

ANNEX A – CONSULTATION RESPONSE FORM

RCS

7 October 2021

Response from Moray Council Litigation and Social Care Team

Question 1 – For the categories of case listed as suitable for an in-person hearing:

- o Do you think the general presumption given is appropriate? and
- o Would you make any additions or deletions and if so why?

Answer 1: We agree that the assumption is appropriate. We would not add any additions or deletions.

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

- o Do you think the general presumption given is appropriate? and
- o Would you make any additions or deletions and if so why?

Answer 2: Yes, we agree that the assumption is appropriate. We would not add any additions or deletions.

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

- o Do you think lodging a motion is the right way to do that? Please explain your answer.

Answer: 3 We agree lodging a motion is an appropriate way to change the mode of attendance if a person's circumstances warrant a departure from the general presumption

Question 4 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

- o Do you agree that the court should have the final say? Please explain your answer

Answer 4: We agree that the court should have the final say on the mode of attendance.

Question 5 – Do you have any other comments to make on the proposed changes within the Rules of the Court of Session?

Answer 5 : I would observe that outwith the central belt in particular, there are many areas with poor signal and broadband so the court should require to be satisfied that parties have the means (whether because of their connectivity or ICT equipment) to participate electronically before proceeding in this way - in addition to the other reasons given in the rules.

OCR

Question 6 – For the categories of case listed as suitable for an in-person hearing:

- o Do you think the general presumption given is appropriate? and
- o Would you make any additions or deletions and if so why?

Answer 6:

Yes.

Going forward, although we are aware these are summary applications, many of the OCR rules are followed for these type of cases by the court so, we thought it appropriate to make the following comments. Adoption and Permanence hearings should be in person hearings as well as potentially contested Adult with Incapacity cases, all of which often involve parties who would have difficulties managing the case electronically. It is noted that the draft rules for the Court of Session do appear to include actions under the Adoption and Children (Scotland) Act 1997 so it is hoped this will be the case in the amended other sheriff court rules. Hearing this type of case electronically excludes parents. It is noted that many cases locally here have representation from the central belt and we would have concerns that parents are not meeting their solicitors at all in person and, as a result, may not be getting proper representation. Since COVID, no parent has been directly involved in any of our permanence cases despite potentially serious implications for them if the order is granted.

In addition to the above, there may also be merit in the sheriff having discretion to have in person hearings where the other party is a party litigant in all types of actions, including OCR.

In relation to 28ZA.2.(3) of the draft OCR, "...significant issue of credibility of a party or witness..." all parties/witnesses require to be analysed (credibility and reliability) and we have concerns as to whether not sure how this can ever be satisfactorily achieved through electronic hearings. For that reason, we think many evidential hearings are best heard in person.

Question 7 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

- o Do you think the general presumption given is appropriate? and
- o would you make any additions or deletions and if so why?

Answer 7:

Yes, subject to our comments above in relation to summary application cases involving children or vulnerable adults.

Also, as mentioned above, where there is a party litigant there may well be a benefit of having this case in person or at least having the discussion as to the best means that works for that individual. We do not think another hurdle should be put in the way of justice for them.

Question 8 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

o Do you think lodging a motion is the right way to do that?
o Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers

Answer 8 :Yes, subject to comments.

Lodging a motion is an appropriate way for solicitors to change the mode of attendance if a person's circumstances warrant a departure from the general presumption.

However, a party litigant may struggle with a motion so it may be better to have a pro forma style application to request a change of mode which is lodged with the application or the answers which is simple to complete for party litigants rather than formal motion procedures. It would also be good to add in further matters that may be taken into account by the court e.g. connectivity issues (whether lack of equipment, broadband or ability to do this)

We would suggest the onus could be changed so that the sheriff "must grant the request for an in house hearing if satisfied that one or more of the reasons for so doing are met ...(eg the party does not have the ICT equipment)

Question 9 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:2

o Do you agree that the court should have the final say? Please explain your answer

Answer 9 :We agree that the court should have the final say on the mode of attendance.

The court should be required to give reasons for their decision though.

Question 10 – Do you have any other comments to make on the proposed changes within the Ordinary Cause Rules?

Answer 10

The court needs to remember that many rural areas do not have good reception, many people are excluded from on-line facilities due to poor connectivity or lack of ICT equipment because of poverty. Also there is no provision in these rules for observers, trainee solicitors etc. so we would query how court skills will be learned. We would also query what provision is being made to ensure the public are able to observe courts going forward.