

Chubers Proceedings
5(4) motions.

KIRKCUDBRIGHT B75 & B76/98 MILLER CALDWELL v MISS JANICE WALKER

AIRDRIE: 1 September 1998.

TAXATION S(4) MOTION
CHILDREN'S PROCEEDINGS

Act: Flinn for appellant

Alt: Haggerty, solicitor for Scottish Legal Aid Board

Reporter to the Children's Panel for Dumfries and Galloway was unrepresented.

The Sheriff Principal having heard solicitors on the appeal answers the question in the stated case in the negative; therefore refuses the appeal and adheres to the sheriff's decision of 16 July 1998 complained of; finds no expenses due to or by either party in relation to the marking and conduct of the appeal.



NOTE:

This is an appeal against the refusal by the sheriff at Kirkcudbright to grant a motion on behalf of a firm of solicitors to allow a percentage increase of 50% in the authorised fees all in terms of regulations 5.-(4) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. The learned sheriff held that the motion was incompetent. Regulation 5.-(4) is in the following terms:

"In all Court of Session proceedings a fee, additional to those set out in Schedules 1 or 3, may be allowed at the discretion of the Court to cover the responsibility undertaken by a solicitor in the conduct of the proceedings. In the Sheriff Court, in proceedings of importance or requiring special preparation, the sheriff may allow a percentage increase in a cause on the Ordinary Roll, not exceeding 50%, and in a cause on the Summary Cause Roll, not exceeding a 100% of the fees authorised by the Schedule 2 or 3 to cover the responsibility undertaken by the solicitor in the conduct of the proceedings. ... the sheriff in fixing the amount of a percentage fee increase shall take into account the following factors."

There then follows a list of factors.

These proceedings commenced before a children's hearing and involved two children of an unmarried mother. The grounds of the referral, specified in terms of the Children (Scotland) Act



1995 section 52(2)(c), was that the children were in need of compulsory measures of supervision in that they were likely to suffer unnecessarily and be impaired in their health or development due to a lack of parental care. The mother did not accept the grounds of referral and the children were deemed to be too young to be capable of understanding them. The children's hearing thus directed the reporter to the children's panel to make an application to the sheriff for a finding as to whether the grounds of referral were established, all in terms of section 65(7) and (9) of the 1995 Act.

To anyone who has detailed knowledge of the procedure in the sheriff court it is apparent that these proceedings could not be described as "a cause on the Ordinary Roll" nor "a cause on the Summary Cause Roll". Regulation 5.-(4) although referring broadly to "proceedings of importance and requiring special preparation" then appears to narrow its application to causes on the "Ordinary Roll" and on the "Summary Cause Roll". The use of capital letters makes the references very specific. It appears to permit the sheriff to allow a percentage increase only in such causes. It follows that it is not competent for him to grant an increase in any other civil cause which may come before him. The wording of regulation 5.-(4) follows very closely the terms of paragraph 5 of the Schedule to the Act of Sederunt (Fees of Solicitors and Others in the Sheriff Court) 1989 (S.I. 1989 No 434) which relates to the fees which might be charged by a solicitor conducting business in the sheriff court on behalf of a client who does not hold a legal aid certificate. Paragraph 5 of the Schedule read short is as follows:

"The sheriff shall have the following discretionary powers in relation to the Table of Fees

(b) In cases of importance or requiring special preparation, the sheriff may ... pronounce a further interlocutor ... allowing a percentage increase in a cause on the ordinary roll not exceeding 50% and in a cause on the summary cause roll not exceeding 100% of the fees authorised by this Table to cover the responsibility undertaken by the solicitor in the conduct of the litigation ... in fixing the amount of the percentage increase the following factors shall be taken into account."

There then follows a list of factors which bear a remarkable similarity to the factors contained in the Civil Legal Aid (Scotland) (Fees) Regulations 1989. However a new Schedule was substituted by the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (S.I. 1993 No 3080). Paragraph 5 of the 1993 Schedule read short provides as follows:

"The court shall have the following discretionary powers in relation to the Table of Fees

(b) The court may, on a motion made not later than seven days after the date of any interlocutor disposing of expenses, pronounce a further interlocutor regarding those expenses allowing a percentage increase in the fees authorised by the Table of Fees to cover the responsibility undertaken by the solicitor in the conduct of the cause. In fixing the amount of percentage increase the following factors shall be taken into account.”

There then follows a list of similar factors. It will be observed that all reference to ordinary roll and summary cause roll are omitted. If the Civil Legal Aid (Scotland) (Fees) Regulations had been similarly amended there would, I think, be no question but that the motion which was before the sheriff would have been competent. The fact that Parliament has by subordinate legislation changed one set of regulations and not the other must be interpreted as meaning that Parliament has been deliberate in differentiating between causes in which fees can be increased in legal aid cases on the one hand and on the other hand proceedings in which a solicitor is privately instructed. I was invited to assume that there had been a mistake and that Parliament would have intended both sets of regulations to be in comparable terms and to proceed accordingly. Tempting though it is on occasion to assume the role of Parliament the invitation extended must always be declined.

The strict interpretation of regulation 5.-(4) means that for example proceedings such as a fatal accident inquiry could not attract an increase in fees because such procedure could not properly be described either as an ordinary cause or a summary cause but in fact I am informed Sheriff Principal Ireland, QC authorised an increase under regulation 5.-(4) in the Ocean Odyssey Inquiry, my predecessor Sheriff Principal Mowat, QC similarly allowed an increase in respect of the Lockerbie Inquiry and Sheriff Principal Nicholson, QC, it has to be said with considerable hesitation, at Linlithgow on 5 March 1997 following a fatal accident inquiry granted an increase of 50%. The following is extracted from the note which he appended:

“I pointed (out) ... that (the) regulation did not appear in terms to extend to legal aid granted for the purposes of a fatal accident inquiry, but (I was) advised ... that it is the practice of the Legal Aid Board to treat the paragraph as if it did in fact cover such legal aid.

I would normally be reluctant to grant a motion of this kind without clear statutory authority for doing so, However, in the present case I have done so on the basis that (the solicitor’s) understanding of the situation is correct, though I have to say that it seems to me that it would be to everyone’s advantage if express provision in respect of fatal accident inquiries were to be made without delay.”

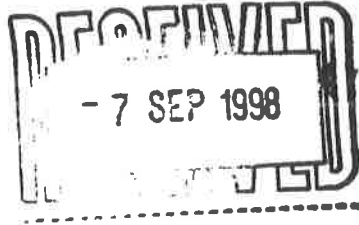


Mr Haggerty who appeared before me today on behalf of the Scottish Legal Aid Board confirmed that the Board would not oppose, on the grounds of competency, applications made for increase in fees following a fatal accident inquiry the reasoning being that a fatal accident inquiry was a summary application. But that argument is suspect given that there are specific rules for summary applications which are neither summary causes nor causes on the ordinary roll.

Whatever the position may be in relation to a fatal accident inquiry it is clear that an application to the sheriff to make a finding whether grounds of referral are established are proceedings *sui generis* and could not be more different from proceedings on the sheriff's ordinary roll or summary cause roll. However my attention was drawn to a recent decision by Sheriff Ross in Linlithgow in which in similar proceedings he granted an increase in fees. Again it appears that the learned sheriff did so with considerable hesitation and was influenced by the equally reluctant opinion of Sheriff Principal Nicholson, QC referred to above. For myself I am not prepared to bend further the terms of regulation 5.-(4) which I regard as clear and unequivocal. I was referred also to the case of *L Petitioner No 3* 1996 SLT 928. However as the learned sheriff said in the court below the procedure in *L* was quite extraordinary, but in any event the attention of their Lordships was not directed to the particular argument which Mr Haggerty, quite correctly in my view, advanced before me. I do not therefore regard *L* as an authority on this question which is in any way binding upon me. It can be clearly distinguished, but more importantly their Lordships did not address the particular issue which was argued before me.

In my view the learned sheriff at Kirkcudbright reached the correct conclusion in this case and the appeal will be refused. It is a decision reached with reluctance particularly since the learned sheriff was satisfied on the merits that a percentage increase, though he did not specify how great, was justified in this case. I would reiterate the pleas both by Sheriff Principal Nicholson and Sheriff Ross that regulation 5.-(4) be looked at as a matter of urgency. It may be that all that requires to be done is to bring the terms of regulation 5.-(4) into line with the terms of paragraph 5 of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (SI 1993 No 3080). My understanding of the ethos is that the legally aided person and his solicitor should not be placed in a substantially different position to the non-legally aided client and his solicitor. The present case reveals a gap which requires to be filled as a matter of urgency.





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SEE VOLUME 5 (APPEAL DECISIONS)

Date

04 September 1998

Dear Sir

KIRKCUDBRIGHT CASE NO: B75 & B76/98
REPORTER TO THE CHILDREN'S PANEL v MISS JANICE WALKER

I enclose a copy of the Sheriff Principal's judgment dated 1 September 1998 for your information.

Thank you very much for the 2-1 Regs + judgments.

Yours faithfully

J Gallacher

Mrs J Gallacher
Secretary to the Sheriff Principal

Enc

Copied to:

R Flinn Esq, Messrs Austins, DX 580603, Dumfries
Sheriff J R Smith, Sheriffs' Chambers, DX 570416, KIRKCUDBRIGHT

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