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
We are generally supportive of the existing Chapter 33AA being removed and the new provisions being implemented in respect of all such actions. Regular 'check ins' to review progress and the eradication of unnecessary court documents should cut down court time and costs. This is likely to be welcomed by solicitors and parties. We have some concerns and areas where we consider further guidance and clarification requires to be given (detailed below).

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 consider the proposals regarding the reform of case management in family and civil partnership actions are radical but generally positive. If implemented, they should result in an improvement in efficiency and avoid unnecessary delay in such cases. These suggested rules would allow greater scope for sheriffs to manage cases and to ensure they are kept on track. We consider that the current system allows too much scope for cases to drift. In cases involving Section 11 orders in particular, there is at present a perception that in some Sheriff Courts such cases always require to follow the Child Welfare Hearing route. In a small number of cases this is inappropriate. We, therefore, welcome the recognition that at an early juncture in s.11 cases, a judicial decision requires to be made to identify whether the case should be marked to progress down the "proof" route or "child welfare hearing" route. There is, further, a perception that cases can drift through a series of Child Welfare Hearings without any real progress or an end point.

In relation to paragraph (e), we are concerned that the default position of a Child Welfare Hearing not being fixed until after the initial case management hearing could create a system which lack expeditious decisions on interim orders involving children. In many cases where contact is withheld , it is only reinstated after involvement of the court. Whilst we envisage that there could be circumstances where interim hearings are fixed to address this, we are concerned court resources will limit this to exceptional circumstances and in the majority of family cases, decisions on interim orders for children could be delayed by a period in excess of 12 weeks. This seems an inappropriate delay.

Regarding paragraph (h), we welcome greater emphasis on having a full case management hearing to act as a check after a series of child welfare hearings and should avoid cases drifting. This is very much lacking in the current system.

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 proposal would remove a step in the process which may not be required, particularly in cases where the matters in dispute are narrow in scope. This would allow more focus on the sensible management of cases without cumbersome and unnecessary documentation having to be prepared. This would help to reduce the costs of litigation.

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
We agree that the rules currently allow for a potentially open-ended series of child welfare hearings to be fixed in section 11 actions. The unnecessary delay and drift is not only contrary to the best interests of children but has significant cost implications. We welcome the recommendation that the sheriff has the ability to call in a case to review progress that has been made and keep track of the length time that the case has been ongoing. It is hoped that such proposed change could assist quicker resolution of cases involving children.

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
We agree with the proposition that cases sisted indefinitely can cause issues in terms of management of cases. The suggestion that there be a stipulated time period for a sist and hearings for reviews of sists appears sensible. We do, however, have concerns that the proposals could cause unnecessary pressure in cases where the parties genuinely do have a motivation to resolve a case but require adequate time to resolve this. We also query whether the Sheriff would have the option to fix a Child Welfare Hearing at the "review of sist hearing" in Section 11 cases, as this appears not to be listed.

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)

Comments

We consider that the proposals regarding reform of pleadings fail to recognise the importance of the factual background in some family cases. Without such detail, it may be very difficult for the court, for example, to decide whether a case ought to proceed down the proof or child welfare hearing routine. Further, we suggest it is wrong to draw influence from commercial actions, which are completely different in dynamic and nature. We consider it unwise to have a blanket rule for family actions as each case very much turns on its own merits and circumstances.

We do, however, recognise that there can be situations where pleadings can be unnecessarily lengthy. A more sensible approach may be greater emphasis on guidance for pleadings in family actions and, perhaps, addressing the issue at an initial case management hearing where the sheriff could suggest to a party that the pleadings require to be revised.

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
It would be of assistance to both the court and the parties that there be a precis of the general type of evidence that each witness on a witness list will give. We recognise that it would assist in case management and help anticipate the likely duration of a proof. Nonetheless, we are concerned with the proposition that a Sheriff would be in a position to decide at such a hearing whether a witness is relevant based on brief general terms. It is quite often the case that the usefulness of a witness' evidence is not fully appreciated until the evidence has concluded. The parties ought to retain the control as to whether to call a witness if they consider their evidence likely to be essential and relevant.

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
We consider that this recommendation, if implemented, would help to ensure consistency in decision making. Different approaches taken by different sheriffs throughout a case can cause issues in terms of inconsistency. This undoubtedly causes delay in cases. The ability to have the same sheriff should reduce court time and cost as a sheriff who is familiar with the case should not need to be addressed at length at each hearing by agents.

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
Widening the ability of the court to refer cases for mediation is to be commended. We have concerns as to the powers sheriffs would have in the event that a party refused to engage in mediation. This requires to be considered in more detail to ensure that any such penalties are measured and appropriate. Rather than considering whether alternative dispute resolution has been adequately considered by parties at the initial case management hearing, we would suggest that a more appropriate stage to do this would be at the warranting stage. Parties could outline in their pleadings the attempts that have been made to reach settlement extra-judicially. If the parties have not attended a form of ADR, they could be required to state a good reason as to why they have not done so. This would ensure that the issue of ADR has been covered at the outset as opposed to discussing it a number of weeks after the action has been raised. If ADR has not been considered at all, the Court could refuse to warrant the Writ until such time as ADR has been attempted or suitable justifications have been given.

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

We agree that parties should be discouraged from instructing expert witnesses unnecessarily. We also accept that joint instructions of expert witnesses can lead to cost savings and can prevent unnecessary delay.

Nonetheless, we consider that there ought to be careful consideration as to how far this goes. It must be borne in mind that our civil litigation system is still based on an adversarial process whereby parties have the scope to elicit such evidence as they see fit to advance their case. This recommendation could put an unnecessary restriction on this and encourage a shift towards a more inquisitorial process. We also consider that the proposals fail to consider adequately the nature of expert evidence. It can be appropriate for a party to an action to seek to challenge opinion evidence from one expert and to lead contradictory opinion evidence from another expert. In these circumstances, it is appropriate that both opinions be heard and for the court to make decisions as to which evidence should be preferred based on the reliability and weight attached to that evidence.

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 consider this to be a sensible suggestion and have no further comment to make.

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

Comments
A possible "fast-track" route for cases not involving s.11 orders is a sensible proposal. This could be in the form of a hearing or a series of structured hearings where the sheriff could have a more "hands-on" approach to encouraging negotiation and resolution of cases.

Children (Scotland) Act 1995?

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

Comments
No