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
This will simplify the procedures and hopefully ensure consistency across Scottish courts.

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

(c) While it is understandable that the initial case management hearing can be conducted without the parties as long as they are represented, the parties should always be allowed to attend if they want to. In the past some sheriff courts tended to exclude parties from child welfare hearings which led to some suspicion that the lawyers were colluding with each other. Although the initial child welfare hearing and the case management hearing are separate, any exclusion of parties from the case management hearing is likely to cause similar concerns.

URGENCY

Section 11 cases should always be conducted with urgency, as recommended by the Inner House in SM v CM (2017) CSIH 1, in which it was noted that "The time taken to resolve disputes about contact should be measured not in years but in weeks or, at most, months." (para 66).

This point was also made in a recent speech by Lord Justice McFarlane, the head of the Family Division (https://www.judiciary.uk/announcements/speech-by-lord-justice-mcfarlane-contact-a-point-of-view/) He states: "Turning to my first headline point, however, there is more that can be done under the present regime to avoid the disaster of a contact case becoming wholly intractable with the result that a child is cut off from contact with the absent parent and, often, grandparents and other important family members.
No fewer than four recent court decisions have provided a timely reminder of what can go wrong when the court puts off early intervention and fails to undertake a fact-finding process when it is clearly necessary to do so."

It is therefore crucial that sheriffs can still make interim contact orders without delay when necessary within the above timescale. Such orders can be for supervised contact if the court does not have sufficient information on whether unsupervised contact is in the interest of the child, although in situations where a child has been cared for by a parent for a significant length of time prior to the Section 11 action, the court should also consider supported or completely unrestricted contact.

The timescales proposed in these new rules for the processes leading up to the child welfare hearing in circumstances without the special urgency noted in para (e) seem to be too slow, and we would suggest that section 11 cases should have a faster turnaround.

FULL CASE MANAGEMENT HEARINGS

While accepting that all such hearings are case specific, there is a need for some general guidance for agents and parties to emphasise the importance of using this process to explore the potential for full or partial resolution of the issues that have been raised. Pre-hearing conferences under the current Chapter 33AA rules seem to be treated by some agents as a formality which has to be ticked off before reaching the proof, rather than a serious opportunity to reach agreement. Agents have a responsibility to the court and the children in the case to use this opportunity fully and they should advise their clients of the importance of using this stage to avoid the need for an evidential hearing.

REASONS COMNTINUED

INITIAL CASE MANAGEMENT HEARINGS

In order to ensure that the Triage function of this hearing is fully understood, training should be provided for the sheriffs who are undertaking these hearings. As with much of the training provided by the Judicial Institute, this training should be designed to allow participants to explore and discuss the range of circumstances in which a case should be allocated to the "proof" track or the "fast" track. By involving experienced family sheriff in this training it should also be possible to develop some guidance based on this discussion which can be made available on the Judicial Hub.

While it is appreciated that sheriffs are already experienced in making triage decisions, this training and development of guidance is necessary to ensure some consistency across Scotland as well as providing support to sheriffs who are new to family actions.

Guidance should also be published for agents and parties, to enhance understanding of this new process. This guidance should emphasise that the interests of children will usually be met by speedy and harmonious resolution of such actions, cautioning agents against the use of correspondence that is needlessly aggressive or hostile. Parties should be provided with information in plain language about the case management process.

Although the content and delivery of such training and guidance remains the responsibility of other organisations, the Scottish Civil Justice Council has the statutory responsibility under its guiding principles to ensure that the civil justice system should be fair, accessible and efficient. Without adequate training and guidance connected to any new measure, there is a great risk that it will not be implemented according to these principles.

The previous set of case management changes, as set out in Chapter 33AA of the Ordinary Cause Rules, were shown by the research conducted on behalf of the SCJC to have suffered problems in implementation. This new set of rules is intended to make even more fundamental changes, and without training and guidance they risk similar problems.

As well as making these strong recommendations the SCJC should continue to monitor their introduction and commission surveys and research to assess how they are being used. Such surveys and research should cover the experience of the judiciary, lawyers, court staff and the parties using the court, and also draw upon statistics from the Courts and Tribunals Service and the Scottish Legal aid Board.

3.

4.

5. **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
When sheriffs have ordered a pre-hearing conference, it is important that parties and agents take this process seriously and make proper efforts to seek resolution. In my experience some agents regard this step as a box ticking exercise and show no indication that they are willing to try and reach agreement. When the draft joint minute is presented to them for approval they refuse to accept any comments about this lack of willingness. It would be useful to have some guidance on this process which includes an indication of what a joint minute is expected to contain. This guidance would also be very useful for party litigants, particularly if as pursuers they are responsible for preparing the joint minute.

6. **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

Although there is a lack of data about the numbers of child welfare hearings in each case, the experience of Families Need Fathers is that quite a few cases have more than 20 hearings and some cases have had as many as 80 hearings, although we accept that procedural hearings may have been mistaken for child welfare hearings in some cases.

We accept that multiple hearings may sometimes be used to manage a case towards resolution, but strongly support the aim of controlling this through a regular review. In point (d) it should perhaps be the joint responsibility of the parties, agents and the sheriff to provide an explanation of why the target number has been exceeded, and that this explanation should be drawn to the attention of the sheriff principal.

7. 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 No other comments

8. **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
Families Need Fathers Scotland supports the move towards abbreviated pleadings and also the transfer to online processes. Scotland should take account of the experience in this topic which has been gained in jurisdictions such as New Zealand, as well as the recent developments in England and Wales, where the Form 100 has been in use for many years and a set of trials of online forms has just commenced. It should be noted that Form 100 in its paper form is lengthy and unwieldy, whereas a smart use of online forms should streamline this process considerably by guiding the user through the relevant portions.

9. **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 No other comments

10. **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
Our experience is that many such cases continue to suffer from a lack of judicial continuity, and we would favour an even stronger statement. We accept that it will not always be possible to maintain the same sheriff, but there is a great advantage if this can be achieved, particularly in long running or complex cases Statistics should be maintained on the number of sheriffs hearing a case.

11. **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

Parties should be given strong encouragement by sheriffs to undertake mediation. Families Need Fathers Scotland is very concerned at the number of cases that we hear of in which family mediation is rejected by the resident parent. If domestic abuse or coercion is alleged it should still be possible to undertake shuttle mediation, using the experience and judgement of the mediator to ensure that one of the parties is not subject to further pressure or control.

In an experiment conducted in the Massachusetts Trial Court, mandatory mediation in family cases achieved a 72% settlement rate. Out of 154 scheduled cases between 2014 and 2017, 133 cases mediated, 12 did not show up, 97 of the cases resulted in whole or partial settlement. There were refusals to mediate in only a very few cases. One reason for this success was the very close linkage between the court and the mediation – when mediation is available immediately of very soon in the same building as the courtroom. (Results reported in a paper delivered at the 54th conference of the Association of Family and Conciliation Courts, 2017 – copies have been made available to Rules Rewrite workstream 5)

Compulsory family dispute resolution has also been used in Australia since the Australian Family Law Act 1975, with a family violence or child abuse exemption. Parents in conflict to make a 'genuine effort' to resolve their dispute through a 'family dispute resolution' process before being eligible to apply for court (http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/getting-ready-for-court/compulsory-family-dispute-resolution-court-procedures-and-requirements)

In a 2017 report, the English and Welsh Civil Justice Council found that voluntary take-up of mediation is 'disappointingly slow and small'. Parties that waste energy and costs arguing about whether or not to mediate generally do so for tactical reasons, and even if they agree to mediate there is no obligation to settle. Members of the group found no evidence that ADR is less successful when compulsory, and indeed sometimes parties are 'quietly relieved' to have avoided the 'who blinks first' dilemma by having the choice removed.(https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjfnNGS-fbcAhWrz4UKHTKDDFwQFjAAegQIABAC&url=https%3A%2F%2Fwww.judiciary.uk%2Fwp-content%2Fuploads%2F2017%2F10%2Finterim-report-future-role-of-adr-in-civil-justice-20171017.pdf&usg=AOvVaw100u8s8wCu2ZyTsbQay7j8)

An appendix to this report gives an international roundup, noting the use of various levels of court-annexed compulsory mediation in a wide range of countries, including China, Indonesia, Japan, Australia, Korea, New Zealand, various American states, Belgium, the Netherlands, Spain, Italy, Sweden and Germany

12. **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
Joint instruction or 'hot-tubbing' of expert witnesses is to be preferred.

13. **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
No other comments

14. **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.

15. **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.

16. **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?

Comments
No other comments

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

Comments
As noted above, Families Need Fathers Scotland is strongly supportive of the need for training for the judiciary and court staff relating to these changes. We also consider that training and guidance should be made available for the legal profession, and hope that the Family Law Association and the various professional and commercial training providers will respond to this need. We also hope that statistics on the operation of these revised procedures will be collected by the SCTS and SLAB, and would suggest that there is also a need for some research on the operation of case management in family actions and also on longer-term outcomes for the parties and children involved in such cases. These statistics and research could be used in the post implementation evaluation of the effectiveness of the new case management procedures by the SCJC. As well as assessing the outcomes, this scrutiny should also assess whether the usage of the new procedures is uniform across Scotland,