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)

The recommendations represent a substantial and comprehensive overhaul of the Ordinary Cause Rules ("OCR"). In general the Working Group is supportive of the proposed changes.

We agree that Chapter 33AA should be removed from the OCR and the he proposed new provisions should apply to all actions with a crave for a section 11 order.

The need for similar provision where there is no section 11 crave is less obvious but on balance providing one rule for all would create uniformity and certainty and will promote the expeditions resolution of cases.

The group also considered that consideration should be given to including cohabitation claims as at present they are not classed as family actions for the purposes of Chapter 33

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

The Group is supportive of the objectives of the proposals which is expeditious resolution of matters particularly where children are concerns. However the time scales may be a little tight and it is not clear whether they have been selected based on evidence as to how long such matters need bearing in mind the fact that input is very often required from other agencies such as schools, social workers, medical workers and psychologists.

While scrutiny of the issues is fundamental at an early stage one wonders whether directing the cases down two alternative routes will achieved the desired result and if the " fast track" envisages a series of child welfare hearings to manage matters one wonders whether it will be very fast at all. The rules should retain sufficient flexibility to enable urgent child welfare hearings and interim orders to be sought.

It is envisaged that however well intentioned the proposals are they will only be effective if legal aid funding can be secured early as most of these actions involve assisted persons.. The Group are led to believe that SLAB can take up to 4 months to grant a full legal aid certificate. This will result in many first case management hearings being sisted which will delay proceedings. It is not clear how much research has taken place into funding being the root cause of some delays.

At present, a Pursuer typically raises a s.11 contact action after:-

- informal contact breaks down or is not offered
- seeking legal advice and corresponding with the other party
- being able to show that the other party is unreasonably refusing to attend mediation
- being able to show that any offer of contact from the other party is unreasonable and not in the child's best interests
- only then, finding money to privately pay for an action or, under current SLAB regulations, being able to apply for legal aid

The delays inherent in these steps usually mean that a Pursuer has not seen a child for at least several months before the action is raised. In addition, the proposed procedure does not appear to take into account some important necessary further delays in many cases, all of which take away judicial control of cases:-

- around 6 – 8 weeks for either a Child Welfare Report to be obtained and/or parties attending intake meetings with Relationships Scotland and identifying suitable slots for supervised or supported contact to commence
- the need to allow contact to bed in, increase and be monitored as it commences or recommences after a gap – this can often take several months
- the need to take a child's views, both at first and again if contact is ordered
- awaiting the outcome of criminal domestic abuse cases; even if contact is able to take place beforehand, it often needs to be suspended around the time of the trial as all parties (including the children) become increasingly on edge

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
This model has been successfully deployed in other types of proceedings . It helps focus minds and provides the sheriff with a written record of what remains at issue. It also encourages discussion .

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

This appears to highlight the potential problem with two distinct tracks. There are often very good reasons why a case is best dealt with by a series of child welfare hearings rather than fixing a proof. Very often contact has to be built up slowly and if the court seeks reports of supervised contact it is usually desirable that there be more than one session before reports are provided to the court. This process can take two to three months which is half the time envisaged to reach a resolution of the case before the 6 month case management review.

While the Group is in favour of calling cases in for a judicial check to see what progress is being made it is not clear what the benefit is of having a further 6 months of child welfare hearings as an option. That would mean many cases would indeed drift for a year without a proof being fixed .

Regarding paragraph 4(d), surely the court already knows how many CWHs there have been:.All in favour of a front sheet which would put this at the hands of the sheriff in much the same way as in summary crime but that is simply an administrative matter.

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)

In reality it is not clear that these proposals actually amount to a change as reasons for sists should always be given otherwise they should not be granted in the first place. Sists for legal aid will be inevitable. If a sist is appropriately granted because parties are attending mediation then there should be no down side for the court. The parties can resurrect matters when necessary.

The proposed rules simply provide for an extra long continuation . What is the benefit of that change . There could be an administrative review of cases which are sisted for more than a certain period just to get an update from parties by e mail but no need for a hearing.

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 X☐ Disagree ☒ Not sure

(Please tick as appropriate and give reasons for your answer)

The Group does not consider that the commercial model fits family actions very well. There is a danger that if fair notice of specific incidents is not given in pleadings cases will be unduly protracted by calls being placed for more information about times and dates of certain events. Unless some other form of disclosure of evidence of such incidents is considered then there could be legal difficulties in terms of admissibility and proof. There is a danger that the baby is being thrown out with the bathwater. Family actions are hung on very complex legal principles and detailed legislation which sets out what parties have to prove. Unless there is a move to simplify the substantive law (which is unlikely) there is still a need to set forth a clear case in law.

The real criticism is the quality of the pleadings in many family actions rather than the need for well focussed and articulated averments. Agents often seem to be unable to tell the difference between pleading a factual basis for a proposition and pleading evidence which is just bad practice. On many occasions there is very little difference in substance between the affidavit of the party and the pleadings. Of course the two documents serve an entirely different purpose.

In short this appears to be more of a training issue in the art and skill of written pleadings which is not best addressed by dumbing down the process.

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)

Agreed although if pre proof hearings are conducted properly this is already done.

In an era in which witnesses commonly refuse to be precognosed by the other side on the rare occasion when they are asked and the proposal might lead to some evidence being agreed, some benefits may also accrue.

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)

Agreed where practical.

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 X☐ Disagree ☒ Not sure

(Please tick as appropriate and give reasons for your answer)

Mediation is one form of alternative dispute resolution. However the parties are entitled to litigate if they wish and there are many instances where that is not only inevitable but is also the most appropriate means of resolving a factual dispute. The working group supports encouragement towards mediation but rejects the presumption in favour of it or any adverse consequences for a failure to resort to mediation.

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)

There are many cases where the instruction of one expert will be appropriate and it is accepted that this is the current trend . However there are cases where expert evidence may vary considerably and requires to be tested.

There is a difference in instructing more than one child psychologist who would have to interview a young child and instructing competing pension reports. If more than one report is really required then the rules should permit that unless we are committed to oving away from an adversarial system..

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)

Agreed

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?

(i) Reference is made to previous comments in relation to the value of two tracks and whether the fast track is really fast at all.

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

Comments

None