EXECUTIVE NOTE

LEGAL AID REGULATIONS

The Civil Legal Aid (Scotland) Amendment (No. 2) Regulations 2007 SSI/2007/425

The above instrument will be made in exercise of the powers conferred on the Scottish Ministers primarily by sections 36(1), (2) and (3) of the Legal Aid (Scotland) Act 1986 ('the 1986 Act'). The instrument is subject to the negative resolution procedure.

Policy objective

Adults with Incapacity

This instrument has the main purpose of changing the legal aid regulations to ensure that there is a level playing field in relation to availability of non means tested legal aid between the adult with incapacity and anyone else claiming an interest in his/her affairs.

Currently, civil legal aid is available for certain applications under Part 6 of the Adults with Incapacity (Scotland) Act 2000 ('2000 Act'). Regulations 13A and 14 of the Civil Legal Aid (Scotland) Regulations 2002 provide for civil legal aid for persons concerned as claiming or having an interest in the property financial or personal welfare of the adult under the 2000 Act without any regard being made to the applicant's income or capital and without any contribution being payable by the applicant to the legal aid fund. Civil legal aid will also be available to those persons opposing in relation to applications and interventions.

The provisions of regulation 13A relate only to applications for intervention and guardianship orders under section 53(1) and 57(1) respectively of the 2000 Act solely or partly in relation to the personal welfare of the adult, and do not apply to the adult himself or herself. The 2002 regulations as amended and extended to further categories of application provide that in such applications, civil legal aid will be available also to the adult himself or herself without reference to sections 15 and 17 of the 1986 Act which provides for the financial conditions as the availability of civil legal aid. The written statement itemising an applicant's disposable income and capital as required by Regulation 5 is not necessary for such applications.

The provisions of regulation 14 are extended so legal aid is also available free in relation to the type of applications covered by section 13A(1) to cases where financial interest is the primary interest rather than the welfare of the adult, with the difference that the amount of contribution shall be calculated with regard to the resources of the adult.

This policy objective will be achieved in two ways:-

- To provide where an adult with incapacity him/herself makes an application for or wishes to oppose an intervention or guardianship order relating wholly or partly to his personal welfare that adult should be entitled to "free" civil legal aid. And

To extend the exiting provisions for "free" civil legal aid in respect of guardianship orders which are wholly or partly concerned with the adult's personal welfare to proceedings under sections 60(1) (application for a renewal of guardianship order), 62(1) (application for joint guardian) and 63(1) (application for appointment of substitute guardian) of the Adults with Incapacity (Scotland) Act 2000 but only for proceedings which are wholly or partly

concerned with the adult's personal welfare for both a person claiming an interest in the adult's affairs and the incapacitated adult him/herself.

Powers and Commencement

Schedule 1 Section 3 of the Adults with Incapacity (Scotland) Act 2007 ('2007 Act') amends sections 34(2) and 36(3)(bb) of the 1986 Act that widen the regulation making power in order which allows the policy aim to be achieved. The Commencement Order for this Section 3 of the 2007 Act is 5 October 2007 which means that this Instrument should be laid by 13 September 2007 to allow these regulations to come into force on the required date.

Consultation

The Scottish government has fully consulted with the Scottish Legal Aid Board on these regulations and have been brought to the attention of the Law Society of Scotland. These are anticipated to affect only 12 cases a year but should be positively viewed by the profession.

Financial Implications

Based on the number of cases a year, the impact on the Legal Aid Fund is anticipated to be negligible.

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