**ANNEX C** **CONSULTATION ON THE CASE MANAGEMENT OF FAMILY AND CIVIL PARTNERSHIP ACTIONS IN THE SHERIFF COURT**

## Dr Kirsteen Mackay

### QUESTIONNAIRE

1. **Recommendation 1: The scope of application of new provisions for case management**

*"The sub-committee recommends that the existing Chapter 33AA should be removed from the Ordinary Cause Rules. It recommends that the new provisions for case management proposed in this report should be applied to all family and civil partnership actions in the sheriff court, not just those with a crave for an order under section 11 of the Children (Scotland) Act 1995."*

**Do you agree or disagree with recommendation 1?**

☐ Agree ☒ Disagree ☐ Not sure

***(Please tick as appropriate and give reasons for your answer**)*

| Comments |
| --- |
| While I agree in principle with removing the existing Chapter 33AA of the Ordinary Cause Rules, I have some concerns about the proposed new provisions. **I outline these in my response to Recommendation 2 below.** |

2. **Recommendation 2: The structure of hearings in family and civil partnership actions**

*"The sub-committee recommends that:*

*(a) On the lodging of a notice of intention to defend in every family and civil partnership action, the sheriff clerk will intimate to the parties a timetable*

*containing (i) the last date for lodging defences and (ii) the date of an "initial" case management hearing. An options hearing will no longer be held in family and civil partnership actions.*

*(b) Defences should be lodged within 14 days of the expiry of the period of notice. The initial case management hearing should take place no earlier than 4 weeks and no later than 8 weeks after the expiry of the period of notice.*

*(c) Only the initial writ and defences are required for the initial case management hearing, and only agents will need to attend, unless a party is not represented. The sheriff may conduct the hearing by conference call, in chambers, or in a court room, as appropriate.*

*(d) The initial case management hearing may be continued once, on cause shown, for a period not exceeding 28 days.*

*(e) Where on the lodging of a notice of intention to defend the defender opposes a section 11 crave, or seeks a section 11 order which is not craved by the pursuer, a child welfare hearing will not normally be fixed until the initial case management hearing has taken place. An earlier child welfare hearing – i.e. before the initial case management hearing – may be fixed on the motion of any party or on the sheriff's own motion.*

*(f) The initial case management hearing will function as a triage hearing. The sheriff will seek to establish whether the case is (i) of a complex, or potentially high-conflict, nature which will require proactive judicial case management leading up to a proof ("the proof track"); or (ii) a more straightforward case where the issues in dispute appear to be capable of being resolved by a series of child welfare hearings without the need for a proof ("the fast track").*

*(g) In a case allocated to the proof track, the sheriff will fix a full case management hearing to take place as close as possible to 28 days after the initial case management hearing (or continued initial case management hearing). The interlocutor fixing the full case management hearing could give the last date for adjustment; the last date for the lodging of any note of the basis of preliminary pleas; and the last date for the lodging of a certified copy of the record. The sheriff may order parties to take such other steps prior to the full case management hearing as considered necessary. In some cases, this may include a pre-hearing conference and the preparation of a joint minute. There may of course be some cases allocated to the proof track which will also require child welfare hearings. This will still be possible.*

*(h) In a case allocated to the fast track, the sheriff will fix a date for the child welfare wearing and a date for a full case management hearing. The child welfare hearing will be fixed on the first suitable court day after the initial case management hearing, unless one has already been fixed. The full case management hearing will be fixed for a date no later than 6 months after the initial case management hearing. It may become apparent, in the course of the series of child welfare hearings, that matters are not likely to be resolved by that means. In those cases, it will be open to the sheriff to bring forward the full case management hearing to an earlier date, so that time is not lost.*

*(i) On the sheriff's own motion, or on the motion of any party, a case may move between the two tracks where necessary.*

*(j) The rules should allow for the full case management hearing to be continued. It is quite possible that some cases will require more than one case management hearing to ensure that the parties are ready for proof.*

*(k) The "initial" or "full" case management hearing should not be combined with the child welfare hearing. The two hearings have distinct purposes which should not be merged. The child welfare hearing should be retained as a separate hearing that focusses solely on what is best for the child.*

*(l) Where a proof or proof before answer is allowed, the date should not be fixed until the sheriff, at a case management hearing, is fully satisfied that the matter is ready to proceed.*

*(m) Pre-proof hearings should not be fixed in family and civil partnership actions as they come too late to be an effective case management tool. Their purpose will now be fulfilled by the case management hearing. As noted at paragraph 4.7 [of the report], pre-proof hearings will be swept away by the deletion of the existing provisions in Chapter 33AA.*

*(n) The rules should provide that a case management hearing can only ever be discharged when an action is being sisted, to prevent the risk of actions drifting."*

**Do you agree or disagree with recommendation 2?**

☐ Agree ☒ Disagree ☐ Not sure

***(Please tick as appropriate and give reasons for your answer)***

Comments

It is laudable that the new provisions recognise that not all cases require to be propelled to a full proof hearing.

However I have some observations about the 'new provisions.' These are:

(1) No procedure appears to have been set out for cases in which section 11 orders are craved along with other urgent orders such as for an 'interdict against removal of the child' or for orders under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

(2) It may be difficult for a sheriff to ascertain the likely need for a proof as early in the process as is suggested (ie: initial case management hearing around 2.5 – 3.5 months after the initial writ has been lodged). That is, where no child welfare hearing has taken place (which the suggested process implies would be the norm), the sheriff is unlikely to have had the benefit of meeting the parties, nor of gaining factual clarity via a child welfare report. It is likely that this may result in the majority of cases being determined as appropriate for 'fast track' at the time of the initial case management hearing. *The committee however may consider this is not an issue given that a case may later be moved to the 'proof track' on the sheriff's motion or the motion of any party.*

(3) The process outlined for the 'proof track' describes an ordered procedure of case management towards a proof hearing, however the welfare of the child may require more than a rapid movement towards a proof hearing. The described 'proof track' does not require any child welfare hearings to be set - although Para (g) states that child welfare hearings *'will still be possible.'* Further consideration may need to be given to how to attend to the welfare of the child (as opposed to case progression).

3. **Recommendation 3: The pre-hearing conference and joint minute**

*"The sub-committee recommends that the pre-hearing conference and joint minute currently required in terms of Chapter 33AA should no longer form a mandatory step before the full case management hearing in the new case management structure. Although this is of value in more complex cases, it may be unnecessary in cases where the only matters in dispute relate to a crave for an order under section 11 of the Children (Scotland) Act 1995 or are narrow in scope. However, the sheriff should still have the option to order a pre-hearing conference (or "case management conference") and joint minute in appropriate cases."*

**Do you agree or disagree with recommendation 3?**

☒ Agree ☐ Disagree ☐ Not sure

***(Please tick as appropriate and give reasons for your answer)***

| Comments |
| --- |
| I agree the sheriff should still have the option to order a pre-hearing conference and joint minute in appropriate cases.<br><br>It may be of interest to the committee that in my court based research (undertaken before the introduction of chapter 33AA), 16% of actions (affecting 299 children) resolved via a joint minute specifying contact arrangements. |

4. **Recommendation 4: Keeping the number of child welfare hearings under review**

*"The majority of actions involving a section 11 crave do not proceed to proof and are managed by way of child welfare hearings. The sub-committee considers that the rules should not allow for a potentially open-ended series of child welfare hearings in such cases because of the risk of drift and delay. Accordingly, the sub-committee recommends that:*

*(a) An initial case management hearing is required in all cases to allow the sheriff (i) to decide if it is appropriate for the case to proceed down the "fast track" and, if so, (ii) to fix a full case management hearing for no later than 6 months later so that cases which have not settled by that point can be "called in" for a judicial check on where the action is headed.*

*(b) At a "full" case management hearing on the fast track, the sheriff may make such case management orders as appropriate (e.g. orders relating to the pleadings, a case management conference and joint minute, or allowing a proof and setting the case down the proof track).*

*(c) The sheriff may also decide to allow the case to proceed by way of a further series of child welfare hearings. Where this happens, the rules should require a second full case management hearing to be fixed, again for no more than 6 months later, so that the case can be "called in" for a second time if it has still not resolved by that point.*

*(d) Rules could also place an obligation on the parties to tell the court at the full case management hearing how many child welfare hearings there have been to date, and to provide an explanation if there have been more than perhaps four or five."*

**Do you agree or disagree with recommendation 4?**

☐ Agree ☒ Disagree ☐ Not sure

***(Please tick as appropriate and give reasons for your answer)***

Comments

I agree it is reasonable to keep the number of child welfare hearings under review. However, I have some concerns with the suggested process for achieving this. In particular paras (a) and (c) refer to having cases "called in" – rather than leaving it up to parties to return to court if they have not resolved their differences in the meantime. I have the following concerns on this approach:

(1) Private law family actions are raised by, and paid for by, private individuals (unless legally aided). While they may seek state intervention in their private and family life, unnecessary interference is to be avoided and parties remain free to make their own arrangements.

(2) "Calling in" a case risks inflaming or re-igniting issues between parties that may be resolving. For example, the parties might be trailing a new arrangement for contact, supported by wider family, and for this reason they may not have come before the court for a period of time (albeit that there has not been a final order made by the court).

***It might be better to require a court to set a full case management hearing IF the parties are before the court and more than six months has passed since the initial case management hearing.*** This also applies in respect of setting a second full case management hearing, where necessary.

A final point is that parties may not agree on the number of child welfare hearings there have been – particularly in the context that many individuals are stressed by the disagreement between them. It would be more realistic to require legal representatives to keep a record of hearings, or the date of each child welfare hearing could simply be marked on the inside cover of the court process by a sheriff clerk.

## 5. Recommendation 5: Sisting family and civil partnership actions

*"The sub-committee recommends that:*

*(a) The rules should state that family and civil partnership actions cannot be sisted indefinitely. The sheriff should have discretion to decide on a suitable duration, taking the particular circumstances into account. For example, a sist to monitor contact or to allow a party to obtain legal aid would not need to be as long as a sist to allow the parties to attend mediation or to sell an asset.*

*(b) Sisted cases should be subject to a mandatory review by way of an administrative hearing, called a "review of sist", which only agents would need to attend. Where a case involves a party litigant, it should be made clear to the party litigant that the hearing is administrative in nature, so that they know substantive issues will not be considered. Operationally, the sub-committee acknowledged there is a limit to how far in advance the court programme will allow hearings to be fixed. This may have an impact on the duration of sist that can be granted initially.*

*(c) The interlocutor sisting the case must specify the reason for the sist, and fix a date for the review of sist hearing. This will provide a procedural focus for parties, and prevent any delay around fixing and intimating the date administratively at the expiry of the sist.*

*(d) At the review of sist hearing, the sheriff should have the following options:*

*(i) extend the sist for a defined period and fix a further review of sist hearing;*

*(ii) recall the sist and fix either an initial case management hearing or full case management hearing (depending on the stage at which the action was initially sisted); or*

*(iii) recall the sist and make case management orders if the case requires it.*

*The sub-committee noted that the choice between (ii) and (iii) would depend to an extent on the state of readiness of the parties, as well as the time available to the court at the review of sist hearing."*

**Do you agree or disagree with recommendation 5?**

☐ Agree ☒ Disagree ☐ Not sure

***(Please tick as appropriate and give reasons for your answer)***

Comments

I strongly disagree with the idea of introducing a 'review of sist' hearing. It is not clear what purpose this is intended to serve. We have the 'no order' principle in Scot's family law, whereby courts only make orders where it is better for the child that an order be made, than none be made at all. In this context we may expect the bulk of family court actions *not* to result in a final court order. In a significant number of cases courts may order interim contact and then sist the action to allow monitoring of this, or a court may note (on the interlocutor) that contact is taking place, as arranged between the parties, and simply state 'no further order in the meantime.'

My key concerns in respect of calling all cases back to court include:

(1) *This may be expected to significantly increase the workload of the courts.* Published research which I undertook in which I reviewed all child contact cases raised in two sheriff courts over the period of a year, found 21% of the cases to be sisted at the time the data was collected. These cases had been raised between 18 – 30 months prior to the data collection.

(2) A 'review of sist' hearing risks inflaming or re-igniting issues between parties that may be resolving. For example, the parties might be actively facilitating contact, with neither party wishing to return to court to dispute these arrangements.

(3) Notably, private law family actions are raised by, and paid for by, private individuals (unless legally aided). While they may seek state intervention in their private and family life, unnecessary interference is to be avoided and parties remain free to make their own arrangements without an onus to tell the court what that is (as long as it does not contravene an order of the court that has been made).

If the primary intention of 'review of sist' is to prevent litigation *over a prolonged period of time*, it is relevant to note that even when a court has made a *final order* in a case, or the parties have entered into a *joint minute of agreement,* the case may become active again if there is a material change in circumstances affecting the welfare of the child (eg: parent moving to another country or getting a new partner who is an alleged 'schedule 1 offender').

## 6. **Recommendation 6: Abbreviated pleadings**

*"The sub-committee recommends that:*

*(a) Abbreviated pleadings, rather than forms, should be adopted in family and civil partnership actions. This accords with the approach taken by the Rules Rewrite Project. The use of forms could be revisited in future years,*

*when family and civil partnership actions come to be added to the Civil Online portal.*

(b) *Lengthy narratives should be discouraged in family and civil partnership actions, so that pleadings are more concise – along the lines of what happens in commercial actions. For example, the sub-committee noted that Practice Note No.1 of 2017 on commercial actions in the Sheriffdom of Tayside, Central and Fife states at paragraph 10 that "pleadings in traditional form are not normally required or encouraged in a commercial action, and lengthy narrative is discouraged". Similar wording is included in the Court of Session Practice Note on Commercial Actions (No 1 of 2017).*

*However, the sub-committee noted that in commercial actions, the parties will have given each other 'fair notice' of their case before proceedings are commenced. The commercial Practice Notes contain provisions about pre-litigation communications, which are not generally exchanged in family actions. If the Committee approves this recommendation, some thought will need to be given to how best to frame any rule relating to it."*

**Do you agree or disagree with recommendation 6?**

☒ Agree ☐ Disagree ☐ Not sure

***(Please tick as appropriate and give reasons for your answer)***

| Comments |
| --- |
| I agree with a key caveat. In family actions, knowledge and understanding of what has occurred in a family are relevant to determining the future welfare of the children affected. Permitted narratives should not be so drastically cut that there is insufficient space for a party to explain the unique circumstances of their family unit in support of their craves.<br><br>While the intent may be to reduce issues parties may disagree on, there is a risk that issues that are *highly pertinent to the present and future welfare of the child*, which the court should be aware of, may also not be put to the court. |

7. **Recommendation 7: Witness lists**

*"The sub-committee recommends that parties should be asked to state (in brief general terms) on the witness list what each witness is going to speak to. This*

*would enable the sheriff to consider whether the witnesses will all speak to issues that remain in dispute (i.e. are relevant) and whether there would be scope to agree some of the evidence. This would give the sheriff greater control over the point at which a date for proof should be fixed, and for how long it should be scheduled."*

**Do you agree or disagree with recommendation 7?**

☐ Agree ☐ Disagree ☒ Not sure

***(Please tick as appropriate and give reasons for your answer)***

| Comments |
| --- |
| The consultation does not clearly state at which stage of proceedings this would be required. It is difficult to assess what may be lost, what may be gained, and to reflect on potential unanticipated consequences without this information. |

8. **Recommendation 8: Judicial continuity**

*"The sub-committee notes that the Fatal Accident Inquiry Rules make provision about judicial continuity. In particular, rule 2.5 provides that, where possible, the same sheriff is to deal with the inquiry from beginning to end. The sub-committee recommends that a similar provision should be applied to family and civil partnership actions. The sub-committee notes that insofar as practicable and feasible, the Sheriffs Principal all encourage judicial continuity in their courts."*

**Do you agree or disagree with recommendation 8?**

☒ Agree ☐ Disagree ☐ Not sure

***(Please tick as appropriate and give reasons for your answer)***

| Comments |
| --- |
| In principle, judicial continuity may enable sheriffs to develop a deeper knowledge and understanding of a reduced number of cases. Most former litigants interviewed as part of my research into child contact disputes were of the view that they would have preferred continuity.<br><br>*However, to increase consistency, it is equally important that all sheriffs who hear family actions are provided with robust training on the impacts of key issues (such as domestic abuse and substance abuse) on children's welfare.* |

9. **Recommendation 9: Alternative Dispute Resolution**

*"The sub-committee accepts that in principle, the sheriff's power to refer an action to mediation should be widened to apply to all family and civil partnership actions, rather than being restricted to cases involving a crave for a section 11 order. This recommendation is subject to two caveats.*

*Firstly, there is a need to ensure that the rule is not inadvertently applied to a type of action that is not listed in section 1(2) of the Civil Evidence (Family Mediation) (Scotland) Act 1995 (inadmissibility in civil proceedings of information as to what occurred during family mediation). That appears unlikely, as the list is very broadly framed.*

*Secondly, the sub-committee understands that Scottish Women's Aid has expressed concerns to the Scottish Government about the appropriateness of mediation in cases with a domestic abuse background. The sub-committee noted two points which may address this concern: (i) mediation is a voluntary process, and if a party is unwilling to participate the mediator will not allow it to go ahead; (ii) in the proposed new case management structure, it will be open to parties to move for a proof – or at least raise concerns about the appropriateness of mediation – at the initial case management hearing, which will take place at a very early stage in proceedings, often before there has been a child welfare hearing."*

**Do you agree or disagree with recommendation 9?**

☐ Agree ☒ Disagree ☐ Not sure

***(Please tick as appropriate and give reasons for your answer)***

Comments

I have two key concerns around broadening the sheriff's power to refer an action to medication to all family and civil partnership actions.

(1) While family actions involving a crave under section 11, may already be referred to mediation by the court, *I am concerned that no assumption is introduced that parties should attend mediation prior to, or during, court action, and that no negative inference is drawn from a party's unwillingness to do so*. We must not lose sight of the fact that only between 5%-10% of separating couples bring an action for contact or residence to the courts in Scotland. These individuals do so because at least one party feels unable to reason with the other and /or that they need the protection of the state.

Mediation may be effective for those who voluntarily *choose* it, rather than taking a case through the courts. We cannot assume however, that it would therefore be effective for those who do not. The post-traumatic stress experienced by those who have been subjected to domestic abuse should not be underestimated. Even though to a third party they may appear not to be at risk of visible 'harm.'

It should not be up to a mediator to assess whether a person can cope with mediation – the assessment of the (informed) individual concerned should suffice.

(2) The majority of family mediators are not trained in family law (that is they do not now the substance of the law). Whilst anecdotal, in my research experience of speaking with individuals who have used mediation to arrange the division of assets at the time of divorce, they are usually not aware of the principles governing the division of property under the Family Law (Scotland) Act 1985. While couples may, of course, agree what they wish, the lack of a legally trained advisor can leave individuals' interests less protected than when they have the benefit of a legal representative advising them on financial issues.

10. **Recommendation 10: Expert witnesses**

*"The sub-committee notes that recommendation 117 of the SCCR states:*

*'The provisions in relation to expert evidence which apply to adoption proceedings should be extended to all family actions and children's referrals.'*

*The SCCR cites paragraph 4.3.3.2 of Practice Note No 1 of 2006 of the Sheriffdom of North Strathclyde as an example. This states:*

*'The sheriff should discourage the unnecessary use of expert witnesses. If expert evidence is essential, the sheriff should encourage the joint instruction of a single expert by all parties. If one party instructs an expert report, it should be*

*disclosed to the other parties with a view to the agreement of as much of its contents as possible.'*

*This paragraph was incorporated into near identical Practice Notes on the Adoption and Children (Scotland) Act 2007 issued in each sheriffdom in 2009.*

*The sub-committee recommends that these points should be added as matters about which the sheriff may make orders at a full case management hearing."*

**Do you agree or disagree with recommendation 10?**

☐ Agree ☒ Disagree ☐ Not sure

***(Please tick as appropriate and give reasons for your answer)***

Comments

Where the welfare of a child is concerned, professionals other than lawyers may often have key expertise and experience (notably psychologists specialising in work with children). They may also be better equipped to speak with children. When a court is making a difficult decision with major implications for the future life and wellbeing of that child, it will often be beneficial for the sheriff to have their input. As the welfare of the child is the court's paramount consideration this is a sensible approach.

If reports have to be agreed by both parties there is a risk of a party blocking the appointment of an expert witness via an inability to agree who that person should be (possibly for well-founded reasons). *It might be beneficial to limit the number of expert witnesses of a particular kind (eg: psychologist) to one per party, as a means of controlling the length of proof hearings - without sacrificing the promotion of a child's welfare.*

11. **Recommendation 11: Minutes of variation**

*"The sub-committee recommends that minutes of variation should be dealt with under a similar procedure to that which is proposed for the principal proceedings. The sub-committee proposes that when a minute is lodged, the clerk will fix an initial case management hearing and specify the last date for lodging answers. An alternative would be to fix an initial case management hearing only where answers are lodged. The sub-committee does not favour this alternative approach, because it is considered that some sheriffs would be reluctant to grant the application without hearing the parties. Further, the procedure could become complicated in cases where there were applications for permission to lodge answers late.*

*The initial case management hearing will determine if the issue can be addressed by way of a child welfare hearing, or if a more formal case management process leading to an evidential hearing on the minute and answers will be required.*

*It is proposed that Chapter 14 (applications by minute) should no longer apply to family or civil partnership actions, and that it would be preferable to insert bespoke provisions into Chapters 33 and 33A."*

**Do you agree or disagree with recommendation 11?**

☐ Agree ☒ Disagree ☐ Not sure

***(Please tick as appropriate and give reasons for your answer)***

| Comments |
| --- |
| It is not clear why a 'case management hearing' is preferred over a child welfare hearing as it is the *impact* of the 'variation' that is sought, upon the child's welfare, that should be the court's focus.<br><br>The need to afford an opportunity for answers to be lodged is important in protecting the welfare of a child. |

12. **Recommendation 12: Training**

*"The sub-committee recommends that formal training for judiciary and court staff should be delivered, by the Judicial Institute and SCTS respectively, in relation to its proposed new case management structure for family and civil partnership actions."*

This recommendation has been endorsed by both the Committee and the SCJC and the SCJC secretariat will liaise with the Judicial Institute and SCTS once the scope of any rules changes is clearer.

13. **Recommendation 13: Legal Aid**

*"The sub-committee recommends that the Committee should liaise with the Scottish Government and the Scottish Legal Aid Board once the scope of any rules changes is clearer."*

This recommendation has been endorsed by both the Committee and the SCJC and the SCJC secretariat will liaise with the Scottish Government and the Scottish Legal Aid Board once the scope of any rules changes is clearer.

14. **Cases without a crave for an order under section 11 of the Children (Scotland) Act 1995**

The sub-committee proposes that where the only matter in dispute is a crave for an order under Section 11 of the Children (Scotland) Act 1995, cases could be allocated to a "fast track". The aim of the "fast track" is for the case to be managed to early resolution by means of a child welfare hearing or series of child welfare hearings. It is recognised that the initial case management hearing would be a procedural formality for cases without a crave for a section 11 order unless such cases could be allocated to a separate "fast track" not involving child welfare hearings.

**Do you have any comments on:**

**(i) whether there should be a "fast track" for cases without a crave for an order under section 11 of the Children (Scotland) Act 1995?**

**(ii) the nature of the hearings or procedure that should apply in a "fast track" for cases without a crave for an order under section 11 of the Children (Scotland) Act 1995?**

| Comments |
| --- |
| (i) There requires to be a 'fast track' for cases without a crave for an order under section 11 of the Children (Scotland) Act 1995. For example cases for divorce.<br><br>This should also be available for cases containing BOTH a crave under section 11 and a further crave (such as divorce).<br><br>To NOT allow for cases to progress via a 'fast track' would be likely to significantly increase costs and the burden on court time. |

## 15. **Do you have any additional comments?**

Comments

(1) In family actions in Scotland, parties have to crave intimation of the child (or disposal of intimation of the child). This is to support children's right to have a say in major decisions affecting them - which Article 12 UNCRC stipulates includes judicial and administrative proceedings.

Children also have a right to instruct a solicitor in civil matters under the Age of Legal Capacity (Scotland) Act 1991. Such children may enter an action as a party minuter.

Any introduction of new procedure in family actions has to carefully consider the possible impact on the opportunities for children to express a view in a family action, if they so wish.

(2) It is also the case that child welfare reports can provide the court with key information and factual clarity. They can also enable to court to avoid an expensive and stressful proof hearing. Given the concern to avoid cases being sisted – raised earlier in this consultation – the committee may be interested to know that my research found that children in respect of whom a court report had been ordered were less likely to have a final outcome of a 'sist' (21% children who were the subject of a report), compared to children in cases in which reports were not ordered (38% of children who were not the subject of a report).