ANNEX A – CONSULTATION RESPONSE FORM

Shared Parenting Scotland is a national charity that supports separated parents to share the parenting of their children. There is convincing research from around the world that children do better in most areas of their life when they have the full involvement of both parents even after divorce or separation. The charity always suggests that separated parents should try dispute resolution methods such as family mediation to resolve disagreements about the practicalities of co-parenting. However many of the people who contact us have to raise a court case where mediation has simply been refused or has been unsuccessful.

We are contacted by about a thousand parents every year – mothers as well as fathers. We publish guidance on court procedures, we train lay supporters to assist unrepresented parents in court and our staff have some direct court experience through acting as lay representatives.

We therefore hear about what is happens in many family court cases across Scotland.

We are very concerned to ensure that family cases are heard swiftly and that court decisions are taken by sheriffs and judges who have had the chance see and hear both parents in person. It is equally important that the parents involved in such cases are present in the court room and that opportunities for resolution and negotiated settlement of issues are maximised.

This response by Shared Parenting Scotland is limited to family hearings within the Scottish Courts, particularly those considering section 11 matters. The comments apply equally to Court of Session and Sheriff Court hearings.

FAMILY HEARINGS SHOULD BE IN PERSON

For all family hearings except purely procedural hearings we consider that it is very important that parties attend court in person. The general presumption for in-person hearings should therefore include case management hearings, pre-proof hearings and options hearings as well as child welfare hearings and proof hearings in the Sheriff Court, and the equivalent non-procedural hearings within the Court of Session.

We propose these changes because it is particularly important that the parties to a family case (normally parents) are present in court for five reasons:

1. To impress on parties the seriousness of what is being considered and the importance of complying in full with the decisions of the court;
2. To ensure that parties are fully aware of what their representatives are putting forward on their behalf and also hear what is presented on behalf of the other party or parties in the case. Shared Parenting Scotland is often told that a parent doesn’t know what is happening in a hearing when they are not present or that they feel that their lawyer has not put their case fully or accurately;
3. So that the sheriff or judge conducting the case is able to see the parties in person and therefore form an impression of them. Credibility is often a key factor in a family case and it is important that sheriffs and judges are able to see and hear parties in person, rather than on a screen.
4. To maximise the potential for settlement of the matters that have been raised in court through discussion between parties and their representatives before or

during the actual hearing. This is particularly important for the children whose arrangements are being considered in court. It is preferable that decisions are reached by mutual agreement rather than by order of court, both to reduce continuing conflict between parties and to make it more likely that the agreed arrangements will be followed by the parties. The ten or fifteen minutes before any family court hearing are often a crucial opportunity for dialogue. This type of settlement is far less likely from a hearing by electronic means. This type of settlement also benefits the court when it leads to a joint minute of agreement rather than prolonging detailed disagreement through a series of child welfare hearings;

5. It is important for the standing of Scotland's courts in the eyes of parties. Previous research[1] showed that parties are more likely to report acceptance of a sheriff or judge's decision if they feel they have had a fair hearing – even when the decision doesn't give them what they wanted.

Given that the court rules for family hearings are likely to be amended in the near future to put an early case-management hearing alongside the first child welfare hearing, it is important to stress the importance of parties being present for both such hearings. Case management in family hearings should not be considered a purely procedural matter.

ENFORCEMENT OF COMPULSORY ATTENDANCE

Since March 2020 Shared Parenting Scotland has been monitoring the changes which have taken place in family court hearings across Scotland and we welcome the moves that have been taken during the pandemic to prioritise hearings in which the restarting of a parent's contact with a child has been raised.

We raised the issue of parents not being present at video or audio child welfare hearings with the Sheriffs Principal in January 2021. Although we received a reassurance at that time from Sheriff Principal Anwar that requests by parties to attend child welfare hearings are not being refused by sheriffs, we continue to hear otherwise from some parents.

Ordinary Cause Rule 33.22A (5) states that all parties should attend a child welfare hearing except on cause shown. We suggest that this provision should be reinforced for all child welfare hearings, whether in-person or by electronic means. We also suggest that judicial training and guidance should stress the importance of parents attending hearings in person. In some cases sheriffs appear to have decided unilaterally to exclude parties from hearings without any issues being raised by either side concerning attendance. We have raised elsewhere our concern, revealed by those who contact us for information, over the inconsistency of practice across Scotland's courts.

CIRCUMSTANCES WHERE ELECTRONIC HEARINGS SHOULD BE ALLOWED

There is an interests of justice argument for the use of electronic hearings if, for example, the parties have to travel a long distance to court or there is some other pressing reasons that prevents attendance in person that is accepted by the court.
Similarly, electronic hearings may be useful as a mechanism for ensuring that parties in islands and remote areas have access to the same specialist family judicial experience

[1] https://eprints.ncl.ac.uk/file_store/production/177121/5DDD9CDD-4F15-447F-990F-A26548E1A83D.pdf

and expertise as those in our main population centres.
In future, we hope that the Scottish courts will adopt procedures that will ensure that a specialist family sheriff will consider all cases that are judged at the initial case management hearing or subsequently to be sufficiently complex to require this level of expertise.
The current situation in which specialist family sheriffs are only available in certain sheriff courts gives rise to an equality issue and we suspect may contravene article 6 of the European Convention of Human Rights and articles 2, 3 and 4 of the UN Convention of the Rights of the Child, given that determining the welfare of a child is a complex process requiring particular skills of a sheriff. The additional requirements to consider the views of a child included in the Children (Scotland) Act 2020 will make this issue even more pressing once these sections of the Act are fully in force.

APPLICATIONS TO CHANGE THE MODE OF ATTENDANCE

Making an application to change the mode of attendance should be a far simpler process that can be undertaken by completing a user-friendly form on the court website using simple language to guide the applicant through the process. A paper version of this process should be available for court users who do not have online access, and assistance should be available from the court for anyone filling in this form who requires additional information.
It should be free for all parties on benefit or universal credit whether or not they receive legal aid.
This is an opportunity for the SCJC to introduce a process which is far simpler than the antiquated motion procedures.

FINAL SAY

We agree that the court should have the final say in this matter, subject to general considerations that could be included in the Bench Book or through judicial training.

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

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