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
If properly resourced, the existing rules already provide an adequate mechanism for allow the court to manage cases. This opinion applies to all Ordinary actions, not just family cases. When they were introduced in 1994 options hearings were intended to enable the sheriff to be proactive and to direct how a case was to progress. There is nothing to prevent that happening other than logistical constraints, such as a lack of time. Simply renaming options hearings as initial case management hearings achieves nothing. We understand that there is an impetus to introduce case management to family law cases and we note the observations made by Lord Glennie in *SM v CM* [2017] CSIH 1. But our view is that changing the rules is less important than giving the courts adequate funding and facilities to be able to take more time over each case. An associated revision of Legal Aid payments would be required for solicitors conducting these cases.

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 do agree that parties should not be required personally to attend the options/initial case management hearing. Also, we agree that such hearings should, if the sheriff thinks it appropriate, be conducted in chambers, by conference call or in open court.

We note the similar in practice between the existing rules and the proposed ones. In particular, both systems provide for the issuing of a timetable when a NID is lodged, the lodging of defences within 14 days of the expiry of the induciae and the fixing of a hearing.

The existing system provides for a period of time to adjust the initial writ and defences. There is then a gap of two weeks for parties to intimate notes of any legal issues that arise, and for a record of all the pleadings to be made up and lodged. The proposed rules do not mention adjustment, notes of argument or a record. The rule that "only the initial writ and defences are required for the …hearing" suggests that nothing is adjusted. If so, we are unclear as to the purpose of delaying the hearing for between 2 and 6 weeks after the defences are lodged; instead, why not have the hearing 3 weeks (or thereabouts) after the NID is lodged?

(d) Is an unnecessary restriction on the sheriff's powers to manage cases. By contrast, under commercial procedure there are no equivalent limits.

(e) Seems to us to be unnecessary too. It is not clear whether it is a rule or a statement of likely practice. The delaying of the assigning of an initial Child Welfare Hearing is a concern; the proposal for a Motion to be required to expedite the assigning of same would be cumbersome.

(f) Convolutes procedure without any sufficient benefit. Having two tracks seems needlessly complicated.

It is not always possible to separate those issues raised at child welfare hearings and those to be dealt with in options/case management hearings. For example, assessing financial provision on divorce often has to take into account the issue of which of the parents will have the "economic burden" of looking after a child. But who is to look after that child (with the accompanying burden) is exactly the kind of matter that the court will determine at a child welfare hearing.

It should be apparent but it is not always possible to obtain financial vouching quickly and while it is laudable that the focus is on resolving conflict as quickly s possible, these timescales may not be capable of being adhered to.

An associated revision of Legal Aid payments would be required for solicitors conducting these cases.

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
We agree that the sheriff ought to have the discretion to direct that these steps not be followed in every case.

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

These proposed rules are unnecessary, inflexible and restrict the sheriff's ability to manage a case appropriately. In our experience, Glasgow sheriffs are perfectly able to progress cases under the present system. In addition, we consider that the priority must be to serve the best interests of the children who are unfortunate to be caught up in court action. Litigation involving children is never truly over until the child reaches the age of 16. "Drift and delay" is generally, but not universally a bad thing. They may actually be advantageous if, for example, one parent may wish to obstruct or frustrate the other's exercise of a contact order. He or she may well be less likely to do so whilst a case is live (even if dormant or sisted) than if the case is terminated. We know that cases can be revived by minutes to vary and that minutes for contempt can be enrolled, but these can be the cause of more delay than if the original action was left alone (along with associated funding delays particularly if the client is legally aided). We appreciate the desire to diminish drift and delay in, e.g., commercial or personal injury cases, but child cases are a different breed of action. They can never be concluded by "truly" final orders or by absolvitor.

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
A sist for a definite period is simply a continuation and should be described as such. A finite sist is an oxymoron. The court should have the power to sist a case. If the sheriff is moved to sist an action and decides instead to continue it then he or she should continue it. However, we do think that the court should periodically check sisted cases (perhaps every 8 weeks) and contact agents to ascertain how matters stand. This could be done by inviting a written or email update or by putting cases out by order. This kind of monitoring is not unreasonable. An associated revision of Legal Aid payments would be required for solicitors conducting these cases.

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)

Comment
In our experience there is little difficulty caused by lengthy narratives in written pleadings in family cases. And there is the perennial problem faced by all agents in litigation; it is safer to aver too much than too little in case one is stopped from leading evidence because there is no record for it. Blame for that omission falls (naturally) on the solicitor and the client is entitled to make a complaint. Guidance however is always welcome.

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
We see no disadvantage in this proposal. It is not unreasonable to ask a solicitor to summarise (in brief general terms) why he or she is proposing to call each of the intended witnesses. This is a practice already in operation in Glasgow. Again, care would have to be taken that solicitors are not unduly pressurised by the court not to call witnesses. A sheriff in Glasgow routinely tries to dissuade agents from calling witnesses intended primarily to provide corroboration, whereas we consider that whilst corroboration is unnecessary it is certainly desirable, and a failure to have it (especially if the corroborating witness is available) can put the solicitor in a similar predicament to the one referred to at point 6 above.

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
This is another issue discussed in *SM v CM*. In Glasgow Sheriff Court there is already a great deal of judicial continuity and it works well. The practice in Glasgow was pioneered by Sheriff Graham Johnston in the 1990s. For over twenty years there has been a team of around four family sheriffs (the composition of which team changes with time). The practice in Glasgow is to attempt, wherever possible, to have a case call before the same Sheriff for all Child Welfare Hearings and to have another hear evidence at Proof, to prevent any appeal on the basis of prior judicial prejudice. We cannot comment on other sheriff courts.

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
Again, we have no difficulty with a proposal that gives the sheriff greater flexibility in how best to resolve court actions. It has to be borne in mind, however, that family cases are more sensitive than, e.g., building disputes, and nobody should be pressurised into mediation, particularly where there are allegations of domestic abuse. ADR is not always a panacea. We note that in *SM v CM* six months were wasted in unsuccessful mediation. In our experience, mediation is only successful where there are willing participants involved. We would be concerned if adverse inference was to be drawn from a party's unwillingness to attend mediation should there be justifiable circumstances to object to same.

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
This is a tricky area. It is hard to argue that the "unnecessary use" of expert witnesses should not be discouraged but we are not aware of such use being a major problem. Again, there is the potential for clients to be aggrieved if they feel compelled to accept the opinion of someone who is not wholly supportive of their case. After all, we do still have an adversarial system of litigation, even in cases involving children's welfare and best interests.

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
We are averse to making changes just for the sake of it. The Minute procedure is well established and generally works. In our experience it resolves a case more quickly than ordinary procedure. The current procedure at Glasgow Sheriff court would be to fix a procedural hearing in the first instance, which appears to be in line with the proposal. As such, we would be concerned that changes are being proposed that are unnecessary when the aim can be achieved within the current system.

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
We feel that this proposal is unnecessary. The sensitive and varied nature of cases where a section 11 order is sought should not be beholden to a desire for early resolution for the sake of resolution. Court users are mindful of the need for expeditious resolution but this cannot be at the sacrifice of reaching the best solution for the children involved in such actions at the time of conclusion and with an eye to the remainder of their childhood. Increased focus on early resolution could lead to an increased use of the Minute procedure. The acknowledgement that amendment to Legal Aid provision is required is most welcome.

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

Comments
We would have liked to have seen the consultation paper address the problems of "evidential child welfare hearings". These are a source of problems in that they are neither fish nor fowl. There is a particular difficulty in appealing the outcome because the evidence is unrecorded; see *LA v JJH* [2016] SAC (Civ) 002. Another issue that might be addressed is one highlighted in *SM v CM,* the problem that appealing a case can hold up progress in the lower court.