RC KG

[redacted] **AND** [redacted] [redacted] [redacted]

TAXATION AT JEDBURGH SHERIFF COURT ON 17 DECEMBER 1996 AT 10.30 A.M.

The account is broken down as following:

Perusals	£32.75	2%	
Letters	£38.70	3%	8 letters
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Travelling time	£172.00 apprx	12%	which is 68 miles
Attendances	£372.66	25%	which lasted 3 hours 50 minutes approx. 4 parties interviewed - (1) pursuer (2) defender (3) [redacted] (4) [redacted]
Framing and engrossing	£645.00	44%	30 pages long
Copying charges	£103.20	7%	
Posts	£25.00	1.5%	

In the judicial decision that we have from Sheriff Palmer he indicated that if the general table was to be looked upon for guidance then severe negative weightings should be applied and the only parts of the general table which would probably cover the custody reporters would be parts E and G.

A - The Importance Of The Matter To The Client

I would not say that this factor should be considered because under the heading it states that "Apart from emotional importance to the client, this factor covers gains achieved or losses averted through the efforts of the practitioner, e.g. the value of advice given heals a family rift, facilitates a reconciliation, settles a dispute amicably. Given that a custody reporter cannot do this then I cannot see how this heading should apply.

B - The Amount Or Value Of Any Money Or Property Involved.

Not Applicable.

C - The Complexity Of The Matter Or The Difficulty Or Novelty Of The Question Raised.

I would not say that this heading would be appropriate as there is no novel or difficult question raised. Indeed the custody reporter is only investigating the background, not raising any question.

As for the complexity issue, again I do not feel, in this case, that it is applicable.

D - The Skill, Labour, Specialised Knowledge And Responsibilities Involved On The Part Of The Solicitor Or Assistant.

Again I do not feel/.....

Again I do not feel that this heading would apply either. Dealing with the skill, in this case, I fail to see where any positive weightings could be justified. As far as I am aware there is no particular skill involved by a custody reporter apart from interviewing the clients, this would also apply to specialised knowledge. As for the responsibility element again I can see how this would be appropriate.

E - The Time Expended

Leaving aside correspondence and drawing charges only 3 hours 50 minutes was spent on meetings. The work involved at meetings is essentially fact finding (i.e. straight forward in nature and for equating purposes should attract a negative weighting). See page 8 of Sheriff Palmer's decision.

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It is recognised the reporter is away from his usual place of business. However, it is respectfully submitted that this is the norm for a reporter and the distances involved in this case are not significant requiring any overnight stay. Therefore, bearing this in mind, there should be no positive weightings. The time approximately spent travelling on this case was around 2 hours which equated to 68 miles. There being no demand on the reporter during the travelling period which would warrant an uplift on this time.

As far as I can ascertain none of the other factors on the general table would be appropriate.

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I also attach to this note a copy of

1) Sheriff Palmer's decision.
2) Copy of custody reporter's account.
3) Letter from law accountants on why general table appropriate and also 2 notes from Mr McConnel and Ian Balfour, Auditors of Edinburgh Sheriff Court.
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~~ADDITIONAL FEE SUBMISSIONS~~

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Leaving aside correspondence and drawing charges only 3 hours 50 minutes was spent on meetings. The work involved at meetings is essentially fact finding (i.e. straight forward in nature and for equating purposes should attract a negative weighting). See page 8 of Sheriff Palmer's decision. Given the report was prepared over a 6 week period this does not appear to suggest that the employment of the solicitor as a custody reporter was labour intensive that would have caused any significant demands on his normal business.

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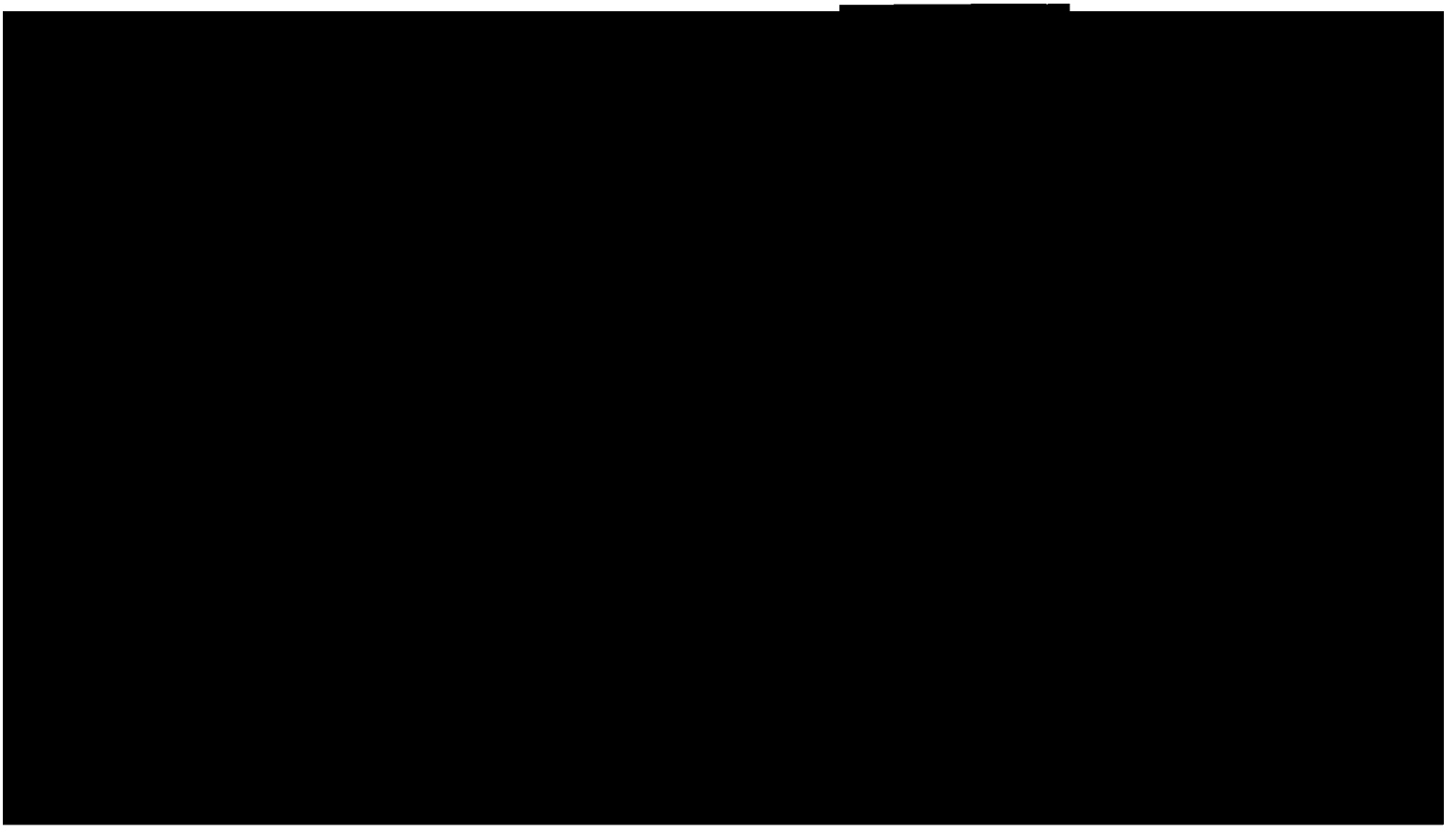

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tel = £83.88 - 6% - Around 1Hour

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ATTENDANCES = £372.66 - 25% - 3Hours 50 mins (approx)

Framing & Engrossing = £645.00 - 44% - 30 pages

Copies = £103.25 - 7%

POSTS = 25 - 15%

Personal

21-50
10-75
£32-25

Travel

34 miles - Around 1Hr. 35-70
£86-00
£86-00
172-00

Letters

8-60
8-60
2-15
2-15
2-15
8-60
2-15
2-15
2-15

Col

2-15
43-00 ($\frac{1}{2}$ hour)
21-50 ($\frac{1}{4}$ ")
8-60
8-60
83-85

Attendances

£129-00 $1\frac{1}{2}$
£150-50 $1\frac{3}{4}$
£50-16 35
£43 $\frac{1}{2}$
372-66

Framing + Engrossing

£516-00
£129-00
645-00

Copies

103-20 (3 Copies)

Postage

£25-00

SHERIFFDOM OF LOTHIAN & BORDERS AT DUNS

REPORT BY AUDITOR OF COURT

on

Account of Expenses

incurred by

Scottish Legal Aid Board

in causa

RC

[redacted]

KG

and

[redacted]

This account relates to expenses incurred by John Grant, Solicitor, for the preparation of a report under Section 11 of the Matrimonial Proceedings (Children) Act 1958. Mr Grant was appointed by the court by interlocutor dated 15 May 1996. The interlocutor directed that the cost of the report was to borne equally by the parties. The report was duly prepared and, as both parties were legally aided, an account of expenses was made up and tendered to the Scottish Legal Aid Board for payment. The Board have disputed the Account and requested that it be submitted for taxation under Reg. 12 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. A diet was fixed for 17 December 1996.

At the diet Mr Wilkie, Law Accountant appeared for Mr Grant. [redacted] represented the Board.

At the outset, [redacted] stated that the main issue of dispute was the basis on which the account had been made up. He observed that the fee had been charged on the basis of the Law Society fees for conveyancing and general business (referred to as the Law Society table) and submitted that this was inappropriate. In support of this submission he referred me to *Linda Mary Henderson v James Henderson (1994 SCLR, 553).* In this case, the auditor had concluded that the reporter was entitled to be paid at the "going rate" and that this could reasonably be based on the Law Society's table of fees. The Legal Aid Board objected to this and the sheriff held that a solicitor acting as a reporter was not automatically entitled to be paid at the Law Society rate but was entitled to be paid a fee at such rate which, in the discretion of the auditor, is fair and reasonable and, that although the position of reporter can in some ways be likened to an expert witness, the auditor's discretion is wide and he can have regard to any of the tables of fees referred to by the parties. The sheriff then remitted the account to the auditor to reconsider the matter.

[redacted] submitted that I should allow the account on the basis of Chapter III of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, hereinafter referred to as the Sheriff Court table. He submitted that the fees formed an outlay in a litigation and that the preparation of the report was not in the nature of legal work for a private client. Moreover, there was no agent-client relationship between the parties. The solicitor had not provided a full professional service but had prepared a report at the direction of the court. Although the report had been requested from a solicitor, there was no reason why a non-legally qualified person could not have prepared the report and that this is frequently done, for example, by social workers. He stated that I should also consider that the length of the report was excessive (30 pages of 250 words per page) and that, taken with the fact that the account had been charged in accordance with the Law Society table, indicated that the exercise was one of fee maximisation. He finally submitted that *Henderson* conferred a wide discretion on the auditor and that the auditor can look to any of the tables of fees for assistance.

In reply, Mr Wilkie submitted that the sheriff had erred in *Henderson* and that I was entitled to take a different view. He referred me to Regulation 1 of the above Act of Sederunt which provides that the Sheriff Court table shall regulate the taxation of accounts between party and party. He stated that as Mr Grant's account was not on a party and party basis, the Sheriff Court table should be disapplied. He referred me to Chapter 6, Reg. 29 which, he submitted, was applicable in this case. This regulation provides that the Law Society table applies in miscellaneous proceedings such as proceedings before parliament, local authorities and other tribunals, inquiries, arbitrations and courts for which professional charges are not prescribed. He further submitted that, in any event, Mr Grant was engaged in his professional capacity and was entitled to be paid as such, and that the Law Society table was reasonable. He referred me to the interlocutor of 15 May 1996 containing the appointment which states "Orders Mr Grant, Solicitor, Duns to prepare a report..." Mr Wilkie argued that the insertion of the word "Solicitor" implied that the Court required a professional legal service and that Mr Grant was entitled to remuneration under the Law Society table. Moreover, he submitted, no negative weighting should be applied as the matters before Mr Grant were complex and required a high level of skill and care. In support of this he stated that the reporter required to interview a number of persons to obtain sufficient background information to enable him to form an objective view on the matter. The case was delicate and required great sensitivity of treatment. The subject matter was of utmost importance to the parties and crave 1 of the writ was for declarator of parentage. When these matters were set against the factors set out in Reg. 4 of Chapter 1 of the Law Society table it was clear that no negative weighting should be applied. Indeed, he submitted, positive weighting may well have been justified. So far as the length of the report was concerned, he repeated that the subject matter was complex and that Mr Grant was obliged to furnish the court with a full and thorough report. In any event, the report had been charged at only 2 units per page where 4 units could well have been justified.

Mr Wilkie also referred me to two decisions by the joint auditor of court at Edinburgh. The first case, *National Home Loans Corporation plc v B & M Greennill* concerned recovery of legal fees by a mortgage lender who had repossessed a property. The question of whether this matter should be taxed by auditor was raised. The auditor decided that taxation was appropriate and taxed the account on the basis of the Law Society table having regard to Ch 6 Reg. 29. The second case concerned the account of *Nicholas Robertson as Trustee in Bankruptcy to Messrs Kidstons, Solicitors.* The issue in this case was a charging system based on the Law Society table at a unit value of £12, the recommended value being £8. The account concerned work done by Mr Robertson in his capacity as trustee. The question of how the account should be charged was raised. Reference in this case was made to the fact

that Chapter III of the Sheriff Court table provided for taxation as between party and party only. Before 1992 this table had also provided for taxation of accounts between solicitor and client but, in July of that year, the Act of Sederunt (Solicitor and Client Accounts) Sheriff Court 1992 came into operation. This does not provide a table of fees but creates a mechanism for taxing such accounts and the criteria to be adopted by the auditor. The test to be applied is whether the sum charged is fair and reasonable. Reference was also made to the application of Ch 6, Reg. 29 above. The auditor allowed the account on the basis of the Law Society table but abated the fee by 20%.

At the outset I should state that *Henderson* in the only recent judicial authority on the matter and I consider that Mr Wilkie's invitation to disregard it should not be accepted lightly. The sheriff in *Henderson* expresses the view that a going rate for solicitors does not exist as there are many different rates applicable depending on the circumstances. Accordingly, resort to the Law Society table in a default situation does not appear to be appropriate. The sheriff in *Henderson* goes on to state that, in some ways, the position of a reporter is similar to that of an expert witness and that the expenses of expert witnesses are taxable by the auditor. It follows from this that the reporter's fee is to be regarded as an outlay in a sheriff court civil litigation. *Henderson* also states that the majority of sheriff courts allow charges based on the Sheriff Court table, with only a few allowing the Law Society table.

I am aware that the general practice in most courts is to allow fees on the basis of Chapter III of the Sheriff Court table. Fairly recent decisions by the auditors at Airdrie and Haddington confirm this. Indeed, an article appeared in the Journal of the Law Society in January 1988 indicating that the Auditor of the Court of Session took the view that the Law Society table is not appropriate as it is purely a recommended scale of charging and reflects the hourly rate to cover all aspects of office work. The remit from the sheriff cannot be entrusted by the solicitor appointed to anyone else in his firm. The article concluded that Chapter III of the Sheriff Court table was the appropriate means of charging.

There is, then, a considerable weight of opinion in favour of charging such accounts under the Sheriff Court table and I am of the view that good cause is requires to be shown before I can depart from this well established practice.

One theme which appeared throughout the taxation was the nature of Mr Grant's appointment. The sheriff in Henderson likens it in many respects to that of an expert witness. I would agree with this but I am also of the view that the nature of the appointment is that of an officer of the court. In any event, there appears to be no agent and client relationship. The sheriff in *Henderson* found that the reporter in this instance, although a solicitor, is no different to any other reporter appointed by the court whether or not they be legally qualified. It follows, therefore, that the nature of the appointment is not to obtain professional legal services but to require the reporter to carry out a specific statutory function. I do not agree with Mr Wilkie's submission that, even if this is the case, the reporter is entitled to remuneration on the Law Society table because he happened to be solicitor. The solicitor was not providing a full professional service. Instead he was discharging a function provided for by statute at the request of the court. As stated above, this can and frequently is carried out by persons who are not solicitors. I accept Mr Wilkie's submission that the reporter was required to carry out this function with a high degree of care and skill. I differ from Mr Wilkie when he states that this entitles the reporter to remuneration on the Law Society table. All such reporters are required to exercise a high degree of care and skill and in this respect a solicitor is no different to a reporter who is not legally qualified. The sanctions applicable if the reporter fails to discharge his duty are no different whether the reporter is a solicitor or not. The normal sanction would be an order to

appear before the court to give an explanation of the failure and perhaps a report to the person's professional organisation or employer. In the case of a solicitor this would be to the Law Society and in the case of a social worker, for example, to his or her employers. I would suggest that the consequences of this are no different for a solicitor than in the case of any other person.

I am assisted by the decision taken by the Auditor at Airdrie in December 1993 who is of the view that a reporter appointed by the court should not be remunerated a rate which is higher than that allowed for the solicitors acting for the parties in the action. In reaching this view, the auditor considered that the degree of responsibility incumbent on the reporter could not be distinguished from that of the solicitors acting for the parties.

I now turn to the remainder of the submissions. The two cases to which I was referred by Mr Wilkie do not provide much assistance. In the *National Home Loans* case, the borrowers, although not clients of the solicitors, were liable for their legal costs by virtue of a clause in the standard security. This is not the case here. In the case of *Robertson* a clear agent and client relationship existed. The client was the trustee who had expressly instructed solicitors. The main issue in Robertson was whether the auditor should allow remuneration on the Law Society table at £12 per unit. Again, these circumstances are not analogous to the present case.

I cannot agree with Mr Wilkie's submission that the court required a full professional service and had engaged Mr Grant in his professional capacity. The use of the word "solicitor" in the interlocutor merely sought to design Mr Grant and implied no more than that. If a social worker had been appointed, the term "social worker" may well have been incorporated into the interlocutor for the same reason.

The submission that the high level of care and skill required justifies charging on the Law Society Scale also fails to convince me. As previously stated, a reporter who is a solicitor is in no different a position to any other reporter. As far as I am aware, there were no particular difficulties with this case (accepting of course that such cases usually present some degree of conflict and concern). The crave for declarator of parentage was not before the reporter and has no bearing on the matter. It appears that Mr Grant was chosen because he had experience in such matters and was present in court to accept the appointment.

The submission by [redacted] relating to the length of the report also has to be considered. This causes me little difficulty. It is no function of the auditor to examine the content of such reports to determine whether the length is excessive. I am of the view that such matters are, in the first instance, for the reporter alone but, if parties have concerns in this area, the matter should be brought before the sheriff.

How then should the account be charged? I have already indicated that the automatic reference to the Law Society Table is inappropriate for the reasons given above. Reference to the Act of Sederunt (Solicitor and Client Accounts) Sheriff Court 1992 offers some assistance in that it provides that the auditor has considerable discretion in reaching a fee which is fair and reasonable. This would, presumably, allow the auditor to have regard to any of the tables of fees available including the Law Society and Sheriff Court tables discussed. I have already decided, of course, that this is not an agent and client matter but the Act of Sederunt nevertheless provides some assistance in that it confirms the auditor's wide discretion.

I find the approach by the sheriff in *Henderson* to be of most assistance. This also reinforces the view that the auditor has a wide discretion and states that the auditor can have regard to all or any of the tables of charges. In deciding this the sheriff has obviously not been constrained by the provision that Chapter III purports to provide only for taxation of accounts between party and party. It is not, of course, simply a matter of a simple choice between the Sheriff Court and Law Society tables. Other tables exist, notably in respect of legal aid which provide for fees significantly less than in Chapter III. It appears to me that Chapter III offers a balance between the Law Society table and other less remunerative tables of fees, and that the test of fairness and reasonableness is best met by allowing the account to be charged under that Chapter.

One final point remains. Although [redacted] sought mainly to challenge the fee charging basis, towards the end of the diet of taxation he began to take issue with some of the attendances by the reporter suggesting that they were excessive. As with the length of the report, I consider that this is a matter entirely for the reporter except in the most extreme circumstances. Accordingly I have not interfered with the individual entries in the account other than to apply the Chapter III fees.

I have therefore taxed the account on the basis of Chapter III and append a copy of the taxed account. As I have taxed off over 20% of the account, the Board is not liable to pay the audit fee.

Iain Williamson

IAIN WILLIAMSON
Auditor of Court, Jedburgh
6 January 1997