

RESPONSE ON BEHALF OF THE FAMILY LAW TEAM AT MORTON FRASER TO THE CONSULTATION PAPER ON RULES COVERING THE MODE OF ATTENDANCE AT COURT HEARINGS ISSUED BY THE SCOTTISH CIVIL JUSTICE COUNCIL

These answers are focused on family law cases.

1. GENERAL OBSERVATIONS ON THE CONDUCT OF REMOTE HEARINGS

(A) ADVANTAGES OF REMOTE HEARINGS

- Some hearings are more productive as agents are prepping in advance and creating a written record of the submissions. Focuses the issues early.
- Where written submissions are lodged, the Sheriff should be fully informed about the cases. However, in practice, in our experience there are still too many times where the Sheriff has not read the papers. There may be a good administrative or time related reason for that.
- In our view remote hearings are particularly appropriate for procedural matters where the client is not present and does not require to participate
- Remote hearings can be more efficient and assist agents balancing their commitments (for example where there are fixed slots for hearings and obviously, being online, geography is not an issue). There can be a considerable cost saving for clients in travel and waiting time.
- Some clients may be less anxious (being physically present in Court can be daunting for a client).
- Flexibility - it may be possible to have a mixed format hearing. We would not however be in favour of a hybrid hearing where one agent/party is physically present, and the other is not.

(B) DISADVANTAGES OF REMOTE HEARINGS

- Where there is a hearing by written submissions, there may be opportunity to explain, develop argument or address issues.
- Effective participation relies on the parties having access to the technology and wifi, and the competence to use the technology. In some circumstances, such as Children's Hearings, you may be dealing with very vulnerable persons.
- There can be inconsistency between courts on the conduct of remote hearing with significant fluctuations in the standard/quality of clerking support. That can make a remote hearing less effective.
- Increased preparation time where written submissions required at the expense to client.
- Substantive hearings have a quality where the parties' conduct include their mannerisms under stress and this forms part of the court's assessment of their credibility and good faith. That is not limited to a proof diet where the court adopts a holistic role in child welfare hearings,
- Conversation is stilted by muting and unmuting. There is no spontaneity and taking instructions from the client is nigh on impossible to do with any fluidity.

- Productions are not easy to share if there is a disparity in the technology available to the agents and it escalates the management burden on all professional participants.
- Technical issues can cause hearings to have to be aborted.
- There is no open justice, members of the public are excluded from hearings that would normally take place in public.
- There is less opportunity for junior colleagues to observe the conduct of hearings and learn from them.

2. ANNEX A – CONSULTATION RESPONSE FORM

RCS

Question 1 – For the categories of case listed as suitable for an in-person hearing: (a) Do you think the general presumption given is appropriate? and (b) Would you make any additions or deletions and if so why?

For family cases our understanding is that the proposed default is all in person other than pre-proof hearings and case management hearings. We support in-person hearings being retained for family actions.

We have had the benefit of considering the response prepared by the Faculty of Advocates and we agree that remote hearings should be considered a departure from the normal form of court hearing. It would be preferable to have a single list of defined hearings which will take place remotely with all other hearings remaining as in-person hearings. This avoids the risk of uncertainty in relation to hearings which are not identified in either list.

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance): Do you think the general presumption given is appropriate? and Would you make any additions or deletions and if so why?

Firstly, we consider that all remote hearings should proceed by way of a video link. A hearing that takes place by telephone is very limited in what it can offer by way of benefits.

We consider pre-proof hearings and case management hearings are suitable to be conducted remotely by WebEx.

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption: Do you think lodging a motion is the right way to do that? Please explain your answer.

Yes. A motion would be an appropriate way to apply for a change of mode of attendance.

We do not agree with the proposal in draft rule 35B.4(4) that the motion will be determined by the court without a hearing, we would only agree to this if it is unopposed. An opposed motion in relation to the mode of hearing should be determined after parties have made oral submissions in the normal manner.

Question 4 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption: Do you agree that the court should have the final say? Please explain your answer

If there is a dispute between the parties to an action on the mode of attendance, then the court will require to determine the dispute. If the parties to an action are agreed on the mode of attendance which suits their case, and the mode proposed is identified in the rules as the normal mode for that type of hearing, there seems to be no justification for disappointing the expectations of the parties without a compelling reason.

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

No

OCR - Sheriff Court

Question 6 – For the categories of case listed as suitable for an in-person hearing: (a) Do you think the general presumption given is appropriate? and (b) Would you make any additions or deletions and if so why?

Our response in relation to the Court of Session draft rules is also applicable to the proposed Sheriff Court rules. We understand that the default is that all Sheriff Court family hearings will be in person, with the exception of various hearing set out in 28ZA.3(2) (a) to (e), including the following: options hearings; procedural hearings; pre-proof hearings; case management hearings. What is not however clear is how these hearings will be dealt with if one or other party wishes to put forward a motion e.g. at the options hearing. Would that then default to in-person, regardless of how contentious or non-contentious the motion is?

We would separately suggest that the rule requiring the attendance of parties at options hearings be dropped.

It would make sense to have a common approach taken to both sets of rules insofar as possible. The rules are not clear about how Children's Hearings are to be dealt with.

As we understand it family proofs will be in person. In our view, the default should be that civil proofs should take place in person, and that there should be no distinction between proofs without significant credibility issues and proofs raising significant credibility issues. We agree with the response from the Faculty of Advocates that there is a problem with the current draft rules in that there is a high degree of subjectivity in the description of the listed hearings. As drafted, it is proposed that proofs would only be heard at an in-person hearing if there is a significant issue of credibility of a party or witness which depends upon an analysis of that person's demeanour or character. Issues of credibility arise in many proofs and issues of reliability arise in virtually every proof. As drafted, this rule would result in disputes between parties as to whether an issue of credibility was likely to be "*significant*" or not. Moreover, there will be cases in which a party may not wish to identify precisely what the credibility issues are, since to forewarn the other party or witness will weaken the challenge at proof.

Question 7 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance): (a) Do you think the general presumption given is appropriate? and (b) Would you make any additions or deletions and if so why?

As mentioned previously, we consider that all hearings deemed to be appropriate to be held remotely, should proceed by way of a video link. In our experience, there is currently an inconsistent approach across different Sheriff Courts with some hearings taking place by WebEx and others by telephone. It

is not clear why all Courts do not use WebEx given that the technology is available. A hearing that takes place by telephone is very limited in what it can offer by way of benefits.

Question 8 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption: Do you think lodging a motion is the right way to do that? Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers

See our answer to question 3

Question 9 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption: Do you agree that the court should have the final say? Please explain your answer

See answer 4

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

No