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

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
Case management will be of benefit to family and civil partnership actions whether they include a crave for a section 11 order or not. It will assist in focusing issues. In some sheriff courts, attempts to implement case management are being made in cases other than those involving a crave for a section 11 order, but the effectiveness of this is hampered by the lack of rules at present.

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

We agree with parts (a), (b), (c) and (d). In relation to part (c), adjustment ought to commence when defences are lodged as this will allow both parties to update their pleadings prior to the initial case management hearing. The issues may not be fully identified in the unadjusted initial writ and defences.

In relation to part (e), we consider that a child welfare hearing ought to continue to be fixed automatically in all cases in which a section 11 order is sought. This ought to be combined with the initial case management hearing in such cases unless an earlier child welfare hearing is sought by the parties or ordered by the sheriff. It is important that the court has the earliest opportunity to address the issues raised in relation to the care arrangements for the child. An initial case management hearing at which a child welfare hearing is then fixed may not be in the interests of the child or the best use of court time.

In relation to parts (f) to (j), we do not agree with the suggestion that there be two specified 'tracks'. As noted in (h) and in recommendation 4 below a full case management hearing would in any event have to be fixed in cases in which only child welfare hearings had been assigned in order to ensure that progress is being made. It is also acknowledged that cases may have to move between the 'tracks' and that in cases which are being prepared for proof, child welfare hearings may still be taking place. A better approach may be to commence all cases with a fixed timetable running up to the full case management hearing, which timetable can then be varied on cause shown. If an early proof is considered appropriate, it ought to be possible for that to be allowed at the initial case management hearing with the timetable being varied accordingly. If it is considered more appropriate that no proof is fixed meantime and that child welfare hearings take place or that parties continue preparation, the date of the full case management hearing could be varied. This would allow flexibility whilst maintaining management of the litigation.

In relation to part (g), it is not clear whether it is envisaged that rules would be retained specifying the last date for adjusting the pleadings and lodging notes of basis of preliminary plea and lists of witnesses and productions. We consider that there should be specified time limits within the rules, subject to a motion for variation of the timetable on cause shown if considered appropriate in a particular case as noted above.

In relation to part (k), it may be more cost effective for litigants and a more efficient use of court time for case management hearings to take place on the same date as a child welfare hearing. The hearings have distinct purposes, but it would make sense for it to be possible for them to be dealt with together. Accordingly, we disagree with the recommendation insofar as it suggests that it would not be possible to do so.

In relation to part (l), an assessment of when a case is ready to proceed could vary significantly. A case will rarely be ready to proceed at the time of the case management hearing, but ought to be ready with the imposition of a timetable leading to proof. If the proof were not to be fixed until the court were fully satisfied that it was ready to proceed, significant delay could ensue. It is also in the interests of litigants to know when a final hearing will take place as it provides greater certainty as to the duration of the litigation. Accordingly, consideration of whether a proof ought to be fixed should be based on the appropriateness of that as a form of procedure and a prospective consideration of whether the parties will be ready for proof within the relevant timeframe.

In relation to part (m), we consider that a pre-proof hearing ought to be retained. This will allow the court to retain control over the management of the case in the run up to the diet of proof.

In relation to part (n), whilst we endorse the intention to prevent drift, there may be a number of good reasons why a case management hearing requires to be discharged without the action being sisted. It ought to be possible for such a hearing to be discharged on cause shown. It this then within the control of the sheriff as to whether the hearing takes place or not. A provision that the hearing can only be discharged where the action is being sisted could result in unnecessary hearings and use of court time.

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
The pre-hearing case conference provides an imperative for the parties to discuss the case. At present, this assists in focusing the issues at a pre-proof hearing. The joint minute of the case conference also provides the sheriff with information in advance of the pre-proof hearing as to the parties' positions. This provision ought to be retained – albeit taking place before the full case management hearing. The provision in OCR 33AA.3(3) that a party has to be available during the case conference may cause difficulties in practice – it is important that a party's representative is fully instructed for such a case conference, but equally parties' representatives may discuss on more than one occasion and take instructions in the intervening times in order to fulfil the requirements of the rule. Accordingly, an amendment of that provision may be appropriate.

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
We again endorse the aim of reducing drift and delay. We have set out above our views in relation to the recommendation of two 'tracks'. In relation to part (d), the court ought to be aware of the number of child welfare hearings which have taken place from the interlocutors. If there has been judicial continuity, the sheriff will also be aware of the reason why there have been a number of hearings. Accordingly, there may be little purpose in placing such an obligation on parties. However, the aim ought to be to avoid undue delay. In the event that a proof is not fixed at a full case management hearing and the case continues to be dealt with by child welfare hearings, such a decision ought to be fully justified and address the appropriateness of that approach in the light of need to avoid such delay. In our response to the Scottish Government's consultation on the Review of Part 1 of the Children (Scotland) Act 1995, we supported the recommendation that a provision be made in primary legislation specifying that undue delay in a court case relating to the upbringing of a child is likely to affect the welfare of the child. Such a provision may be of assistance, particularly if reinforced by rules providing for effective case management and provision of the necessary court resources.

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
We agree that sists in family actions should be granted for a limited time only and on the basis of specified reasons. Whilst the sist ought to be reviewed by the court, it ought to be possible for a joint motion/motion of consent to be made administratively to renew the sist on specified grounds and to discharge the review of sist hearing. This will avoid an unnecessary court hearing where there is good reason for the action to remain sisted for a further period. Similarly, where the parties are agreed that further procedure should be fixed, it ought to be possible for them to ask for that to be done administratively without the requirement for attendance at a hearing. In the event that the reasons set out for either renewing the sist or fixing further procedure are inadequate, the sheriff could of course require that a hearing takes place.

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
We do not agree that this is a matter appropriately dealt with by way of a rule. Pleadings ought to be concise, identify the issues in dispute and provide fair notice. It is an issue in practice that pleadings are not in the proper form, are not updated, include pleading of evidence and are long-winded and confusing. If considered necessary, this would be more appropriately dealt with in a Practice Note rather than a rule. Alternatively, it may be identified as an issue on which training and improvements in practice are required. Effective case management should also discourage verbose and unfocused pleading.

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
This ought to be identified prior to the case management hearing at which the proof will be assigned and updated (if necessary) prior to the pre-proof hearing.

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
It is of great benefit to litigants to have judicial continuity and specialist sheriffs if available.

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
An extended power to refer matters to mediation is to be welcomed, subject of course to the parties being able to address the court on its appropriateness in any given case.

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

Amongst the matters to be canvassed at any case management hearing, whether initial, full or a pre-proof hearing, ought to be whether any expert evidence is to be led. If so, the court ought to be advised as to the nature of that evidence. Whilst parties ought to be encouraged to give consideration to the appointment of a joint expert, it ought to be recognised that they are entitled to instruct their own expert. It should also be recognised that expert reports instructed by a party for the purpose of proceedings are privileged documents. A party cannot be compelled to produce such a report if he or she does not propose to call and rely on the evidence of that expert. However, if experts are to be called, the court ought to have the power to make specific orders as to the date by which the relevant reports should be lodged or exchanged and order that experts discuss matters to narrow the issues in dispute for the assistance of the court.

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 would be sensible for the procedure for minutes for variation to follow the same procedure to that adopted in principal actions.

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
As noted above, it ought to be possible to seek to vary the timetable on cause shown – this would allow an earlier diet of proof to be fixed, if considered appropriate for any reason. For example, if the relevant date or date of cessation of cohabitation is in issue, it may be considered appropriate to fix an early preliminary proof on that issue alone. It is important to retain flexibility in the management of cases.

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

Comments