

COURT OF SESSION FAMILY ACTIONS – ‘LAST DATE’ FOR ADJUSTMENT, LODGING PRODUCTIONS AND LODGING WITNESS LISTS

Policy Proposal

1. The proposal is to amend Chapter 49 of the Rules of the Court of Session (“RCS”) by bringing forward the last date for adjustment, lodging productions and lodging witness lists.

Background

2. Members will be aware that there is a Court of Session Family Actions User Group (“the User Group”), which provides a forum in which family law practitioners can discuss any practical or operational issues encountered in family actions in the Court of Session.
3. In the past, the User Group has considered a voluntary protocol that previously operated in Court of Session family actions. The aim of the protocol was to facilitate case management. As its first main project, members might recall that the User Group submitted a proposal to the Family Law Committee (“FLC”) suggesting that the protocol’s provisions relating to two types of case management hearings be formalised in court rules. The User Group submitted a draft instrument for the FLC’s consideration. This was approved by both the FLC and the SCJC and an Act of Sederunt¹ amending Chapter 49 was subsequently made on 11 July 2017.
4. There are certain elements of the now superseded voluntary protocol that have not yet been taken forward in rules. For example, the protocol encouraged parties to lodge productions much *earlier* than 28 days before proof. It recognised that a last date for adjustment and lodging productions of 28 days before proof (as prescribed in the rules) can be very tight.
5. As FLC members will know, affidavits are routinely used in defended family actions. Realistically, these cannot be prepared until the parties have had an opportunity to consider the productions, meaning that there is frequently a pressured rush to get affidavits ready just before proof. Not only does this place significant pressure on agents, it also minimises any possibility that settlement might be achieved. Parties do not have a sufficiently early opportunity to focus on the issues that are agreed and those that remain in dispute.
6. The User Group therefore agreed that the FLC should be asked to consider changing what some practitioners refer to as the ‘28-day rule’, with a view to bringing it forward to an earlier point in proceedings. This would allow parties more time to consider matters ahead of the proof, rather than losing the opportunity to do so due to the need to concentrate all efforts in rushing to prepare affidavits.

¹ Act of Sederunt (Rules of the Court of Session 1994 and Summary Application Rules 1999 Amendment) (Miscellaneous) 2017 ([S.S.I. 2017/242](#)).

Rationale and discussion

7. There are three aspects of court procedure which collectively form the '28-day rule'. These are discussed in turn below. One way of looking at the proposals would be to say that in the User Group's view, the existing '28-day rule' should be replaced with a '56-day rule'.

Last date for adjustment of pleadings

8. Rule 49.33 applies to the adjustment of pleadings and the lodging of the record in family actions². Rule 49.33(3) provides: *'Notwithstanding the pronouncement of an interlocutor under paragraph (2), the parties may adjust their respective pleadings until 28 days before the diet of proof...'*
9. The User Group suggests that the reference to "28 days" could simply be replaced with "56 days".

Last date for lodging productions

10. Rule 36.3(1), which applies to family actions, provides: *'Where a proof has been allowed, all productions which are intended to be used at the proof shall be lodged in process not later than 28 days before the diet of proof.'*
11. The timing of the lodging of productions was considered last year by Workstream 4 of the Rules Rewrite Project. It was agreed that, until online lodging becomes available, bringing forward the lodging date could cause storage difficulties for the General Department (office of court). The members of Workstream 4 thought that this could be avoided by requiring the intimation of inventories of productions (and the productions themselves) by no later than 56 days before the proof. Inventory sheets would require to be lodged in process at the same time, while the actual productions would not need to be lodged until a later date specified in the rules.
12. One possibility would be to disapply rule 36.3 in family actions and insert a new rule into chapter 49 in similar terms, but adapted to make provision along the lines of what is suggested in paragraph 11, above. In terms of when the productions would have to be lodged in process, the new rule could perhaps require this to be done no later than 14 days before the proof.

Last date for lodging witness lists

13. Perhaps surprisingly, the RCS do not require a list of witnesses to be lodged in advance of a proof. Rule 36.9(2) provides: *'Each party shall, before his case begins, give to the macer of the court a numbered list of any witnesses of his in the order in which it is proposed to call them.'* But this is not the same as lodging a list in advance.
14. In contrast, rule 9A.3 of the Ordinary Cause Rules ("OCR") requires the intimation and lodging of a list of witnesses *'within 28 days after the date of the interlocutor allowing a proof or proof before answer.'* We understand that, whether due to

² Rule 49.33 disapplies Chapter 22 (making up and closing records).

misinterpretation or disregard, this rule is not always adhered to and instead, witness lists are frequently lodged at the same time as productions (28 days before the proof).

15. While there may be no equivalent *rule* in the RCS, Court of Session Practice Note No 8 of 1994 states:

‘...not later than 28 days before the diet fixed for a proof..., each party shall –

(a) give written intimation to every other party of a list containing the name, occupation (if known) and address of each person whom he intends to call as a witness; and

(b) lodge a copy of that list in process.’

16. The User Group feels that it would be preferable for the 28-day timescale to be changed to 56 days. Rather than asking the Lord President to consider making a new ‘witness lists’ Practice Note limited to family actions, LPPO’s view is that it would be clearer for everyone if any new provisions relating to witness lists were formalised in Chapter 49 of the rules.

What about the Ordinary Cause Rules?

17. It is recognised that many of the same difficulties with the ‘28-day rule’ exist in the sheriff courts. However, as an initial step, the proposal is to prepare an instrument that will apply to Court of Session family actions only – at least for now.

18. The suggestion that we focus on the RCS at this stage is made purely because, from a drafting perspective, it would be cleaner to incorporate the sheriff court changes at the same time as amending the OCR for the case management project. This would allow a systematic approach to be taken to the OCR changes. We think that if we were to try and make sheriff court changes now, ahead of the case management work, there would likely be a need to unpick some of the drafting further down the line.

Next steps

19. A simple way of looking at the proposals would be to say that in the User Group’s view, the existing ‘28-day rule’ should be replaced with a ‘56-day rule’, for the reasons set out in paragraphs 5 and 6, above.

20. If members are in favour of the proposals, the most straightforward drafting approach might be to -

(i) amend rule 49.33(3) (adjustment) as suggested in paragraph 9, above; and

(ii) insert a new rule 49.33A (to sit just after rule 49.33) into Chapter 49 – this could cover the lodging and intimation of productions and witness lists.

21. Since the proposal is to make changes to the RCS only at this stage, it is suggested that it might be logical for an initial draft instrument to be developed by the User Group and then presented to the FLC at a later date.

Recommendation

22. Members are invited to –

- (i) consider the proposal outlined above; and**
- (ii) if they are content for it to be progressed, confirm whether they are content for an initial draft instrument to be developed by the User Group and then presented to the FLC at a later date.**

Lord President's Private Office/Scottish Civil Justice Council Secretariat

March 2019