

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

FAMILY LAW COMMITTEE

MONDAY 08 OCTOBER 2018 AT 10 AM

JUDGES' DINING ROOM, PARLIAMENT HOUSE, EDINBURGH

MINUTES

Members Present: Lord Brailsford (Chair)
Lynda Brabender QC (SCJC member)
Fiona Campbell (Solicitor)
Ian Maxwell (SCJC member)
Fiona Jones (Clan Childlaw)
Rachael Kelsey (Solicitor)
Sheriff Fiona Tait
Simon Stockwell (Scottish Government representative)
Catriona Whyte (Scottish Legal Aid Board representative)

In attendance: Yvonne Anderson (Clerking Services Manager - Civil)
David Smith (Deputy Head of Legislation Implementation Team,
Scottish Courts and Tribunals Service)

Support: Inez Manson (Deputy Legal Secretary, Lord President's Private
Office)
David Ross (Policy Officer, Scottish Civil Justice Council
secretariat)

Apologies: Sheriff Principal Lewis
Professor Fran Wasoff

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those members present and introduced Fiona Campbell, who was attending her first meeting as a Committee member. Fiona was appointed to the Committee by the Scottish Civil Justice Council on 14 May 2018 for a period of three years with effect from 31 May 2018. The Chair advised that Fiona is a Director with Macleod & MacCallum in Inverness where she heads up the Family Law Team. She is accredited as a Specialist in Family Law and as a Family Mediator by the Law Society of Scotland.

2. The Chair informed members that Fiona Jones had tendered her resignation from the Committee in July, to have effect from December. The Chair advised that Fiona's tenure had in fact expired on 27 September 2018, but he had invited her to attend today's meeting to contribute to the discussion. The Chair thanked Fiona for her valuable contribution to the Committee and wished her well for the future.

3. The Chair went on to inform members that this was David Ross's last meeting, and that secretariat support to the Committee would be provided by Karen Stewart until David's replacement had been recruited.

4. The Chair noted apologies from Sheriff Principal Lewis and Professor Fran Wasoff.

5. The Committee agreed not to publish the following papers: 2.2, 3.2, 3.2A-C, 4.1, 4.1A-E, 4.2, 5.1, 5.1A.

6. The Committee agreed to publish **Paper 6.1**, subject to minor amendments, and agreed that the secretariat should seek the consent of the policy holders to publish **Paper 5.1B**.

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

7. **The Committee approved the minutes of the previous meeting.**

Item 2.2 – Progress of actions from previous meetings (Paper 2.2)

8. Simon Stockwell informed members that further work is required before the Scottish Government will be able to launch its consultation on proposals to extend the simplified procedure for divorce and dissolution to cases including children under 16. It was previously agreed that the Scottish Civil Justice Council's consultation on draft rules, which were developed by the Committee, to give effect to the proposed extension will run concurrently with the Scottish Government's consultation.

9. **The Committee noted the progress that had been made on actions since the previous meeting.**

Item 3: Work programme

Item 3.1 – Update from the Scottish Government on potential UK or Scottish Government legislation or proposals which might impact on court rules or procedures (Oral)

10. Simon Stockwell informed members that the Scottish Government's consultation on reforming part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy closed on 28 September 2018. Around 250 responses were received, plus around 300 responses to the questionnaire aimed at children and young people. Simon provided an update on the Family Law Bill and the Female Genital Mutilation Bill, both of which were announced in the Scottish Government's Programme for Government 2018-19, and both of which may require changes to court rules. He went on to advise members that the Scottish Government has launched a consultation on the future of civil partnership in Scotland, based on the recent UK Supreme Court declaration that the Civil Partnership Act 2004 is incompatible with the European Convention on Human Rights to the extent that it does not permit an opposite sex couple to enter into a civil partnership.

Item 3.2 – Family Law Committee Priorities 2018/19 (Papers 3.2 and 3.2A-D)

11. **Paper 3.2** invited the Committee to note the priorities for 2018/19 which the Council has remitted to it to take forward: judicial case management of family actions; extension of simplified divorce and dissolution to cases including children under 16; the remaining recommendations of the Scottish Civil Courts Review which are within the Committee's remit; and completion of existing work on the voice of the child. Members noted that the Council has agreed that all of its Committees should give a high priority to Brexit related work and to the implementation of legislation and developments in case law.

12. With regard to Brexit, Simon Stockwell provided members with an update on the position in respect of various EU Regulations concerning family law.

Item 4: Proposals for rules: policy development

Item 4.1 – Hearing the Voice of the Child – Form F9 (Papers 4.1 and 4.1A-E)

13. Inez Manson introduced **Paper 4.1**, which invited members to consider (i) an expanded draft instrument (**Paper 4.1A**) which inserts into the rules the new forms that are intended to replace Forms F9, CP7 and 49.8-N for hearing the voice of the child in family and civil partnership actions; and (ii) revised draft guidance on completing the new forms (**Paper 4.1D**). To assist members, comparison documents were provided showing the changes made since the Committee's last meeting on 30 April 2018 to the sheriff court section of the draft rules (**Paper 4.1B**); the draft Form F9 itself (**Paper 4.1C**); and to the draft guidance (**Paper 4.1E**).

14. Inez advised that **Paper 4.1** outlined a number of questions and points for discussion concerning the draft instrument. Discussion took place regarding the procedure for ensuring judicial oversight of the form in the Court of Session; the question of whether a motion or minute for decree is required in undefended Court of

Session actions for a section 11 order; the procedure for making an application for variation of a section 11 order in the Court of Session; and sending the form to young children.

15. The Committee considered and discussed the revised draft instrument and provided feedback on the issues raised in Paper 4.1. In particular, the Committee:

- **noted the changes to the sheriff court section of the draft instrument;**
- **requested the Lord President’s Private Office to make enquiries about whether a motion for warrant to intimate to the child would attract, or be exempt from, a fee in the Court of Session;**
- **indicated that it was content with the provisions concerning applications to vary section 11 orders in the Court of Session;**
- **instructed an amendment to rule 49.28(1)(a) (evidence in certain undefended family actions) – namely, the deletion of actions for a section 11 order from the list of actions to which rule 49.28 does not apply, in order to reflect the fact that the Court of Session always insists on affidavit evidence in these cases;**
- **flowing from the change to rule 49.28(1)(a) noted above, instructed that draft rule 49.20(2) (views of the child – undefended actions) be amended to remove the reference to motion for decree, since a minute for decree with affidavits will always be required;**
- **instructed the deletion of rule 49.8A(3)(a)(ii) (and other rules making similar provision, including the draft Ordinary Cause Rules) in order to remove the requirement that the pursuer submit a draft Form 49.8A when requesting the court to dispense with intimation to the child;**
- **noted the changes to the Form F9, and to the revised draft guidance;**
- **indicated that it was content with the suggested alternative form of wording on sending the form to young children, and reiterated its hope that this might help bring about a change in practice and lead to a greater number of younger children being asked for views.**

16. Subject to clarification of the Court of Session motion fee point and an updated draft instrument making the agreed revisions being circulated to members by correspondence, the Committee approved the draft rules, and agreed that they be submitted to the Scottish Civil Justice Council for consideration and approval at the next suitable meeting.

Item 4.2 – Hearing the Voice of the Child – Adoptions and Permanence Orders (Papers 4.2 and 4.2A)

17. Inez Manson informed members that **Paper 4.2** originated from a meeting in July between the Lord President's Private Office, the secretariat, and Scottish Government officials to discuss outstanding actions from the Scottish Government's original policy paper on hearing the voice of the child in family actions. That paper was first considered by the Committee on 07 December 2015 and was reproduced for today's meeting at **Paper 4.2A**.

18. Inez explained that it had been agreed that most of the proposals made by the Scottish Government had been addressed by the Committee's work on redesigning Form F9, or may be addressed by the Family Law Bill. However, it was agreed that the Committee's views should be sought on the question of whether there is any need to include a provision in the rules for adoptions and permanence orders about ensuring that the court has the child's current views in long-running cases.

19. **The Committee considered and discussed Paper 4.2 and agreed that it is unnecessary to amend the Sheriff Court Adoption Rules and Chapter 67 of the Rules of the Court of Session to include a provision about seeking up-to-date views of the child in long-running adoption and permanence order cases.**

Item 5: Proposals for rules: implementation of legislation

Item 5.1 – Child Support Rules – Passport Disqualification (Papers 5.1 and 5.1A-C)

20. Inez Manson introduced **Paper 5.1** which invited members to consider a draft instrument (at **Paper 5.1A**) amending the Child Support Rules to provide for applications to the sheriff to disqualify a non-resident parent from holding or obtaining a United Kingdom passport if they fail to pay child support maintenance. The proposal to amend the Child Support Rules was made by the Department for Work and Pensions and the Office of the Advocate General for Scotland, whose joint policy paper was provided at **Paper 5.1B**. The passport disqualification power is provided for in Section 27 of the Child Maintenance and Other Payments Act 2008 which is expected to be commenced in late 2018. The draft provisions for passport disqualification mirror the existing rules for driving licence disqualification.

21. **The Committee approved the draft rules and agreed that they be submitted to the Scottish Civil Justice Council for consideration and approval.**

Item 6: Research and consultations

Item 6.1 – Consultation Report – Case Management of Family and Civil Partnership Actions in the Sheriff Court (Paper 6.1)

22. The Chair introduced **Paper 6.1**, which was a report about the consultation on the case management of family and civil partnership actions in the sheriff court. The consultation ran from 31 May until 22 August 2018. Twenty responses were received from a range of consultees. **Paper 6.1** provided members with a high-level summary of the responses. Members noted that the responses were not overwhelmingly for or against the recommendations, and that further analysis was required. Members considered a suggestion that the Secretariat and LPPO could prepare a further policy paper for the next Committee meeting. Members discussed whether this would delay the Committee's consideration of how to progress this work. It was felt that a better approach would be to reconvene the case management sub-committee, or to establish a new sub-group. Members were keen for the work to be progressed, and this would enable Committee members to become involved at an earlier stage.

23. **The Committee, having considered and discussed Paper 6.1, requested the secretariat to explore whether it would be possible for work to be taken forward by the sub-committee, or a new sub-group, in advance of the next Committee meeting.**

Item 7: AOCB

24. **Simon Stockwell informed members about a recent meeting between the Scottish Government and National Records of Scotland concerning divorce extracts.**

Item 8: Dates of future meetings

25. The Committee noted that the secretariat would be holding a business planning meeting, and that future meetings dates of the Committee would be confirmed thereafter.

Scottish Civil Justice Council Secretariat

October 2018