

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

EF

Report by The Auditor of Court on the
Account of Ms. Lindsey Reynolds as
Safeguarder to [REDACTED] AW117/08

Following my Report dated 28th October 2010 a hearing was assigned for 15th July 2011 to determine further procedure in this case. At the hearing The Safeguarder, Ms. Lindsey Reynolds was in attendance as was Ms. Moncrieff of Livingstone Brown, Solicitors, Glasgow, Agents for [REDACTED] the Respondent. The Scottish Legal Aid Board was not represented. The interlocutor of 15th July 2011 on the Safeguarders Motion "finds that the safeguarder's expenses, as taxed, be deemed as an outlay in terms of [REDACTED] legal aid certificate". Legal aid was made available to [REDACTED] on 24th September 2008.

To avoid the expense of a further diet of taxation I agreed with the Safeguarder and the Board to proceed by way of written submissions. The Board's submissions dated 13th February and 28th March 2012 and the Safeguarder's submissions, in reply, dated 21st February and 4th April 2012 are appended hereto. The Board have accepted liability for the shorthand writer's account £996.46, page 12 of the account and the audit fee £712.05, page 13 of the account and these have both been paid.

The two main issues which arise are:-

1. Can the fees and outlays incurred by the safeguarder be properly considered to be an "outlay"; and
2. Even if these costs can form an outlay in the Respondent's account are they chargeable to the fund in terms of the Act and regulations.

If the expenses can be deemed to be an outlay in the Respondent's account how material is the date of the Respondent's legal aid certificate in the taxation of the expenses.

Briefly put the Board's position is that an outlay in a legally aided case must be:-

Properly incurred by a solicitor acting for any person by providing legal aid; and

actually, necessarily and reasonably incurred. As civil legal aid was made available to [REDACTED] on 24th September 2008 she was not an assisted person prior to that date. A solicitor cannot incur an outlay any more than a solicitor can incur a fee prior to the effective date of civil legal aid.

Therefore, a) The work undertaken prior to the effective date of the certificate is not chargeable to the fund as there was no civil legal aid in place and b) The work undertaken after the effective date cannot be considered to be an outlay and was not instructed by the nominated solicitor in this case. In effect the Board are requesting me to disallow the account in its entirety.

Ms Reynolds position is that as the civil legal aid certificate was in place at the point where the expenses were dealt with, the account is properly due as an outlay under the legal aid certificate. She also submitted that it has become established practice over a number of years that in such circumstances Safeguarder's expenses are met as an outlay of the Cause under a legal aid certificate. Her solicitors firm obtained payment as Safeguarders in this way, has funded Safeguarders appointed in clients applications in this way, and has given advice to clients along these lines for many years. Four solicitors in her firm are regularly appointed as Safeguarders and this is the first time they have reached a complete impasse with SLAB on this issue.

Ms Reynolds concludes her response of 21st February 2012 as follows:-

"I was appointed as Safeguarder to [REDACTED] *ex proprio motu*. I did my utmost to achieve resolution of the case without the need to proceed to Proof, by submitting two lengthy, detailed reports to the Court. The Proof was fixed, as I understand it, *ex proprio motu*. Sheriff Baird specifically commented within his decision that the proceedings benefited from the appointment of a Safeguarder. Had I not attended the Proof there could have been serious questions asked about why proceedings with significant consequences for the adult were proceeding without the interests of the Adult being duly Safeguarded.

I submit that under these circumstances my firm is entitled to remuneration for my work. [REDACTED] herself had limited means and an award of expenses against her would have been inappropriate. The local authority did not intervene and thus an award against them was not an option. [REDACTED] herself does not have the means to meet this outlay and it appears was not advised that she could be personally liable for the Safeguarder's expenses, presumably as it was Livingstone Brown's as well as our experience that the expenses would be met under the legal aid certificate.

Unless and until the legal aid board produce contrary guidance, it is submitted that practitioners are entitled to rely on the established practice to date, as in the present case the only means by which my expenses can be met is as an outlay under Marie Slaven's legal aid certificate".

The Board accept that it has treated costs in connection with the preparation of a report by a reporter, curator or (in relatively few cases) a safeguarder as an outlay which, subject to the Sheriff Court Rules can be considered to be an outlay on the account of one of the parties to the litigation, subject to there being legal aid in place. In this case as the work was undertaken by the Safeguarder as a party to the litigation, representing the interests of [REDACTED] the Board content that the normal course of action is for the Safeguarder to apply for civil legal aid.

Miss Reynolds response was that "it has historically been the position of the Board since the Adults with Incapacity (Scotland) Act 2000 came into force, that there is no legal aid available for safeguarders on the basis that a safeguarder does not have to be a solicitor.

Finally, [REDACTED] has advised that the Board will be more clearly equiparating the position of a safeguarder with that of a curator in its guidance and that the Government, it is believed, is prepared to set out in regulations a clear structure as to remuneration of reporters curators and safeguarders in early course.

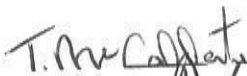
Having considered all submissions made what cannot be disputed is that Ms Reynolds was appointed by the court as safeguarder to [REDACTED] on 2nd June 2008. Ms Reynolds thereafter submitted two lengthy reports (19 sheets and 6 sheets) to the court after due investigation of matters. This work was carried out in June and July of 2008 some months prior to Legal Aid being made available to [REDACTED] on 24th September 2008. The Board accept that "had it not been for the effective date issues.... The Board would have been in a position to pay for all reasonable work undertaken by the safeguarder in the preparation of a report in this case".

Subsequent to the lodging of the second report on 15th July 2008 a diet of Proof was assigned which proceeded over four days in October – November 2008. From 15th July 2008 the work relates largely to the preparation for and attendance at this Proof.

Undoubtedly the outlay for work carried out by Ms Reynolds in this matter has been "actually, necessarily and reasonably" incurred and was of great assistance to the court. However, I accept as I did in the taxation of an account of a reporter in the case [REDACTED] (Assisted Person) V. [REDACTED] in 2003 that the Board cannot be liable where legal aid has been suspended or as in the present case has not yet been granted. I have therefore disallowed all charges prior to 24th September 2008. Thereafter, I have allowed all charges subject to items previously intimated as "taxed off". In particular I have disallowed in full the charge for framing the account of expenses £222.30 appearing on page 12 of the account as historically the Board have paid safeguarders expenses. Having no reason to believe she would not be paid the safeguarder had the account prepared in good faith.

It is extremely unfortunate that an Agent, appointed as safeguarder by the court and who has carried out this function expeditiously and within the constraints of time limits, is not to be properly remunerated for this work. It is to be hoped that the guidance and regulations which [REDACTED] referred to in the Board's submissions will be implemented sooner rather than later to avoid a similar occurrence in future.

In the circumstances I tax the safeguarders account of expenses at Four Thousand Four hundred and Sixteen Pounds and Twelve pence (£4,416.12p).



AUDITOR OF COURT
SHERIFFDOM OF GLASGOW & STRATHKELVIN
22nd MAY 2012