SCOTTISH
CHILDREN'S REPORTER
ADMINISTRATION

Practice Direction 22

Legal Aid

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SUMMARY

- Legal aid (in the form of Children's Legal Assistance) is available, subject to eligibility criteria, for representation at children's hearings and related court proceedings. In general, the expectation is that children, relevant persons and others attending a hearing seek their own legal representation for the hearing (in which case the type of legal aid is called assistance by way of representation, "ABWOR").

- Unless a child has obtained their own solicitor acting under ABWOR, children are entitled to "automatic children's legal aid" for certain specified children's hearings. These are:

    - a 2nd working day hearing,
    - a custody hearing (and any deferred hearing following that),
    - any hearing where it is likely the hearing will be considering secure accommodation or a movement restriction condition for the child (and any deferred hearing following that).

    For these specified hearings, the Scottish Legal Aid Board ("SLAB") must arrange for a duty solicitor to be available to the child if that child does not already have their own solicitor of choice.

- If arranging a specified children's hearing, the reporter must check whether the child already has their own solicitor. If the reporter considers that the child is capable of instructing a solicitor (applying a presumption that a child aged 8 or over is capable of instructing a solicitor) and does not have their own solicitor, the reporter is to contact SLAB as soon as possible by secure e-mail using a pro-forma refer to in this Practice Direction. The reporter should not provide SLAB with any information other than provided for in the pro-forma. SLAB will then provide SCRA with the name and firm of the duty solicitor they have appointed to the child.

- Hearings do not appoint legal representatives. However, a pre-hearing panel or hearing can determine that:

    - it may be necessary for the child or relevant person to be represented by a solicitor in order to participate effectively in the hearing; and
    - it is unlikely that the child or relevant person will arrange to be represented.

    If so, the children's hearing will complete a "legal assistance recommendation form" and the reporter is required to pass on certain information to SLAB.

- The reporter may only share further information about the child's case when the reporter is satisfied as to the solicitor's identity and that the solicitor has the child's or relevant person's instructions to act.

- All solicitors and firms must register to provide Children's Legal Assistance and comply with a Code of Practice monitored by SLAB. If a reporter has concern about a solicitor's compliance with the Code of Practice, this concern is to be passed to the LRM.

- A person seeking to be deemed relevant at a pre-hearing panel, and a person to whom a section 126 contact direction review hearing relates might be entitled to ABWOR.

- Participation Individuals or those seeking that status may also be entitled to ABWOR.

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1. Introduction

1.1 Legal aid is available, subject to eligibility criteria, for representation at children's hearings, pre-hearing panels considering a relevant person or participation individual determination and for all related court proceedings. In general, the expectation is that children and relevant persons seek their own legal representation in advance of the hearing or pre-hearing panel (in which case the legal aid is called advice by way of representation , "ABWOR").

1.2 Except for "automatic children's legal aid" (see section 4), all legal aid is subject to a means and merits test. Generally, the applicant must satisfy SLAB that s/he meets the merits test, except in certain urgent situations. The merits test for legal aid at a hearing is that legal representation is required in order to allow the applicant for legal aid to effectively participate in the hearing.

1.3 For more information and specific statutory references on all forms of legal aid for hearings and related proceedings please see Appendix 1.

2. Legal Representation at hearings and pre-hearing panels

2.1 Children, relevant persons and any person who wishes to be deemed relevant are entitled to be represented at every type of hearing and pre-hearing panel by a solicitor (or counsel) whether or not they are also accompanied to the hearing or pre-hearing panel by another (lay) representative. Rule 11[1], s.78 Children's Hearings (Scotland) Act 2011.

2.2 Before a solicitor can represent a child at a hearing, the child must have capacity to directly instruct a solicitor which means the child must have a general understanding of what it means to instruct a solicitor. The reporter is to apply a presumption that a child aged 8 or over has such an understanding. When a child seeks his/her own legal advice, it is for the solicitor (not the reporter) to judge the child's capacity. There are other situations when the reporter might have to give a view as to the child's capacity. See below.

2.3 There is no specific right for a person to whom an s.126 contact direction review hearing relates to have representation at a hearing. However, such a person is eligible to apply for ABWOR and therefore may in practice be accompanied to the hearing by a solicitor. The solicitor's attendance at the hearing will be at the chair's discretion though it is likely to be considered appropriate to allow the solicitor's attendance as a matter of fairness. See Practice Direction 13 on Attendance

[1] The Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 (any reference to a Rule or the Rules in this Practice Direction will be a reference to these Rules)

3. Determination by hearing/pre-hearing panel that legal representation is necessary – known as 'Recommendation Requests'.

3.1 Hearings do not appoint legal representatives. However, a pre-hearing panel or hearing can determine:

- that it may be necessary for the child or relevant person to be represented by a solicitor in order to participate effectively in the hearing; and
- that it is unlikely that the child or relevant person will arrange to be represented. Rule 50 and 61

3.2 A grounds hearing can only make this determination after the grounds have been accepted. Rule 61(1)

3.3 The purpose of this determination is to facilitate contact between a solicitor and child and/or relevant person. Where a hearing/pre-hearing panel makes such a determination, the reporter must notify SLAB of the determination, the name and address of the child or relevant person and the reason for the determination. Rule 50(7) and Rule 61(1)(d) and (e). A pro-forma has been developed between SLAB, SCRA and CHS for use in this situation. The reporter must ensure that this form is used and completed. The chair must sign the determination. This form must be sent to SLAB by secure e-mail.

3.4 A child and relevant person are not required to instruct a solicitor even if the hearing determines that it may be necessary s/he or they should have one. Once the reporter sends the information set out in 3.3 above to SLAB, the relationship between the solicitor and child/relevant person is that of normal client/solicitor. The solicitor will apply for ABWOR in the usual way, if necessary. SLAB may decide, despite the hearing's determination, that the child/relevant person is not eligible for ABWOR.

3.5 The reporter is only to give any further information such as hearing papers to a solicitor when a solicitor confirms to the reporter that a child/relevant person has instructed them to act. If the reporter is in any doubt about the identity of the person contacting them for papers or about the solicitor having instructions, the reporter is to request a formal written mandate.

4. Automatic legal aid and the duty scheme

4.1 Unless a child has obtained their own solicitor acting under ABWOR, children are entitled to "automatic children's legal aid" (where there is no means or merits test) in five specified circumstances:

- at a 2nd working day hearing;
- at a custody hearing, and any deferred hearing following that;

- where the children's hearing is likely to consider it might be necessary to include a secure accommodation authorisation in an order, and any deferred hearing following that;
- where the children's hearing is likely to consider it might be necessary to include a movement restriction condition in an order, and any deferred hearing following that;
- at proceedings before a sheriff in relation to an application for variation or termination of a CPO or Child Assessment Order (CAO) (s.28C Legal Aid (Scotland) Act 1986).

4.2 To give effect to the child's right to automatic children's legal aid in the specified circumstances, SLAB must arrange for a solicitor to be available to the child. SLAB has set up a duty solicitor scheme to satisfy this obligation. SLAB will contact a duty solicitor, and the duty solicitor will contact the child.

4.3 In order to give a child the option to exercise his/her right to have a duty solicitor represent them at one of the hearings above, the reporter must contact SLAB as soon as possible if:

- arranging a specified children's hearing, i.e. a 2nd working day hearing, custody hearing or any hearing where the reporter believes that secure accommodation and/or a movement restriction condition is likely to be considered, and
- the child would be capable of instructing a solicitor (the reporter is to apply a presumption that a child aged 8 or over has such an understanding) , and
- the child has not already instructed and is not in the process of instructing his own solicitor and ABWOR is available to the child (the reporter should check with the social worker or secure unit when making arrangements for an emergency hearing).

An appointed and instructed duty solicitor retains responsibility for deferred hearings. It is for the solicitor to contact SLAB if alternative representation is required at a deferred hearing.

The reporter is to alert the sheriff clerk to the fact that the clerk may need to arrange for a duty solicitor to be present at court for a child in relation to an application to vary or terminate a CPO.

4.4 The reporter is to notify SLAB that a children's hearing is being arranged and provide SLAB with certain information. The reporter is to use the proforma and this is to be sent by secure e-mail. As the child is not obliged to instruct the duty solicitor appointed, reporters are to restrict the information given to SLAB to what is necessary to enable the duty scheme to operate effectively.

Therefore, reporters must only provide SLAB with the following information in relation to the child:

- the name and date of birth of the child.
- the date, time and place of a hearing.
- a method of contacting the child. If a child is already in secure accommodation, the reporter should say where and provide the telephone number of the secure unit. If the child is in a custody suite, the reporter should say which custody suite and provide a telephone number. If the child is in another place of safety, the reporter should provide the name and telephone number of the social worker through whom contact with the child should be made. If the child is at home the reporter should provide the child's address for contact.

SLAB will find a duty solicitor and will inform the reporter of the duty solicitor's name and contact details. The duty solicitor will then make contact with the reporter's office to confirm they have been instructed.

4.5 The reporter is only to give any further information such as hearing papers to the duty solicitor when the duty solicitor confirms to the reporter that the child has instructed them to act. If the reporter is in any doubt about the identity of the person contacting them for papers or about the solicitor having instructions, the reporter is to request a formal written mandate.

4.6 A pre-hearing panel may determine that it is likely a children's hearing will consider making a CSO or ICSO including a secure accommodation authorisation in relation to the child and/or that it is likely a children's hearing will consider making a CSO or ICSO including a movement restriction condition. If a pre-hearing panel makes such a determination, the reporter must, as soon as possible after that determination, notify the SLAB of that fact and the name and address of the child. Rule 50(6)

4.7 However, a child is entitled to automatic children's legal aid without a pre-hearing panel being held.

5. Registration for children's legal assistance and Code of Practice

5.1 All solicitors and firms must register to provide children's legal assistance. A condition of registration is compliance with a Code of Practice. SLAB administers the legal aid scheme, deals with applications and monitors compliance with the Code of Practice.

5.2 If a reporter has concern about a solicitor's compliance with the Code of Practice, this concern should be passed to the Locality Reporter Manager. The Locality Reporter Manager must have the consent of the Head of Practice and Policy to raise this matter with SLAB.

Appendix 1: Forms of legal aid for hearings and related proceedings

1. Advice And Assistance

This is a form of legal aid which is available to all persons, assuming they qualify, for general advice before and after a children's hearing and for advice on associated court proceedings. Reporters will not have any direct involvement in relation to advice and assistance.

2. Automatic Children's Legal Aid

"Automatic children's legal aid" is a form of legal aid available only to a child. It is available in five specific circumstances, but only where the child has not secured themselves their own solicitor who is acting for them under AWBOR (see below).

The four specified circumstances are set out in section 28C of the Legal Aid (Scotland) Act 1986:

- Proceedings before a sheriff when an application has been made to the sheriff for variation or termination of a child protection order under s48 of the Act.
- Second working day children's hearing following the granting of a child protection order.
- A children's hearing if the children's hearing or a pre hearing panel considers that it might be necessary for that children's hearing to make a CSO including a secure accommodation authorisation. If the children's hearing is deferred, automatic children's legal aid continues to be available at the deferred hearing (provided the child has not obtained his/her own solicitor who is acting under ABWOR).
- A children's hearing if the children's hearing or a pre hearing panel considers that it might be necessary for that children's hearing to make a CSO including a movement restriction condition. If the children's hearing is deferred, automatic children's legal aid continues to be available at the deferred hearing (provided the child has not obtained his/her own solicitor who is acting under ABWOR).
- A section 69(3) children's hearing where child has been arrested and detained in a place of safety. If the hearing is deferred, automatic children's legal aid is available for the deferred hearing.

3. Assistance By Way Of Representation (known as ABWOR)

This is available to a child with no means and merits tests for the five specified circumstances outlined above.

This is available to a relevant person (including a deemed relevant person) for the five specified circumstances outlined above where the solicitor representing the relevant person will apply both the means and the merits test. SLAB will "back

end" check these grants of ABWOR and will pay the solicitor for the work carried out if it is satisfied that the tests were correctly applied by the solicitor.

For all other hearings which fall outwith the five specified hearings above, ABWOR is available to a child and relevant person. The solicitor representing their client applies the means test and applies to SLAB who will consider the merits test of effective participation. Where the client is a child this assumes that they have sufficient capacity to instruct a solicitor directly.

ABWOR is also available to a "section 126 individual" for representation at a children's hearing fixed under section 126 only[2]. The solicitor applies the means test and applies to SLAB who will consider the merits test.

ABWOR is available to a child, relevant person and person seeking to be deemed to be a relevant person at a section 79(2) pre-hearing panel or at the beginning of a hearing. It is also available to someone who seeks participation rights at a pre-hearing panel or at the beginning of a hearing. The solicitor applies the means test and applies to SLAB who will consider the merits test.

4. Children's Legal Aid

This is available to a child, relevant person and person who has been deemed to be relevant at a pre-panel or children's hearing for all related court proceedings (including appeals against panel decisions) before the sheriff, Sheriff Appeal Court and Court of Session. Where the client is a child this assumes that they have sufficient capacity to instruct a solicitor directly.

This will also be available to an individual who wishes to appeal against a decision of a pre-hearing panel or children's hearing not to deem them relevant and for any onward appeal to the Sheriff Appeal Court and Court of Session.

This will also be available to a section 126 individual who wishes to appeal against a decision taken at a section 126 children's hearing and for any onward appeal to the Sheriff Appeal Court and Court of Session in this respect.

An application for children's legal aid is made to the SLAB by the client's solicitor. SLAB will apply both the means and the merits test.

Special Urgency children's legal aid will be available to all those entitled to receive children's legal aid in these associated court proceedings where there has been insufficient time to submit/consider a full children's legal aid application and where special urgency can be shown.

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[2] A "section 126 individual" means a person to whom section 126(2)(b) or (3) of the 2011 Act applies namely an individual, who is not a relevant person, and:

(i) who is named on a contact order which regulates contact between the child and that individual; or

(ii) who is named on a permanence order which specifies arrangements for contact between that individual and child; or

(iii) who claims that s/he has or recently has had significant involvement in the upbringing of the child.