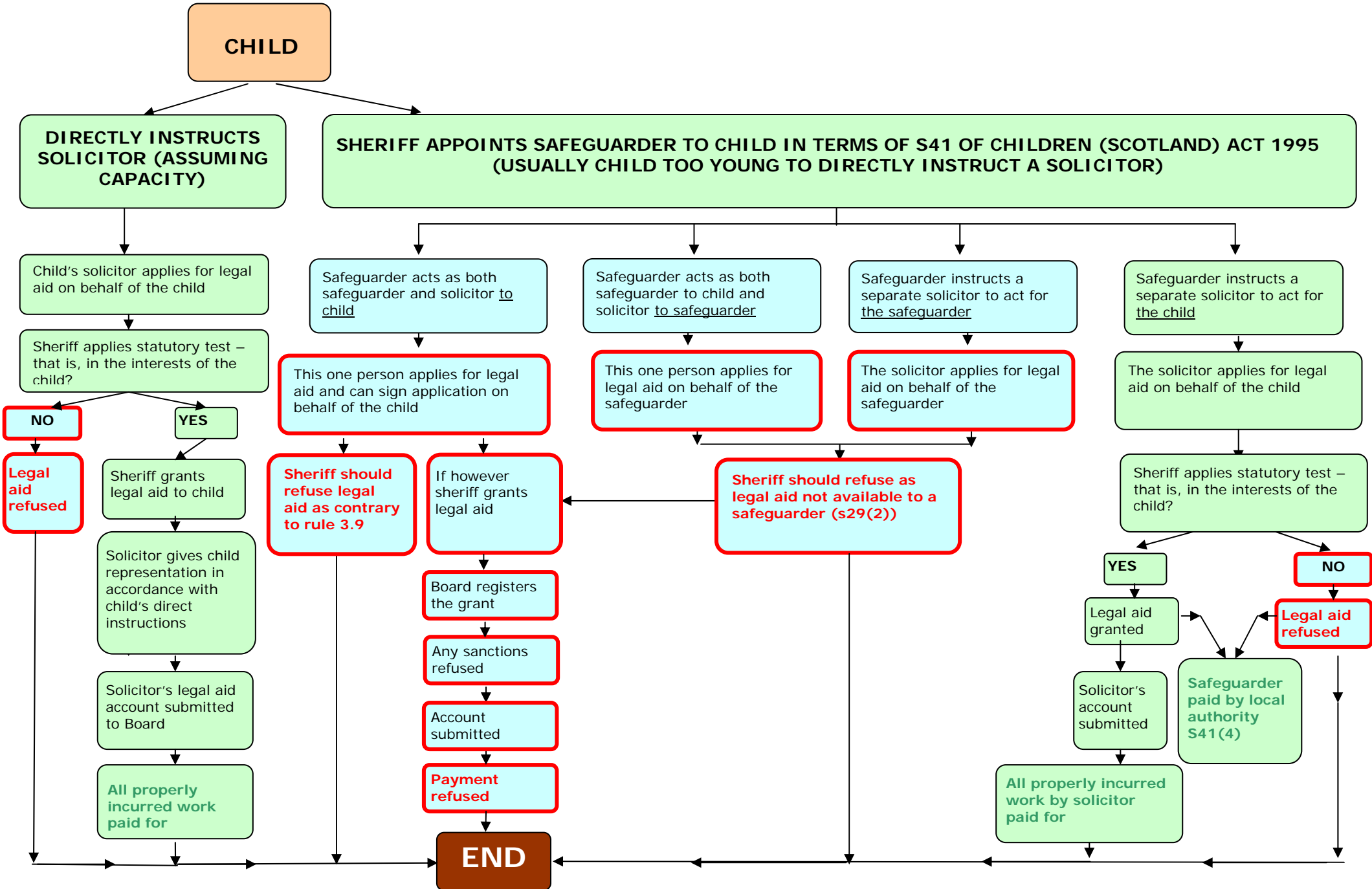
### **10.11 Appointment as safeguarder and curator *ad litem***

If a person is appointed by the sheriff to act as both safeguarder and curator *ad litem* the Board will apply paragraphs 10.1, 10.7, 10.8, 10.9 and 10.10 which apply to someone appointed to act as a curator *ad litem*.

### **10.12 Advice and assistance cannot be given by safeguarders and curators *ad litem***

Safeguarders or curators *ad litem*, even if they are practising solicitors, cannot provide advice and assistance to a child – see chapter 4 for more details about advice and assistance.

**SAFEGUARDERS IN PROCEEDINGS UNDER PART II CHAPTERS 2 AND 3 OF THE CHILDREN (SCOTLAND) ACT 1995**



**CURATORS IN PROCEEDINGS UNDER PART II CHAPTERS 2 AND 3 OF THE CHILDREN (SCOTLAND) ACT 1995**

**CHILD**

**DIRECTLY INSTRUCTS SOLICITOR (ASSUMING CAPACITY)**

**SHERIFF APPOINTS CURATOR AD LITEM TO CHILD UNDER THE COMMON LAW (USUALLY CHILD TOO YOUNG TO DIRECTLY INSTRUCT A SOLICITOR)**

Child's solicitor applies for legal aid on behalf of the child

Sheriff applies statutory test – that is, in the interests of the child?

**NO**      **YES**

**Legal aid refused**

Sheriff grants legal aid to child

Solicitor gives child representation in accordance with child's direct instructions

Solicitor's legal aid account submitted to Board

**All properly incurred work paid for**

Curator acts as both curator and solicitor to child

This one person applies for legal aid and can sign application on behalf of child

Sheriff applies statutory test – that is, in the interests of the child?

**YES**      **NO**

Legal aid granted to child

Account submitted

**Only work amounting to the provision of legal services to child can be paid**

Curator acts as both curator to child and solicitor to curator

This one person applies for legal aid on behalf of the curator

**Sheriff should refuse as legal aid not available to a curator (s29(2))**

Curator instructs a separate solicitor to act for the curator

Solicitor applies for legal aid on behalf of the curator

If, however, sheriff grants despite legal aid not being available to a curator

Board registers the grant

Any sanctions refused

Account submitted

**Payment refused**

**END**

Curator instructs a separate solicitor to act for the child

The solicitor applies for legal aid on behalf of the child

Sheriff applies statutory test – that is, in the interests of the child?

**YES**      **NO**

Legal aid granted

Solicitor's account submitted

**All properly incurred work by solicitor only paid for. (No separate payment mechanism such as local authority available to curator)**

**Legal aid refused**