



FLAGS [Family Law Arbitration Group Scotland] has considered the Consultation on the Case Management of Family and Civil Partnership Actions in the Sheriff Court published by the Scottish Civil Justice Council in May 2018 and has provided this written response to that consultation.

Introduction

In Scotland, the current legislative framework for arbitrations is the Arbitration (Scotland) Act 2010. This Act provided scope for the creation of tailored arbitration rules to meet specific needs that served particular areas of Scots law. Family Law Arbitration Group Scotland was established to meet the need to provide tailor made arbitration as an alternative means of dispute resolution in family law cases. It has a tailor- made a set of Rules for family law arbitrations, containing all the mandatory rules within Schedule 1 of the 2010 Act together with such discretionary rules as are applicable to family law cases. It has established a programme of training for arbitrators with extensive experience in family law cases to arbitrate such cases and runs a web site listing those arbitrators who have been so trained. All accredited Family Law arbitrators are qualified lawyers with expertise and experience in the field of family law. All solicitor FLAGS Arbitrators are accredited as specialist family lawyers by the Law Society of Scotland.

Arbitration is an adversarial process, accordingly uses the skills and training of court practitioners. It is not a consensual method of dispute resolution like collaboration, for example, or mediation. It is closest to litigation within the range of ADR solutions available to the clients. It may have elements of consensual dispute resolution but only insofar as negotiation of the agreement to arbitrate.

Arbitration can be used to resolve most family law disputes, although it cannot make any awards in relation to matters of status e.g. divorce, paternity, non-parentage etc. Issues that arbitration can be used to decide on include:

- The award of financial provision to be made upon divorce. The expectation is that the parties would proceed with an undefended divorce in their local court after the financial award had been determined by the arbitrator
- Cohabitation claims arising from separation or death.
- Child contact/residence orders. Interestingly in England questions regarding these disputes may not be the subject of family law arbitration.
- Specific issues regarding children, for example the removal of a child from the court’s jurisdiction, choice of school, consent to medical treatment etc. Again, in England, these are specifically excluded from the scope of family law arbitration.
- Variation of aliment/periodical allowance.
- Discrete issues, such as the relevant date, the value of matrimonial property or a particular asset for example, a shares value or company value.

FLAGS notes that one of the guiding principles of the SCJC is to take due account of the methods of resolving disputes which do not involve the courts and that these should be promoted, where appropriate. Taking into account this guiding principle and the purpose of family law arbitration FLAGS, it has limited the scope of its response to the Consultation to that aspect of it concerned with Alternative Dispute Resolution and the issues that flow from that.

Recommendation 9: Alternative Dispute Resolution

FLAGS considers that the Consultation should not only support the widening of shrieval power to refer family and civil partnership case to mediation regardless of the presence of a “section 11 order”¹ but should also support shrieval discretion to suggest the diversion of cases to FLAGS arbitration where appropriate. FLAGS notes that the Consultation proposes a new case management structure in family and civil partnership actions. Having regard to that structure, FLAGS considers that at the proposed Initial Case Management Hearing, the Sheriff should consider, in addition to the two tracks proposed within that new structure, whether or not the case was one suitable for resolution through FLAGS arbitration.

¹ Children Scotland Act 1995 section 11

In advancing such a proposal, FLAGS notes that its current procedure for family law arbitration has much to recommend it that chimes with the Sub Committees' recommendations regarding the use of pleadings in family and civil partnership cases.² The procedure of a FLAGS arbitration is determined by the FLAGS Arbitration Rules and the Agreement to Arbitrate entered into between the parties. The rules require that the arbitration be conducted without unnecessary delay and without incurring unnecessary expense. The Agreement to Arbitrate is a contract drafted between the parties and their solicitors which allows for the parties to agree the scope of the arbitration. This should not extend to lengthy narrative but reflect concise issues requiring determination by the FLAGS arbitrator.

The procedure of the arbitration will be decided by the arbitrator at an initial Case Management Meeting attended by the arbitrator, the parties' representatives and, if desired, the parties. Such a procedure is in step with much of the approach adopted by the Sub Committee outlined in the Consultation³. This initial case management meeting will determine the procedure for the arbitration. The meeting would consider how the dispute between the parties is to be determined and the time scale for that to occur. The Arbitrator will determine, having heard the parties or their representatives;

- What information is required to resolve the issues in dispute
- What timescales should be placed on the provision of information
- How is evidence to be presented to the arbitrator
- What form will that evidence take, including the need for any expert witness evidence, whether that should be a joint expert or not, the disclosure by one party of their instruction of an expert and the exchange of any expert reports obtained⁴
- Will all the evidence be in the form of affidavits or oral evidence or will the evidence be a mixture of affidavits and oral evidence?
- Should submissions be written or oral
- If the intention is that evidence and submissions are to be all written should the length or number of these be limited
- Which dates the arbitration will take place on and where it will occur.

Once these matters have been resolved the arbitration would occur.

² Recommendation 6

³ See Recommendation 2

The process is designed to be flexible although not drawn out! Dates for the arbitration would be fixed around the diaries of all participants to the FLAGS arbitration. One obvious advantage of this is that it provides for consistent case management of the arbitration by the same person; the FLAGS arbitrator. The sub-committee noted the Scottish Government recommendation regarding judicial continuity of family and civil partnership cases but recognised the practical difficulty the imposition of a requirement for such consistency would impose on the sheriff court system⁵. By supporting a recommendation of increased shrieval discretion to refer a family and civil partnership case to arbitration, there would meet the Scottish Government's recommendation that such cases benefit from consistency of judicial approach. Such consistency is beneficial to the necessity that decisions regarding the welfare of children are made only in a manner consistent with protecting and promoting that welfare.

FLAGS arbitration is one of a range of alternatives to resolving family and civil partnership cases. FLAGS recognises that there is no single method of dispute resolution that is universally suited to all cases. However, family law arbitration would suit many and ought to be available to all. FLAGS supports the sub-committee's Recommendation 13 and encourages the continued liaison between the Committee, the Scottish Government and the Scottish Legal Aid Board on ensuring that all those engaged in family and civil partnership disputes have access to legal advice, not only those capable of meeting its cost themselves.

⁴ The sub- committee's Recommendation 10 is entirely consistent with the procedure envisaged at a case management hearing in a FLAGS arbitration.

⁵ See Para 3.10 and Recommendation 8