



Children's Hearings (Scotland) Act 2011

2011 asp 1

PART 19

LEGAL AID AND ADVICE

191 Legal aid and advice

After section 28A of the Legal Aid (Scotland) Act 1986 (c.47) insert—

“PART 5A

CHILDREN'S LEGAL AID

28B Children's legal aid

- (1) This Part applies to children's legal aid.
- (2) In this Act, “children's legal aid” means representation by a solicitor and, where appropriate, by counsel in proceedings mentioned in subsection (3), on the terms provided for in this Act, and includes all such assistance as is usually given by a solicitor or counsel in the steps preliminary to or incidental to those proceedings.
- (3) The proceedings are—
 - (a) proceedings before the sheriff in relation to an application under section 48 of the 2011 Act (application for variation or termination of child protection order),
 - (b) proceedings before a children's hearing arranged by virtue of section 45 or 46 of the 2011 Act (children's hearing following making of child protection order),
 - (c) proceedings before a children's hearing or a pre-hearing panel if the children's hearing or the panel considers that it might be necessary to make a compulsory supervision order including a secure accommodation authorisation in relation to the child to whom the proceedings relate,

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- (d) proceedings before a children's hearing to which section 69(3) of the 2011 Act applies (children's hearing following arrest of child and detention in place of safety),
- (e) proceedings under Part 10 or 15 of the 2011 Act.

(4) In this Part—

“compulsory supervision order” has the meaning given by section 83 of that Act,

“pre-hearing panel” has the meaning given by section 79 of that Act,

“secure accommodation authorisation” has the meaning given by section 85 of that Act.

28C Circumstances where children's legal aid automatically available

(1) Subsection (2) applies where—

- (a) an application is made under section 48 of the 2011 Act for variation or termination of a child protection order,
- (b) a children's hearing is arranged in relation to a child by virtue of section 45 or 46 of the 2011 Act,
- (c) a children's hearing or a pre-hearing panel considers that it might be necessary to make a compulsory supervision order including a secure accommodation authorisation in relation to a child, or
- (d) a children's hearing to which section 69(3) of the 2011 Act applies is arranged in relation to a child.

(2) If assistance by way of representation has not been made available to the child, children's legal aid is available to the child for the purposes of—

- (a) proceedings before the sheriff in relation to the application mentioned in paragraph (a) of subsection (1),
- (b) the children's hearing mentioned in paragraph (b) or, as the case may be, (c) or (d) of that subsection, and
- (c) if that children's hearing is deferred, any subsequent children's hearing held under Part 11 of the 2011 Act.

(3) The Scottish Ministers may by regulations—

- (a) modify subsection (1),
- (b) modify subsection (2) and section 28B(3) and (4) in consequence of modifications made under paragraph (a).

28D Availability of children's legal aid: child

(1) Subsection (2) applies in relation to proceedings under Part 10 or 15 of the 2011 Act (other than an appeal to the sheriff principal or the Court of Session).

(2) Children's legal aid is available to the child to whom the proceedings relate if, on an application made to the Board, the Board is satisfied that the conditions in subsection (3) are met.

(3) The conditions are—

- (a) that it is in the best interests of the child that children's legal aid be made available,

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- (b) that it is reasonable in the particular circumstances of the case that the child should receive children's legal aid, and
 - (c) that, after consideration of the disposable income and disposable capital of the child, the expenses of the case cannot be met without undue hardship to the child.
- (4) Subsection (5) applies in relation to an appeal to the sheriff principal or the Court of Session under Part 15 of the 2011 Act.
- (5) Children's legal aid is available to the child to whom the proceedings relate if, on an application made to the Board, the Board is satisfied that—
- (a) the conditions in subsection (3) are met, and
 - (b) the child has substantial grounds for making or responding to the appeal.

28E Availability of children's legal aid: relevant person

- (1) Subsection (2) applies in relation to—
- (a) proceedings before the sheriff in relation to an application under section 48 of the 2011 Act (application for variation or termination of child protection order), and
 - (b) proceedings under Part 10 or 15 of the 2011 Act (other than an appeal to the sheriff principal or the Court of Session).
- (2) Children's legal aid is available to a relevant person in relation to the child to whom the proceedings relate if, on an application made to the Board, the Board is satisfied that the conditions in subsection (3) are met.
- (3) The conditions are—
- (a) that it is reasonable in the particular circumstances of the case that the relevant person should receive children's legal aid, and
 - (b) that, after consideration of the disposable income and disposable capital of the relevant person, the expenses of the case cannot be met without undue hardship to the relevant person.
- (4) Subsection (5) applies in relation to an appeal to the sheriff principal or the Court of Session under Part 15 of the 2011 Act.
- (5) Children's legal aid is available to a relevant person in relation to the child to whom the appeal relates if, on an application made to the Board, the Board is satisfied that—
- (a) the conditions in subsection (3) are met, and
 - (b) the relevant person has substantial grounds for making or responding to the appeal.
- (6) In this Part, "relevant person"—
- (a) has the meaning given by section 200 of the 2011 Act, and
 - (b) includes a person deemed to be a relevant person by virtue of section 81(3), 160(4)(b) or 164(6) of that Act.

28F Availability of children's legal aid: appeals relating to deemed relevant person

- (1) Subsection (2) applies in relation to—
 - (a) an appeal under section 154 or 163(1)(a)(iii) or (2) of the 2011 Act arising from a determination of a children's hearing mentioned in section 142(1)(a) if by virtue of section 142(4)(b) an individual is no longer to be deemed to be a relevant person,
 - (b) an appeal to the sheriff under section 160(1)(a) of that Act against a determination of a pre-hearing panel or children's hearing that an individual is not to be deemed a relevant person in relation to a child,
 - (c) an appeal to the sheriff under section 160(1)(b) of that Act against a direction under section 142(4)(a) that an individual is no longer to be deemed a relevant person in relation to a child,
 - (d) an appeal to the sheriff principal or the Court of Session under section 164(1) of that Act against a decision of the sheriff in an appeal under section 160(1)—
 - (i) confirming a determination that an individual is not to be deemed a relevant person in relation to a child, or
 - (ii) quashing a determination that an individual is to be deemed a relevant person in relation to a child, and
 - (e) an appeal to the Court of Session under section 164(2) of that Act against a determination of the sheriff principal where the effect of the sheriff principal's determination is that an individual is not to be deemed a relevant person in relation to a child.
- (2) Children's legal aid is available to the individual if, on an application made to the Board, the Board is satisfied—
 - (a) that it is reasonable in the particular circumstances of the case that the individual should receive children's legal aid,
 - (b) that, after consideration of the disposable income and disposable capital of the individual, the expenses of the case cannot be met without undue hardship to the individual, and
 - (c) that—
 - (i) in relation to an appeal mentioned in paragraph (a) of subsection (1), the individual has substantial grounds for making or, as the case may be, responding to the appeal,
 - (ii) in relation to an appeal mentioned in any other paragraph of that subsection, the individual has substantial grounds for making the appeal.

28G Conditions

The Board may make the grant of children's legal aid subject to such conditions as the Board considers expedient; and such conditions may be imposed at any time.

28H Board to establish review procedures

- (1) The Board must establish a procedure under which a person whose application for children's legal aid has been refused may apply to the Board for a review of the application.
- (2) The Board must establish a procedure under which any person receiving children's legal aid which is subject to conditions by virtue of section 28G may apply to the Board for a review of any such condition.

28J Board's power to require compliance with conditions

The Board may require a person receiving children's legal aid to comply with such conditions as it considers expedient to enable it to satisfy itself from time to time that it is reasonable for the person to continue to receive children's legal aid.

28K Contributions to the Fund

- (1) A person in receipt of children's legal aid (the "assisted person") may be required by the Board to contribute to the Fund in respect of any proceedings in connection with which the assisted person is granted children's legal aid.
- (2) A contribution under subsection (1) is to be determined by the Board and may include—
 - (a) if the assisted person's disposable income exceeds £3,355 a year, a contribution in respect of income which is not to be more than one-third of the excess (or such other proportion of the excess, or such amount, as may be prescribed by regulations made under this section), and
 - (b) if the assisted person's disposable capital exceeds £7,504, a contribution in respect of capital which is not to be more than the excess (or such proportion of the excess or such lesser amount as may be prescribed by regulations made under this section).
- (3) Regulations under this section may prescribe different proportions or amounts for different amounts of disposable income and for different cases or classes of case.

28L Power of Scottish Ministers to modify circumstances in which children's legal aid to be available

- (1) The Scottish Ministers may by regulations modify this Part so as to—
 - (a) extend or restrict the types of proceedings before a children's hearing in connection with which children's legal aid is to be available, and
 - (b) specify the persons to whom children's legal aid is to be available.
- (2) If regulations are made making children's legal aid available to a child, the regulations must include provision—
 - (a) requiring the Board to be satisfied that—
 - (i) one of the conditions in subsection (3) is met, and

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- (ii) the conditions in section 28D(3) are met before children's legal aid is made available, and
 - (b) requiring the Board, in determining for the purposes of subsection (3)(b)(ii) whether the child would be able to participate effectively in the proceedings, to take into account in particular the matters mentioned in subsection (4).
- (3) The conditions are—
- (a) that it might be necessary for the children's hearing to decide whether a compulsory supervision order or, as the case may be, an interim compulsory supervision order should include or (where a compulsory supervision order is being reviewed) continue to include a secure accommodation authorisation, and
 - (b) that—
 - (i) the condition in paragraph (a) is not met, and
 - (ii) for the purpose of enabling the child to participate effectively in the proceedings before the children's hearing, it is necessary that the child be represented by a solicitor or counsel.
- (4) The matters are—
- (a) the nature and complexity of the case (including any points of law),
 - (b) the ability of the appropriate person, with the assistance of any accompanying person, to consider and challenge any document or information before the children's hearing,
 - (c) the ability of the appropriate person, with the assistance of any accompanying person, to give the appropriate person's views at the children's hearing in an effective manner.
- (5) If regulations are made making children's legal aid available to a person other than the child to whom the proceedings relate, the regulations must include provision—
- (a) requiring the Board to be satisfied that the conditions in subsection (6) are met before children's legal aid is made available, and
 - (b) requiring the Board, in determining for the purposes of the condition in subsection (6)(a) whether the person would be able to participate effectively in the proceedings, to take into account in particular the matters mentioned in subsection (4).
- (6) The conditions are—
- (a) that, for the purpose of enabling the person to participate effectively in the proceedings before the children's hearing, it is necessary that the person be represented by a solicitor or counsel,
 - (b) that it is reasonable in the particular circumstances of the case that the person should receive children's legal aid, and
 - (c) that, after consideration of the disposable income and disposable capital of the person, the expenses of the case cannot be met without undue hardship to the person or the dependants of the person.
- (7) In subsection (4)—
- “accompanying person” means a person entitled to accompany the child or other person to the children's hearing by virtue of rules under section 177 of the 2011 Act,

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“appropriate person” means—

- (a) for the purposes of subsection (2)(b), the child,
- (b) for the purposes of subsection (5)(b), the other person.

- (8) The Scottish Ministers may by regulations modify—
 - (a) the matters for the time being set out in subsection (4),
 - (b) the definition of “accompanying person” for the time being set out in subsection (7).

PART 5B

CHILDREN'S LEGAL ASSISTANCE

28M Register of solicitors and firms eligible to provide children's legal assistance

- (1) The Board must establish and maintain a register of—
 - (a) solicitors who are eligible to provide children's legal assistance, and
 - (b) the firms with which such solicitors are connected.
- (2) A sole solicitor who wishes to provide children's legal assistance must be included in the register maintained under this section both as a solicitor and as a firm.
- (3) Only those solicitors who are included in the register maintained under this section may provide children's legal assistance.
- (4) Subject to subsection (5), a solicitor may provide children's legal assistance only when working in the course of a connection with a firm included in the register maintained under this section.
- (5) Where the Board employs a solicitor under sections 26 and 27 to provide children's legal assistance—
 - (a) the Board may only employ a solicitor who is included in the register maintained under this section,
 - (b) the entry in the register relating to the solicitor's name must include a note that the solicitor is so employed,
 - (c) the Board is not to be regarded as a firm for the purposes of this section and is not required to be included in the register.
- (6) The Scottish Ministers may by regulations make provision about qualifications to be held by persons who may be included in the register maintained under this section.
- (7) Subsections (5) to (15) of section 25A apply in relation to the register maintained under this section as they apply in relation to the Register subject to the modifications mentioned in subsection (8).
- (8) Those modifications are—
 - (a) subsections (8) and (9) are to be read as if references to the code were references to the code of practice under section 28N for the time being in force, and

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- (b) subsection (9) is to be read as if the reference to criminal legal assistance were a reference to children's legal assistance.

28N Code of practice

- (1) The Board must prepare a draft code of practice in relation to the carrying out by solicitors of their functions with regard to the provision of children's legal assistance.
- (2) Different provision may be made for different cases or classes of case.
- (3) Subsections (3) to (8) of section 25B apply in relation to a draft code prepared under subsection (1) above as they apply in relation to a draft code prepared under subsection (1) of that section.

28P Duty to comply with code of practice

- (1) Solicitors and firms included in the register maintained under section 28M(1) must comply with the requirements of the code of practice under section 28N for the time being in force.
- (2) The Board must monitor the carrying out by those solicitors and firms of their duty under subsection (1).
- (3) For the purpose of carrying out its duty under subsection (2) the Board may use the powers conferred on it by sections 35A and 35B.

28Q Non-compliance with code of practice

- (1) Section 25D applies in relation to a solicitor or firm included in the register maintained under section 28M(1) and the code of practice under section 28N for the time being in force as it applies in relation to a registered solicitor or registered firm and the code subject to the modifications mentioned in subsection (2).
- (2) Those modifications are—
 - (a) references to the Register are to be read as if they were references to the register maintained under section 28M(1),
 - (b) subsection (6) is to be read as if the references to criminal legal assistance were references to children's legal assistance.

28R Further provision as to removal of name from register

- (1) Subsection (2) applies where the Board is satisfied (whether on being informed by the solicitor concerned or otherwise) that a solicitor who is included in the register maintained under section 28M(1)—
 - (a) has become connected with a firm whose name is not included in that register, and
 - (b) is no longer connected with a firm whose name is included in that register.
- (2) The Board must remove the solicitor's name from the register.

- (3) Subsections (6) to (9) of section 25D (as applied by section 28Q) apply in relation to a solicitor whose name is removed from the register under subsection (2) above as they apply in relation to a solicitor whose name is removed from the register under subsection (4) of that section (as applied by section 28Q).

28S Publication of register etc.

Section 25F applies in relation to the register maintained under section 28M(1) as it applies in relation to the Register.”.

192 Power to make regulations about contracts for provision of children's legal aid

After section 33A of the Legal Aid (Scotland) Act 1986 insert—

“Contracts for the provision of children's legal assistance

33B Contracts for the provision of children's legal assistance

- (1) The Scottish Ministers may by regulations made under this section empower the Board to enter into contracts with relevant firms for the provision by relevant solicitors connected with those firms of children's legal assistance.
- (2) Regulations under this section may prescribe—
- (a) the procedures to be followed by the Board in awarding any such contract, and
 - (b) subject to subsection (3), any terms and conditions which are to be included in any such contract.
- (3) Regulations under this section must provide that any contract entered into by virtue of this section must include a provision that, in the event of the termination of the contract, or a breach of it by the relevant firm concerned, the Board may—
- (a) withhold payments under the contract, and
 - (b) require the firm to secure the transfer to a relevant solicitor of—
 - (i) any work currently being undertaken by any solicitor connected with them for any client by way of children's legal assistance, and
 - (ii) notwithstanding any lien to which any such solicitor might otherwise be entitled, any documents connected with any such work.
- (4) Regulations under this section may provide that where the Board has by virtue of this section entered into contracts with any relevant firms for the provision of children's legal assistance in any area, then, unless it seems to the Board to be inappropriate in a particular case, any person seeking such assistance in that area is to be required to instruct a relevant solicitor connected with one of those firms.
- (5) Any money due to a firm under a contract made by virtue of this section is to be paid to the firm—

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- (a) firstly, out of any amount payable by the client in accordance with section 11(2),
 - (b) secondly, by the Board out of the Fund.
- (6) For the purposes of sections 32 and 33, the money paid to a firm, as provided in subsection (5) above, in respect of a contract made by virtue of this section is to be taken to be a payment made in accordance with this Act, and no solicitor connected with such a firm is entitled to any other payment out of the Fund in respect of any work done by the solicitor by virtue of such a contract.
- (7) In this section—
- “relevant firm” means a firm included in the register maintained under section 28M(1),
 - “relevant solicitor” means a solicitor included in the register maintained under section 28M(1).”