

SHERIFFDOM OF LoTHIAN & BORDERS AT EDINBURGH

REPORT

by

F.M.McCONNELL  
Joint Auditor  
12 Drumsheugh Gardens  
Edinburgh EH3 7QG

on fees charged by  
Joan Morrison, Solicitor  
in her capacity as Reporter  
in the cause of

PURSUER

SR v JC

against

DEFENDER

Background

Joan Morrison, a Solicitor of some six years post qualifying experience was appointed by the Court to report on the care and upbringing of a 6 year old child.

It was apparent that there would need to be wide ranging enquiries. The parties, their current partners, grandparents, in-laws, G.P's and teachers would all have to be interviewed.

The child in question had lived with his parents until they separated when he was 2 years old. Thereafter he continued to live with his mother and for at least a year, his father, the pursuer had no contact with him. It was alleged that the child was at risk. His mother's relationship with her current partner could be described as volatile. There were suggestions of physical abuse and that the child was being seriously neglected. It was against this background that the Court instructed Ms. Morrison.

In due course, having made extensive enquiries, Ms. Morrison produced a 33 page report to the Court. I understand the Court accepted her recommendations. Her fees totalled £2,381.72 and the Solicitors for the pursuers, who had been granted legal aid, duly rendered their account which incorporated the Reporter's fee as an outlay to the Scottish Legal Aid Board. The Board considered her fees were excessive and had been calculated on the wrong basis. In the circumstances the matter came before me on a joint remit to tax the Reporter's fee.

Submissions on behalf of the Scottish Legal Aid Board.

██████████ appeared on behalf of the Board. His position could be summarised thus:-

- Regulation 4 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 provided that a Solicitor "shall be allowed such fees and outlays as are reasonable for conducting the proceedings in a proper manner, Solicitor and client, third party paying".

- that regulation was the starting point. Fees and outlays incurred by the nominated Solicitor must follow that approach.

- in this case the Reporter's fee note had been calculated in accordance with the recommended rates set out in the Table of Fees for General Business. That, he said, was the wrong approach. Reg. 1 is in these terms:-

"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".

In this case Ms. Morrison was not acting as a Solicitor providing legal services to a client. She had been nominated by the Court to act as a Reporter. She accepted this nomination and her role was as a Reporter. She was in no difference position from say an advocate or a social worker or a child psychologist who are also appointed as Reporters.

- ██████████ further submitted that where a member of the junior bar is appointed as a Reporter a daily rate of £242.50 was agreed with the Faculty of Advocates in 1992. This daily rate was still in force and had never been reviewed. He also indicated that fees paid to Social Workers were much lower than fees charged by Reporters who happened to be Solicitors. He was at the taxation unable to give any figures but subsequently telephoned me to say that the current rate for a junior social worker was £14.00 per hour and £20.00 per hour for a senior social worker. He also mentioned that where Children First are instructed in a pilot scheme in Falkirk Sheriff Court they

charge £50.00 per hour. While these rates differ they are all considerably less than what the Reporter is here charging.

- while [REDACTED] argued that to base the fee on the rates recommended in the Table of Fees for General Business was the wrong approach he recognised that the Auditor in exercising his discretion would take these rates into account in determining what was "reasonable". Indeed the Board have been paying accounts to Reporters who are Solicitors where such accounts are framed in accordance with the scale of fees prescribed in Ch.III Fees for Solicitors in the Sheriff Court even though this Table related only to party and party accounts. It was a pragmatic approach and the Board had conceded that accounts based on Ch III were "reasonable".

- historically the fees payable to Solicitors under Ch III were less generous than the recommended rate under the General Table. By agreeing to accounts based on Ch III that met the test of Agent and Client third party paying where it is a trite proposition that by applying this test the fee payable by a third party would be less than could be justified against the client. However by recent amendment the fees chargeable under Fees for Solicitors in the Sheriff Court had been increased and the gap between the two Tables had narrowed. It was no longer an attractive proposition to agree to accounts rendered by Reporters who were Solicitors being charged on the basis of Ch. III far less the General Table. It was therefore necessary to revisit the issue of charges for Solicitor Reporters. The Board did not have unlimited funds and it was necessary to try and achieve a degree of consistency and approach so far as Solicitor Reporter fees were concerned. It could not be justified that Solicitors were charging fees greatly in excess of those being charged by Advocates, Social Workers and the like.

- taking a practical approach to the problem [REDACTED] submitted that one approach would be to have regard to the rates recommended in the General Table. That would produce a recognised fair and reasonable fee for a Solicitor providing legal services to a client. In this case, however, the Solicitor was not so acting. She had accepted the nomination as a Reporter and her fees were in the end to be paid by a third party, i.e. the Board. Accordingly it could not be justified in simply applying the recommended rates. To achieve a result which was fair to the Solicitor and the Board who were having to meet these outlays one approach might be to take an account based on the recommended rates and apply a negative weighting, i.e. reduce the fee by a percentage reduction. This would have the effect of restoring a differential between the General Table and the Table of Fees for Solicitors in

the Sheriff Court. Were the auditor to exercise his discretion, utilising that approach, that would probably, subject to the level of the percentage reduction, be acceptable to the Board.

- in support of these propositions [REDACTED] referred me to the following authorities:-

Henderson v Henderson 1994 SCLR 553

Report by the Auditor of Jedburgh Sheriff Court in the case  
of Cowan v Gillies 1996.

Hamilton v Hamilton - Sheriff Bell Edinburgh 2000 (unreported)

### The Reporter's Submissions

- the Reporter was represented by [REDACTED] a Law Accountant who had prepared the account which was the subject of this taxation.

- she had no quarrel with the general approach adopted by Mr. Shearer.

- she expressed surprise that the Board were now taking this challenge. Her experience was that accounts prepared on the basis of the General Table had, where the fee was considered reasonable and could be justified, had been accepted and paid over many years.

- in any event the fee charged in this case would be justified and on any view could be considered reasonable. She argued that reference to the Table of Fees in the Sheriff Court was not the correct approach. This Table related only to party and party accounts. The only Table which had any significance was the Table of Fees for General Business. That prescribed a recommended rate for Solicitors carrying out their professional duties and was the obvious starting point in preparing an account such as the present one.

- when one had regard to the terms of Regulation 4 supra it was clear that it gave the auditor a degree of discretion in taxing fees and outlays. Each case had to be decided on its own merits. She submitted that the auditor had 3 options. 1) to apply the recommended rate, 2) to apply a negative weighting and 3) to apply a positive weighting. To exercise one of these options the auditor had to have regard to what work was done and whether the fee charged was, in his opinion, reasonable.

- in this case the Court appointed Ms. Morrison to report on the care and upbringing of a six year old child. She was instructed as a Solicitor with experience in this area of practice, that was plain from the terms of the interlocutor appointing her. The Court could have appointed an Advocate or a social worker or a child psychologist but it did not; it appointed Joan Morrison, Solicitor.

- the Reporter is experienced in providing such Reports for the benefit of the Court. In this case a wide ranging enquiry had to be undertaken and a report produced within six weeks. The remit demanded a speedy and diligent response. Having regard to the interests of a six year old boy and the particular circumstances of the case, time was of the essence if his interests were not to be prejudiced.

- [REDACTED] referred me to the factors which had to be considered as set out in par 4 to the General Regulations of the Table of Fees for General Business. In particular she argued:-

- 1) the importance of the matter, and nothing could be more important than the interests of a vulnerable child at risk. The child had resided with his mother for a number of years and had no contact with the father pursuer for a year. The mother had 5 other children from different fathers. She was less than stable. She lived with a partner who it was alleged physically abused the boy. It was an anxious and fraught situation.
- 2) it was a complex and difficult matter.
- 3) the skill, labour and specialised knowledge of the Reporter came into play.
- 4) the time expended
- 5) the importance of the report which had to be prepared and
- 6) the place where the services were rendered. The Reporter was based in Edinburgh but it was necessary to travel to East Lothian to see a number of witnesses.

- taking these factors into account she submitted that in preparing the account based on the recommended rates in the General Table she could have applied a positive weighting and increased the sum claimed. As it was the recommended rate was far below her own charge out rate as a Solicitor which was £130.00 per hour.

- on any view her charges were reasonable within the meaning of Regulation 4 supra and I was invited to tax the account without abatement.

### Decision

I am grateful to both [REDACTED] for the obvious care and attention in presenting their very full and helpful submissions. Notwithstanding I have not found this an easy matter to determine. I can well understand that the Board would wish a degree of consistency in how accounts for such

Reports are calculated. They are under an obligation to carefully scrutinise all fees and outlays and there is no doubt that a common approach would greatly assist their administration and taxation of accounts. On the other hand, Solicitors who accept appointments as reporters, wish to be adequately paid for the work done reflecting the responsibility of the task. It may be that aims of the opposing parties are irreconcilable. Where there is no prescribed Table of Fees and the determination of quantum is discretionary then there will never be a consistent approach and it seems to me that there is a case to be made for the imposition of a Table of Fees. That, however, does not resolve the particular difficulty which has arisen here.

Having given the matter careful consideration I am of the view that reference to the revised Table of Fees for Solicitors in the Sheriff Court is of no assistance.

My approach would be to have regard to the recommended rates in the General Table. I agree however with the proposition that Ms. Morrison was not acting as a Solicitor but as a Reporter appointed by the Court. That said, in deciding whether her fees, based as they are, on the General Table, can be construed as "reasonable" within the meaning of Regulation 4 I have to put into the balance what other reporters, from different disciplines, would charge. It has been said on an agent and client account, third party paying an appropriate test would be what expenditure would a prudent man of business authorise - McLaren on Expenses p.508. On that basis the prudent man of business, on the information provided to me, would insist on say an Advocate being instructed. He would obtain broadly the same service at a greatly reduced fee.

In the Hamilton case Sheriff Bell said:-

"There does not appear to be any good reason why a Solicitor appointed as a reporter should charge as if she was doing the work of a Solicitor, especially if this might lead to unjustifiable discrepancies between the fees payable to solicitor-reporters, those payable to advocate-reporters and those paid to other reporters". He continued "there can be no good reason I can see for different professions to charge for reports of the same kind on widely different bases".

I agree that each case will turn on its own merits and while I would not quarrel with Ms. Nicoll's assessment that this was a difficult and anxious case, I think that all such cases involving the welfare of children are in a similar position. Having considered the terms of the Report I was not persuaded the particular circumstances give rise to special considerations. It was necessary to report on the

factual background and the interviews which had to be conducted were within a 20 mile radius of Edinburgh. Having ascertained this factual background the Reporter then had to turn her mind to making recommendations as to custody and contact. In that respect it was no different from many similar reports which are considered by the Courts on virtually a daily basis.

Taking all these factors into account and including what is charged by other disciplines for similar work I now turn to the particular account. If one deducts, for the moment, the fee of £1,509.75 for framing the Report the net fee for taking instructions and interviewing the witnesses, including travel, totals £871.97. What I propose doing is applying a 15% negative weighting on these fees, thus reducing them to £741.17. Having done this essential spadework the Reporter then proceeds to prepare her Report for the Court. It was a full and comprehensive Report of some 33 pages in length. Is however a fee of £1,509.75 reasonable? There is no doubt that in an agent and client account I would unhesitatingly conclude that it was reasonable. However, this is not an agent and client account (see Sheriff Bell's obiter observations in the Hamilton case). As an outlay payable to the Reporter by the Scottish Legal Aid Board under the Legal Aid scheme I have come to the view that it is excessive taking into account the fees incurred for the preliminary work and the various other factors discussed above. What would be a reasonable fee? I think an auditor in exercising his discretion has to take a broad axe; there is no "right" fee and it is true that each case will turn on its own merits. In this instance, if I believe, as I do, that in an Agent and Client account the fee of £1,509.75 would be "reasonable" I think equity would be served were I to reduce this fee by 20% to £1207.81.

I therefore tax the fee payable to the Reporter at £1,948.98 to which sum falls to be added 1) VAT at 17.5% £341.07 together with the dues of taxation of £148.05 inclusive of VAT.

*E. A. J. MCCONNELL*  
JOINT AUDITOR

EDINBURGH

*14/11*  
NOVEMBER 2001