

ANNEX A – CONSULTATION RESPONSE FORM

The following answers are provided following discussion with colleagues.

RCS

Question 1 – For the categories of case listed as suitable for an in-person hearing:

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

Answer – We can only comment as the solicitor instructing counsel in hearings under the Adoption and Children (Scotland) Act 2007.

Generally yes, the presumption is appropriate, particularly for proofs. This is because an in-person proof hearing allows for the judge to better assess witness credibility. It also allows for better management in terms of reference to productions. It is difficult to see parties over a computer screen whilst also referring to productions and other documents on screen.

Respondents and witnesses in these types of cases are often vulnerable. It is not always the case that they have access to a computer/laptop with a webcam and internet to allow them to participate in a proof. Technology can also be unreliable and thus lead to delays.

An in-person hearing also allows the solicitor/counsel to better gauge the judge and read their cues etc. In-person hearings can also allow for settlement discussions before the hearing.

It would also be difficult to fully instruct counsel in a virtual hearing. It would be difficult to speak to counsel between witnesses etc. Sitting with counsel in court allows for better communication.

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

Answer – As above, procedural hearings and hearings that do not involve witness evidence could be dealt with by video or telephone conference. However, this would very much depend on how complicated the matter is, and the length of any hearing (for the reasons set out above).

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

- Do you think lodging a motion is the right way to do that? Please explain your answer

Answer – We appreciate there needs to be a formal method of making such a request. A motion may be the most appropriate way of achieving this. However, there should be some other mechanism for stating personal reasons (which the other side would not be privy to). It would be for the sheriff to determine. This would only be in exceptional circumstances as the other side should normally be given an opportunity to respond and possibly oppose the motion.

Question 4 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

- Do you agree that the court should have the final say? Please explain your answer

Answer – Yes. The court, as final decision maker for all other matters, should have the final say on the mode of attendance. The court will be impartial and take into account all the circumstances of the case.

Question 5 – Do you have any other comments to make on the proposed changes within the Rules of the Court of Session?

Answer – No.

OCR

Question 6 – For the categories of case listed as suitable for an in-person hearing:

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

Answer – Yes, however, this very much depends on the complexity of the case. For example, a debate involving counsel and various authorities could take longer than a straightforward debate and would therefore be better dealt with in-person. A straightforward debate could potentially be dealt with electronically. However, with that being said, sometimes it is unclear how complex a debate will be until the debate is actually underway.

For family cases, procedural hearings (closing the record or fixing a proof) could be dealt with electronically. A child welfare hearing or proof would be better managed in-person. As above, this allows the sheriff to assess witness credibility. It would also allow solicitors to take instructions from their clients.

For adoption cases, procedural hearings should be dealt with electronically, unless there is a particular reason for an in-person hearing. I recently attended an in-person procedural hearing and the waiting time was 2 hours. The hearing itself lasted no more than 10 minutes. Not only was this a poor use of time, there was nothing complex about the hearing which meant that it could not have been dealt with electronically.

Question 7 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

- Do you think the general presumption given is appropriate? and
- Would you make any additions or deletions and if so why?

Answer – Yes. Options hearings, pre-proof hearings, and other procedural hearings are generally short and can be dealt with electronically. This saves parties travelling to court, and unnecessary waiting time. Waiting time is chargeable. Where parties are legally aided, this would increase costs to the public purse.

Question 8 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:

- Do you think lodging a motion is the right way to do that?
- Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers

Answer – See answer to question 3.

Question 9 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:

- Do you agree that the court should have the final say? Please explain your answer

Answer – Yes. See answer to question 4.

Question 10 – Do you have any other comments to make on the proposed changes within the Ordinary Cause Rules?

Answer – No.