

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

REPORT BY DEPUTE AUDITOR OF COURT

on

account of expenses

incurred by

SCOTTISH LEGAL AID BOARD

in causa

against AS v AC

and

THE TAYSIDE REGIONAL COUNCIL,
constituted under the Local Government (Scotland) Act 1973 and having their
principal offices at 28 Crichton Street, Dundee, *Second Defenders*

This account relates to expenses incurred by Miss Eileen Dommer, Solicitor, Dundee. Miss Dommer was appointed to act as curator *ad litem* in this case by interlocutor dated 26 September 1995. By interlocutor dated 21 November 1995 she was sisted as a party to the action. By interlocutor dated 1 August 1996 the pursuer was found liable for the fees and outlays incurred by Miss Dommer in her capacity as curator *ad litem*.

Miss Dommer submitted an account to the Scottish Legal Aid Board and they took exception to it. At a diet of taxation I heard [REDACTED] on behalf of the Scottish Legal Aid Board and Mr. Fitzpatrick on behalf of Miss Dommer. Mr. Shearer made the point that this was a solicitor and client account third party paying. While he acknowledged that the Court had made an order finding the pursuer liable for the curator's fees and outlays, these still had to pass the "reasonable man" test otherwise the pursuer would be personally liable. He referred me to McLaren's "*Expenses in the Supreme and Sheriff Courts*" at pages 508 - 512, a copy of which is attached as appendix "A". One passage from McLaren which [REDACTED] highlighted reads as follows :

"....it was evidently the opinion of the Court that where a third party has to pay, taxation as between agent and client is not to proceed on the footing that the third party will be liable in whatever fees or charges the successful party chooses to pay, but will be limited to what is needful, and not excessive."

██████████ also referred me to the case of *Her Majesty's Advocate - v - Daniel Gray 1992 SCCR at pages 883 - 890* a copy of which is attached as Appendix "B". This was a Criminal Legal Aid case in which expenditure of over £9500 was incurred in obtaining photographs without estimates having been obtained. I can see how that might fail the "reasonable man" test.

██████████ indicated that Miss Dommer's first duty was to apply for Legal Aid as this would have offered a less costly funding route. He referred me to an article in the "*Bulletin*" No. 10/84, a copy of which is attached as Appendix "C". He suggested that even if Miss Dommer had not applied for Legal Aid initially she should certainly have done so as soon as she decided to seek to become a party to the action.

He referred me also to the cases of *Antony Barclay Walker - v - Claire Louise Watson or Walker* (Appendix D) and *Christine Neish - v - Kevin Malcolm MacKenzie Neish* (Appendix E). These were two undated reports by the Auditor of Court at Inverness. These cases related to disputed accounts submitted by a solicitor who had been appointed to prepare reports under Section 11 of the Matrimonial Proceedings (Children) Act 1958. The main area of dispute in each case was the preparation of precognitions. While the auditor had to consider whether to allow fees for their preparation I did not feel that either case added any weight to Mr. ██████████ case.

██████████ then addressed me on the what would be an appropriate level of remuneration for any work which I considered to be reasonable. He submitted that Chapter III of the Table of Fees of Solicitors in the Sheriff Court was the appropriate scale. He referred me to the case of *Robert Cowan - v - Karen Anne Gillies* in which the Auditor of Court at Jedburgh issued a report on 6 January 1997 (Appendix F).

He also referred me to the case of *Linda Mary Henderson - v - James Henderson (1994 S.C.L.R. at pages 553 to 558)* (Appendix G). Again this case concerned the fees payable to a solicitor acting as a reporter rather than a curator.

Mr. Fitzpatrick accepted that applying for Legal Aid was an option available to a curator. He submitted, however, that at the time of Miss Dommer's appointment the Court had considered whether to sist the cause to enable the curator to apply for Legal Aid but had decided not to do so as delay would not be in the interests of the child.

I considered the submissions made by ██████████ and Mr. Fitzpatrick along with the authorities cited by ██████████

This was an unusual case for a number of reasons :

it is a case for custody of a child and was raised by the child's maternal grandfather, who at the time of raising the action was 63 years of age. The pursuer and his partner are travelling people. The child suffers from Foetal Alcohol Syndrome. In general its effect is that the child so afflicted will never attain a degree of mental independence to allow him to live an independent life. Best prognosis is a supervised life which life expectancy is nonetheless not diminished by the affliction,

the pursuer's solicitor and the curator *ad litem* submitted a joint motion for an increase in fees in terms Regulation 5(4) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. Sheriff Young (who had appointed Miss Dommer as curator, found the pursuer liable for the curator's fees and outlays and heard a five day proof) granted the motion so far as it related to the pursuer's solicitor,

in a note Sheriff Young explained that as Miss Dommer had not been granted Legal Aid she could not competently seek an increase in terms of said Regulation. I attach a great deal of significance to what he added thereafter :

"Miss Dommer put a great deal of effort into this anxious case both out of court and in the context of proceedings over some days in court on behalf of the unfortunate boy. On one level she is entitled to remuneration above the standard rate of fee." and

"Having with extreme regret come to the conclusion that I have in this particular case, what is a reasonable fee in the end of the day may involve consideration of the very criteria found in regulation 5(4). Miss Dommer is not hidebound by the Law Society General Table of Fees or the Sheriff Court Table of Fees."

In all the circumstances I have decided that all the work charged in Miss Dommer's account meets the "reasonable man" test. I am entirely satisfied that the work Miss Dommer carried out was necessary and that she paid due regard to economy. For most cases I would probably agree with the view expressed by the Auditor of Court at Jedburgh in the case of *Robert Cowan - v - Karen Anne Gillies* and allowed the account to be charged under Chapter III. However I am of the opinion that this case merits a higher level of remuneration than usual. In reaching that conclusion I have taken into account the criteria referred to at Regulations 5(4)(a) - (e) of the Civil Legal Aid (Scotland) Regulations 1989.


(Peter A G Digney)
Depute Auditor of Court

16 February 1998

NOTE:

This is a continued motion, 7/5 of process being a joint motion by the pursuer and curator ad litem. The motion is expressed as moving the Court to allow an uplift in fees of 50% or such other percentage as shall seem reasonable to the Court in terms of Regulation 5 of the Civil Legal Aid (Scotland)(Fees) Regulations 1989.

Mrs Dyckhoff appeared on behalf of the pursuer, Miss Dommer as curator ad litem appeared. [REDACTED] for the Scottish Legal Aid Board ("SLAB") sought to appear to oppose the motion as incompetent.

At the outset it was observed by Miss Dommer that there had been no notice of intention to oppose the motion lodged at all, let alone out of time. This was correct and was accepted by [REDACTED], who gave a lame explanation as to why no notice - which could have been later withdrawn - had not been lodged timeously. In the event, however, standing the assertion that the motion was incompetent I was prepared to entertain his opposition and heard his submission forthwith. The basis of my hearing the submission was that it is pars judicis to recognise whether the granting of the motion would be to exceed my powers in this regard.

The statutory and regulatory framework will be mentioned at this stage:

Narrated short, Regulation 4 of the above mentioned regulations providesa solicitor shall be allowed such fees and outlays as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying.

This regulation thus deals with such fees AND outlays as are reasonable to an auditor on a taxation basis (whereas judicial taxation is on a party-party basis)

Regulation 5 deals with the issue of uplift of fees as sets out various criteria to be considered. This is concerned with uplift of FEES and not any uplift in OUTLAYS.

Section 13 of the Legal Aid (Scotland) Act 1986 in defining "civil legal" aid refers to "a solicitor" and does not refer to anyone acting in the office of curator ad litem.

What was submitted to be the position was that Mrs. Dyckhoff was providing legal aid according to the Act and accordingly any sums payable to her were in respect of fees and also outlays properly incurred by her. Miss Dommer has no legal aid certificate and accordingly is not a solicitor to which regulation 4 applies. Accordingly she, herself, cannot apply for and be paid anything acting by herself. [REDACTED] indicated that in his submission, Miss Dommer's way forward lay with Mrs. Dyckhoff. I was advised that is the practice of SLAB in a situation, as here, where the curator ad litem has no legal aid certificate that the curator's reasonable costs will form an outlay of the nominated solicitor's account. *Not true. Legal aid. Curator entered for*

It was said by [REDACTED] that the involvement of a sheriff in matters of this sort was incompetent as being premature, but only so far as related to Miss Dommer.

Regulation 5(4) allows a sheriff on application being made and some or all of the criteria set forth in the regulation being met, to grant an uplift to the applicant so long as that person was a nominated solicitor.

Put shortly, Miss Dommer, maintained that she performed the work and incurred outlays and ought to be entitled to seek recognition of the importance and special preparation needed for this particular case by being allowed an uplift.

Miss Dommer put a great deal of effort into this anxious case both out of court and in the context of proceedings over some days in court on behalf of the unfortunate boy. On one level she is entitled to remuneration above the standard rate of fee. However nothing in what she said or from consideration of the regulation permits me to recognise her as a solicitor entitled to make such regulation 5(4) application. It follows that her application falls to be treated as incompetent. As her application came very much under the umbrella of the pursuer's nominated solicitor, Mrs. Dyckhoff Mr. ██████ suggested that the whole motion was tainted. I do not agree. He did not attack the motion from that angle and nothing in what he said suggested that it was an incompetency to deal with her motion.

Having with extreme regret come to the conclusion that I have in this particular case, what is a reasonable fee in the end of the day may involve consideration of the very criteria found in regulation 5(4). Miss Dommer is not hide bound by the Law Society General Table of Fees or the Sheriff Court Table of Fees.

A date will be fixed for the further hearing of this motion.

(The question posed by Miss Dommer as to what was a "nominated solicitor" and indicated that the term was nowhere to be found. ██████, staggeringly, said it was a colloquial term but one known and recognised by solicitors. After the briefest of searches I notice regulation 25 in part IV of the Civil Legal Aid (Scotland) Regulations 1987 which has the heading: "Change of nominated solicitor". In its context the term must relate to "the solicitor nominated by an assisted person".)



THE SCOTTISH LEGAL AID BOARD

COPY

To: [REDACTED]
Senior Assessment Officer
Accounts Assessment
Room F11

[REDACTED]
Assistant Manager
Accounts Assessment Office
Room F18

From: [REDACTED]
Solicitor
Room No. T11
Ext. No. 280

Ref: [REDACTED]

Date: 18 ^{February} December 1998

[REDACTED] and TAYSIDE REGIONAL COUNCIL

I refer to the above taxation at Dundee Sheriff Court, in which I have eventually received the auditor's decision after some four months.


In this case, the curator, Eileen Dommer, entered the process but did not seek legal aid. She charged her fees on the basis of the general table. The auditor has made a small abatement to the account.

Having considered the terms of his decision, I do not consider that we have any grounds for taking a note of objections. It would seem to me that he has clearly applied his mind to the material before him (even though he seemed to fall asleep during my submissions!) and has carefully cross-referenced his decision to the authorities to which he was referred. He has applied his mind firmly to the test of agent and client third party paying, and has addressed the prudent man of business. He does place a great deal of reliance upon the sheriff's observations. Unfortunately, the sheriff is now dead, and any sheriff before whom a note of objections was presented would, I suspect, feel unable to disagree with any comments made by the sheriff who heard the proof. In any event, we could hardly argue that the sheriff's note in the reg.5.(4) motion was not a material consideration. The auditor has also clearly had regard to all the circumstances before him, and been satisfied that this was a particularly complex and difficult case. Whilst he would normally allowed have allowed charges under chapter III, this particular case was such that it merited a higher level of remuneration than usual. Accordingly, I do not think that this is really a precedent for any future case. It does seem to me sit fully in line with Sheriff Palmer's decision in Henderson, and accordingly the auditor has not misdirected himself in law. However unpalatable the decision may be, the auditor has clearly addressed his mind to

the particular circumstances of this particular case, which is more than could be said for the auditor at Edinburgh in the Hamilton report. Whilst at first glance the auditor may appear to have misdirected himself in the final sentence of his decision, I do not think that he has. He is merely reiterating what the sheriff has said in finding that the criteria in regulation 5.(4) might justify a higher level of fees. It does not justify a note of objections, and would certainly be such a narrow point that we would appear in very bad light before the court. We would also run the risk of a reported decision, which I think we would prefer to avoid. It may be a good example of a case which could be useful in indicating the necessity for specified fees for curators. My one real area of concern is whether it might encourage Miss Dommer to never apply for civil legal aid in the future. Hopefully our latest set of guidelines for curators may cure the problem and this may only be a one-off situation.

If you have any contra views, obviously let me know since the last date for any note of objections would be 2 March 1998.

PP M. McNeil

Enc:  - All papers
 - copy Auditor's Report