

DRAFT RULES FOR CONSULTATION

SCOTTISH STATUTORY INSTRUMENTS

XXXX No.

COURT OF SESSION

SHERIFF COURT

Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (Attendance at Hearings) xxxx

<i>Made</i> - - - -	<i>xxx</i>
<i>Laid before the Scottish Parliament</i>	<i>xxx</i>
<i>Coming into force</i> - -	<i>xxx</i>

In accordance with section 4 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013(a), the Court of Session has approved draft rules submitted to it by the Scottish Civil Justice Council.

The Court of Session therefore makes this Act of Sederunt under the powers conferred by sections 103(1) and 104(1) of the Courts Reform (Scotland) Act 2014(b) and all other powers enabling it to do so.

Citation and commencement, etc.

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (Attendance at Hearings) xxxx.

(2) It comes into force on [xxx].

(3) A certified copy is to be inserted in the Books of Sederunt.

Amendment of the Rules of the Court of Session 1994

2.—(1) The Rules of the Court of Session 1994(c) are amended in accordance with this paragraph.

(2) After Chapter 35A (Vulnerable Witnesses (Scotland) Act 2004)(d), insert—

(a) 2013 asp 3. Section 4 was amended by the Courts Reform (Scotland) Act 2014 (asp 18), schedule 5, paragraph 31(3) and by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (asp 2), schedule 1, paragraph 1(4).

(b) 2014 asp 18.

(c) The Rules of the Court of Session 1994 are in schedule 2 of the Act of Sederunt (Rules of the Court of Session 1994) 1994 (S.I. 1994/1443), last amended by [xxx].

(d) Chapter 35A was inserted by S.S.I. 2007/450 and was amended by S.S.I. 2009/450.

“CHAPTER 35B ATTENDANCE AT HEARINGS

Application and interpretation

35B.1.—(1) This Chapter is without prejudice to any enactment under which provision has been made regarding the attendance of persons at hearings.

(2) In this Chapter—

“Convention adoption order” has the meaning given by rule 67.24 (Convention adoption orders, interpretation)(a);

“parental order” has the meaning given by rule 97.1 (applications for parental orders under the Human Fertilisation and Embryology Act 2008, application and interpretation)(b);

“Part I order” has the meaning given by rule 71.1 (registration and enforcement of Part I orders under the Family Law Act 1986, interpretation)(c);

“procedural judge” has the meaning given by rule 37A.2(1).

Attendance in person at hearings

35B.2.—(1) Where this rule applies a person is not excused from a requirement to attend a hearing physically.

(2) This rule applies to the following hearings—

(a) those in a family action within the meaning of rule 49.1(1) (interpretation of the family actions chapter)(d), other than those mentioned in rule 35B.3(2)(a) and (b);

(b) all those in an application—

(i) under the Adoption and Children (Scotland) Act 2007(e);

(ii) for a Convention adoption order;

(iii) under the Child Abduction and Custody Act 1985(f);

(iv) for the registration and enforcement of a Part I order under the Family Law Act 1986(g);

(v) for a parental order under the Human Fertilisation and Embryology Act 2008(h);

(vi) under the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011(i);

(c) legal debates on the procedure roll raising a point of law of general public importance/particular difficulty or importance;

(d) where paragraph (3) applies, proofs in an ordinary action;

(e) civil jury trials;

(f) reclaiming motions and appeals raising a point of law of general public importance/particular difficulty or importance;

(a) Rule 67.24 was substituted by S.S.I. 2009/283.

(b) Rule 97.1 was inserted by S.S.I. 2010/136.

(c) Rule 71.1 was amended by S.I. 1997/795.

(d) Rule 49.1(1) was substituted by S.S.I. 2005/632 and was last amended by S.S.I. 2014/302.

(e) 2007 asp 4. Chapter 67 makes provision for applications under the Adoption and Children (Scotland) Act 2007. The chapter was substituted by S.S.I. 2009/283 and amended by S.S.I. 2011/288.

(f) c. 60.

(g) c. 55.

(h) c. 22. Chapter 97 makes provision for applications for parental orders under the Human Fertilisation and Embryology Act 2008. The chapter was inserted by S.S.I. 2010/136 and last amended by S.S.I. 2019/147.

(i) 2011 asp 15.

- (g) all those where the court grants an application made under rule 35B.4(2);
 - (h) all those where the court directs a person to physically attend, in accordance with rule 35B.5(2).
- (3) This paragraph applies to proofs—
- (a) where there is a significant issue of credibility of a party or witness which is dependent upon an analysis of the party’s or witness’s demeanour or character;
 - (b) other than those mentioned in rule 35B.3(2)(f).

Attendance by electronic means at hearings

- 35B.3.**—(1) Where this rule applies a person—
- (a) is excused from a requirement to attend a hearing physically; and
 - (b) must instead attend at the hearing by electronic means.
- (2) This rule applies to the following hearings—
- (a) case management hearings fixed by the court under rule 49.32A (case management hearings in family actions)(a);
 - (b) pre-proof hearings fixed by the court under rule 49.32A(4)(b);
 - (c) all those in relation to a petition for judicial review;
 - (d) those in relation to procedure;
 - (e) legal debates on the procedure roll, other than those mentioned in rule 35B.2(2)(c);
 - (f) all those in commercial actions, including proofs;
 - (g) reclaiming motions and appeals, other than those mentioned in rule 35B.2(2)(f);
 - (h) those in which the court grants an application made under rule 35B.4(1);
 - (i) those in which the court directs a person to attend by electronic means in accordance with rule 35B.5(1);
 - (j) all other hearings which—
 - (i) do not involve the giving of evidence by a witness; or
 - (ii) are not otherwise listed in rule 35B.2(2).

Applications for other mode of attendance

- 35B.4.**—(1) Where a person is to attend a hearing physically, in accordance with rule 35B.2, a party may apply for—
- (a) the person to attend by electronic means; or
 - (b) the hearing to be conducted with persons attending by electronic means.
- (2) Where a person is to attend a hearing by electronic means, in accordance with rule 35B.3, a party may apply for—
- (a) the person to attend the hearing physically; or
 - (b) the hearing to be conducted with persons attending physically.
- (3) An application under paragraph (1) or (2) is to be made by motion, together with an application in Form 35B.4-A or Form 35B.4-B, respectively.
- (4) The motion is to be placed before a Lord Ordinary or, where the cause is in the Inner House, a procedural judge for determination without an oral hearing.
- (5) The court may grant an application only if it is of the opinion that by doing so it would not—

(a) Rule 49.32A was inserted by S.S.I. 2017/242.

- (a) prejudice the fairness of the proceedings; or
- (b) otherwise be contrary to the interests of justice.

Directions for attendance at hearings

35B.5.—(1) In proceedings to which rule 35B.2 applies the court may direct that a person may attend a hearing by electronic means only if it is of the opinion that allowing a person to do so would not—

- (a) prejudice the fairness of proceedings; or
- (b) otherwise be contrary to the interests of justice.

(2) In proceedings to which rule 35B.3 applies the court may direct that a person must attend a hearing physically only if it is of the opinion that allowing a person to attend the hearing by electronic means would not—

- (a) prejudice the fairness of proceedings; or
- (b) otherwise be contrary to the interests of justice.

(3) The court may revoke a direction under paragraph (1) or (2) on the motion of a party or of its own accord.

(4) Where a party enrolls a motion under paragraph (3), it is to be placed before a Lord Ordinary or, where the cause is in the Inner House, a procedural judge for determination without an oral hearing.

(5) Nothing in this Chapter affects the power of the court to make such other direction as it considers appropriate in the interests of justice.”.

(3) In rule 36.9 (attendance, and lists, of witnesses)—

- (a) in paragraph (1), for “It shall be the duty” substitute “Subject to paragraph (1A), it is the duty”;
- (b) after paragraph (1), insert—

“(1A) Where a witness is to attend a proof by electronic means in accordance with Chapter 35B (attendance at hearings), it is the duty of each party to ensure that the witness, if any, is available when called on to give evidence.”;

- (c) after paragraph (4), insert—

“(5) In paragraph (3), at a proof in which a witness is to attend by electronic means the references to being present in, and leaving, “the courtroom” are to be read as being present in, and leaving the “court by electronic means”.”.

(4) In the appendix (forms) after Form 35A.7 (Vulnerable Witnesses (Scotland) Act 2004, Form of Certificate of Intimation), insert—

- (a) Form 35B.4-A (form of application by a party seeking authorisation for a hearing to be conducted wholly or partly with persons in physical attendance in court);
- (b) Form 35B.4-B (form of application by a party seeking authorisation for a hearing to be conducted wholly or partly electronic means).

Amendment of the Ordinary Cause Rules 1993

3.—(1) The Ordinary Cause Rules 1993(a) are amended in accordance with this paragraph.

(2) After Chapter 28 (Recovery of Evidence)(b), insert—

(a) The Ordinary Cause Rules 1993 are in schedule 1 of the Sheriff Courts (Scotland) Act 1907 (c.51). Schedule 1 was substituted by S.I. 1993/1956 and last amended by [xxx].

(b) Chapter 28A was last amended by S.S.I. 2015/419.

“CHAPTER 28ZA ATTENDANCE AT HEARINGS

Application

28ZA.1. This Chapter is without prejudice to any enactment under which provision has been made regarding the attendance of persons at hearings.

Attendance in person at hearings

28ZA.2.—(1) Where this rule applies a person is not excused from a requirement to attend a hearing physically.

(2) This rule applies to the following hearings—

- (a) diets fixed under rule 24.2(1) (withdrawal of solicitors)(a);
- (b) those in a family action within the meaning of rule 33.1(1) (interpretation of the family actions chapter)(b), other than those mentioned in rule 28ZA.3(2)(a) to (e);
- (c) those in a civil partnership action within the meaning of rule 33A.1 (interpretation of the civil partnerships actions chapter)(c), other than those mentioned in rule 28ZA.3(2)(a) to (d) and (f);
- (d) an application made under section 23(2) of the Child Abduction and Custody Act 1985 (declarator that removal of child from United Kingdom was unlawful)(d);
- (e) legal debates raising a point of law of general public importance/particular difficulty or importance;
- (f) where paragraph (3) applies, proofs;
- (g) civil jury trials;
- (h) those where the court grants an application made under rule 28ZA.4(2);
- (i) those where the court directs a person to physically attend, in accordance with rule 28ZA.5(2).

(3) This paragraph applies to proofs where there is a significant issue of credibility of a party or witness which is dependent upon an analysis of the party’s or witness’s demeanour or character.

Attendance by electronic means at hearings

28ZA.3.—(1) Where this rule applies a person—

- (a) is excused from a requirement to attend a hearing physically; and
- (b) must instead attend at the hearing by electronic means.

(2) This rule applies to the following hearings—

- (a) hearings under rule 9.12 (Options Hearing);
- (b) procedural hearings under Chapter 10 (additional procedure)(e);
- (c) pre-proof hearings fixed by the sheriff under rule 28A.1 (pre-proof hearing)(f);
- (d) case management hearings fixed by the sheriff under rule 33AA.2 (fixing date for case management hearing in certain causes)(g);

(a) Rule 24.2(1) was amended by S.S.I. 2000/239.

(b) Rule 33.1(1) was last amended by S.S.I. 2014/302.

(c) Rule 33A.1 was inserted by S.S.I. 2005/638 and amended by S.S.I. 2006/207.

(d) c. 60.

(e) Chapter 10 was last amended by S.S.I. 2013/139.

(f) Rule 28A.1 was inserted by S.S.I. 2006/410 and was last amended by S.S.I. 2013/139.

(g) Rule 33AA.2 was inserted by S.S.I. 2013/139.

- (e) hearings fixed under rule 33.65A(6) (applications for leave in relation to applications for orders under Section II of the Children (Scotland) Act 1995)(a);
- (f) hearings fixed under rule 33A.57A(6) (applications for leave in relation to applications for orders under Section II of the Children (Scotland) Act 1995 in civil partnership actions)(b);
- (g) legal debates, other than those mentioned in rule 28ZA.2(2)(e);
- (h) hearings fixed under rule 13A.3(4) or 13A.4(3)(b) (interventions by the Commission for Equality and Human Rights)(c);
- (i) diets fixed under rule 13B.4(3)(b) (interventions by the Scottish Commission for Human Rights)(d);
- (j) hearings fixed under rule 14.3(2)(c), 14.8(2)(a) or 14.10(1)(a) (applications by minute)(e);
- (k) hearings of motions under rule 15.5 (hearing of motions);
- (l) hearings fixed under rule 18.3(2)(applications to amend)(f);
- (m) hearings fixed under rule 26.3(b)(remit of cause from Court of Session)(g);
- (n) hearings of any motion under rule 28.1(1);
- (o) hearings fixed under Chapter 28 (recovery of evidence)(h);
- (p) proof management hearings fixed under rule 29.17A(1) (proof management hearing)(i);
- (q) hearings fixed under rule 31A.4(2)(d) (qualified one-way costs shifting: procedure)(j);
- (r) diets of taxation fixed under rule 32.3(2) or (3) (diet of taxation)(k);
- (s) hearings fixed under rule 32.4(6) (objections to taxed account);
- (t) first, and any subsequent, hearings fixed under Chapter 35 (actions of multiple pinding)(l);
- (u) incidental hearings to which rule 36.L.1 (incidental hearings)(m) makes provision;
- (v) procedural hearings fixed under rule 36A.7(2) (closing record in certain personal injuries actions) or 36A.9(6) (procedural hearing)(n);
- (w) case management conferences fixed under rule 40.10 (fixing date for case management conference in commercial actions);
- (x) procedural hearings fixed under rule 40.14 (hearing for further procedure);
- (y) hearings fixed under Chapter 44 (the Equality Act 2010)(o);
- (z) hearings fixed under Chapter 45 (Vulnerable Witness (Scotland) Act 2004)(p), to include the taking of evidence by commission;
- (aa) hearings fixed under rule 48.3(5) (reporting restrictions, representations on interim orders) or 48.5(3) (applications for variation or revocation);

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- (a) Rule 33.65A was inserted by S.S.I. 2009/284.
 - (b) Rule 33A.57A was inserted by S.S.I. 2009/284.
 - (c) Chapter 13A was inserted by S.S.I. 2008/223.
 - (d) Chapter 13B was inserted by S.S.I. 2008/223.
 - (e) Rule 14.3 was substituted, and rules 14.8 and 14.10 were inserted, by S.I. 1996/2445.
 - (f) Rule 18.3 was amended by S.S.I. 2000/239.
 - (g) Rule 26.3 was amended by S.S.I. 2015/227.
 - (h) Chapter 28 was last amended by S.S.I. 2019/74.
 - (i) Rule 29.17A(1) was inserted by S.S.I. 2020/166.
 - (j) Rule 31A.4(2)(d) was inserted by S.S.I. 2021/226.
 - (k) Rule 32.3 was substituted by S.S.I. 2019/74.
 - (l) Chapter 35 was amended by S.S.I. 2007/463.
 - (m) Rule 36.L.1 was amended by S.S.I. 2016/229.
 - (n) Rule 36A.9 was amended by S.S.I. 2015/227 and 296.
 - (o) Chapter 44 was inserted by S.S.I. 2006/293 and last amended by S.S.I. 2012/271.
 - (p) Chapter 45 was inserted by S.S.I. 2007/463.

- (bb) those in which the court grants an application made under rule 28ZA.4(1);
- (cc) those in which the court directs a person to attend by electronic means in accordance with rule 28ZA.5(1);
- (dd) all other hearings which—
 - (i) do not involve the giving of evidence by a witness; or
 - (ii) are not otherwise listed in rule 28ZA.2(2).

Applications for other mode of attendance

28ZA.4.—(1) Where a person is to attend a hearing physically, in accordance with rule 28ZA.2, a party may apply for—

- (a) the person to attend by electronic means; or
- (b) the hearing to be conducted with persons attending by electronic means.

(2) Where a person is to attend a hearing by electronic means, in accordance with rule 28ZA.3, a party may apply for—

- (a) the person to attend the hearing physically; or
- (b) the hearing to be conducted with persons attending physically.

(3) An application under paragraph (1) or (2) is to be made by motion.

(4) The motion is to be placed before a sheriff for determination without an oral hearing.

(5) The sheriff may grant an application only if the sheriff is of the opinion that by doing so it would not—

- (a) prejudice the fairness of the proceedings; or
- (b) otherwise be contrary to the interests of justice.

Directions for attendance at hearings

28ZA.5.—(1) In proceedings to which rule 28ZA.2 applies the sheriff may direct that a person may attend a hearing by electronic means only if the sheriff is of the opinion that allowing a person to do so would not—

- (a) prejudice the fairness of proceedings; or
- (b) otherwise be contrary to the interests of justice.

(2) In proceedings to which rule 28ZA.3 applies the sheriff may direct that a person must attend a hearing physically only if the sheriff is of the opinion that allowing a person to attend the hearing by electronic means would not—

- (a) prejudice the fairness of proceedings; or
- (b) otherwise be contrary to the interests of justice.

(3) The sheriff may revoke a direction under paragraph (1) or (2) on the motion of a party or of the sheriff's own accord.

(4) Where a party enrolls a motion under paragraph (3), it is to be placed before a sheriff for determination without an oral hearing.

(5) Nothing in this Chapter affects the power of a sheriff to make such other direction as the sheriff considers appropriate in the interests of justice.”

(3) Omit rule 33.36 (attendance of parties at options hearings in defended family actions).

(4) Omit rule 33A.36 (attendance of parties at options hearings in defended civil partnership actions)(a).

(a) Chapter 33A was inserted by S.S.I. 2005/638.

Edinburgh
Date

CJM SUTHERLAND
Lord President
I.P.D.

SCHEDULE

Paragraph 2(4)

Form 35B.4-A

Rule 35B.4(3)

Form of application by a party seeking authorisation for a hearing to be conducted wholly or partly with persons in physical attendance in court

(Cause Reference No)

IN THE COURT OF SESSION

in the cause [or in the petition of]

[A.B.] (designation and address)

Pursuer[s] [or Petitioner[s]] [or Appellant[s]]

against

[C.D.] (designation and address)

Defender[s] [or Respondent[s]]

1. [Name of applicant], [Pursuer] [or Petitioner] [or Appellant] [or Defender] [or Respondent], applies to the court for authorisation for [state here whether the application is for either one hearing, or for more than one hearing in the proceedings to be conducted in person, and the nature of the hearing[s] in question] in the proceedings to be conducted in a manner where persons physically attend the court [and/or for [state here the person, or the persons, in question to whom the application relates to physically attend the hearing[s] in the proceedings].
2. The nature of the proceedings is [state here the subject matter of the proceedings]. [or The nature of the hearing is [state here the nature of the hearing (for example a proof which does not fall within the criteria of rule 35B.2(3))]. Accordingly, under the operation of rule 35B.3 attendance by persons at the hearing[s] in the proceedings is to be by electronic means.
3. The applicant applies for the hearing[s] to be conducted with persons [or with the persons as narrated in this application to be] in physical attendance at court on the following grounds:-
(Set out the grounds in brief numbered paragraphs. The grounds could, for example, include access to justice grounds, as follows:-

whether a party is a party litigant;

whether a party or witness is a vulnerable witness, within the meaning given in section 11 or 11A of the Vulnerable Witnesses (Scotland) Act 2004;

whether a party, witness or other person in the proceedings is a person with health conditions or impairments;

whether parties and all other persons in the proceedings have access to and are able to use telephone, information technology and/or internet services (to include access to a reliable telephone signal and adequate broadband);

whether any specialist support services (for example, interpretation services or witness support) are required and, if so, whether any issues are considered likely to arise in the provision of such services should a hearing be conducted by electronic means;

the arrangements which are in place to ensure that parties are able to converse with their representatives who, in turn, are able to take instructions, all in an appropriate manner.)

(Signed)

Solicitor [or Agent]

For [A.B.] [or [C.D.], Applicant

[or Party litigant]

(Date)

Form 35B.4-B

Rule 35B.4(3)

Form of application by a party seeking authorisation for a hearing to be conducted wholly or partly by electronic means

(Cause Reference No)

IN THE COURT OF SESSION

in the cause [*or* in the petition of]

[A.B.] (designation and address)

Pursuer[s] [*or* Petitioner[s]] [*or* Appellant[s]]

against

[C.D.] (designation and address)

Defender[s] [*or* Respondent[s]]

1. [*Name of applicant*], [Pursuer] [*or* Petitioner] [*or* Appellant] [*or* Defender] [*or* Respondent], applies to the court for authorisation for [*state here whether the application is for either one hearing, or for more than one hearing, to be conducted by electronic means – and the nature of the hearing[s] in question*] in the proceedings to be conducted in a manner where person[s] is [*or* are] in physical attendance in court by electronic means [*and/or for [state here the person or persons, in question to whom the application relates] to attend the hearing[s] in the proceedings by electronic means*].
2. The nature of the proceedings is [*state here the subject matter of the proceedings*]. [*or* The nature of the hearing is [*state here the nature of the hearing (for example, a civil jury trial)*]. Accordingly, under the operation of rule 35B.2 persons are to physically attend the court for the hearing[s].
3. The applicant applies for the hearing[s] to be conducted with persons [*or* with the persons as narrated in this application to be] in attendance at court by electronic means on the following grounds:-

(Set out the grounds in brief numbered paragraphs. The grounds could, for example, include access to justice grounds, as follows:-

whether a party is a party litigant;

whether a party or witness is a vulnerable witness, within the meaning given in section 11 or 11A of the Vulnerable Witnesses (Scotland) Act 2004;

whether a party, witness or other person in the proceedings is a person with health conditions or impairments;

whether parties and all other persons in the proceedings have access to and are able to use telephone, information technology and/or internet services (to include access to a reliable telephone signal and adequate broadband);

whether any specialist support services (for example, interpretation services or witness support) are required and, if so, whether any issues are considered likely to arise in the provision of such services should a hearing be conducted by electronic means;

the arrangements which are in place to ensure that parties are able to converse with their representatives who, in turn, are able to take instructions, all in an appropriate manner.

whether there are any geographical or financial impediments in place meaning that attendance by electronic means is more equitable to the person(s) in question.)

(Signed)

Solicitor [or Agent]

For [A.B.] [or [C.D.], Applicant

[or Party litigant]

(Date)

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt makes provision about the attendance of persons at hearings. The instrument amends the Rules of the Court of Session (“the RCS”), by the insertion of new Chapter 35B, and the Ordinary Cause Rules (“the OCR’s”), by the insertion of new Chapter 28ZA. It comes into force on [xxx].

The new Chapters provide two lists of hearings. One lists hearings in which persons are not excused from a requirement to attend the court physically. The other lists hearings in which persons are excused from a requirement to attend the court physically and must instead attend by electronic means.

The new Chapters provide that a party to an action may apply, by motion, to the Court of Session or, as the case may be, the sheriff for a hearing to be conducted in a manner other than as prescribed. New Forms for these applications are provided for the RCS.

Provision is made in the new Chapters to allow the Court of Session or, as the case may be, the sheriff to make a direction regarding the mode of attendance by persons at hearings.

The test for such applications and directions is the same, namely that the granting of an application or the making of a direction would not prejudice the fairness of the proceedings, or otherwise be contrary to the interests of justice.

The instrument also makes consequential amendments to the RCS and the OCR’s.