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?

X Agree ☐ Disagree ☐ Not sure

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

We agree with this recommendation. Chapter 33AA has proved to be less successful in its application than may have been hoped for. When it was first introduced it was believed it would mark a significant change in the approach taken to the organisation of family cases which were heading to proof. It was a reaction to the decision of the Supreme Court in the case of *NJDB -v- J G & Others* where there was considerable criticism of the delay and case management in that dispute.

In reality a substantial number of family cases do not proceed to proof and Chapter 33AA only applies where a proof is in contemplation. Revising the rule to replace it will give a more structured form of case management which will include cases not destined to go to proof.

In addition there have always been difficulties surrounding the funding of work to be carried out in terms of rule 33AA. It was subject to considerable criticism from the profession in that there were no specific changes made to the fees payable to the profession to cover the work done (although in reality much of the work was capable of being charged for). Removing this particular rule will alleviate that tension

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?

X Agree ☐ Disagree ☐ Not sure

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

Comments

We agree with this recommendation. It provides for proactive management and an early decision to be taken on whether or not the case is likely to be resolvable without recourse to a proof. One of the difficulties that arises in the current court procedure is that there can be prolonged attempts made to try to settle matters without recourse to a proof when in reality it is unlikely that the parties will ever be able to reach any form of agreement or understanding about what is needed to allow this to happen.

Most of our high cost cases which have been running for several years, have had reports ordered, intervention such as supervised contact and the involvement of psychologists, ultimately still head to proof as judicial determination is the only thing that will bring about an end to the process. If this potential was recognised at an earlier stage then much time could be saved and the elongated nature of such proceedings with all the difficulties that this brings for the families involved at the centre of the dispute could be avoided.

The recommendation allows for movement between the proof track and the fast track depending on the circumstances so if a complex case is assigned to the proof track at the outset but parties then are able to come to some form of common understanding or show that they are prepared to be more flexible in their approach then the matter can be changed to a fast track procedure and vice versa.

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?

X Agree ☐ Disagree ☐ Not sure

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

Comments
At present the pre-hearing conference and the joint minute can be something of a formulaic tick-box exercise. There is little purpose in this and in the contact disputes with which we regularly deal it would be preferable if matters proceeded straight to a full case management hearing to determine the route that the case should take without the need for the pre-hearing conference and joint minute. This is also the part of Chapter 33AA for which we have difficulty in making payment so its removal would be of assistance.

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?

X Agree ☐ Disagree ☐ Not sure

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

Comments

As detailed in the response to recommendation 2 we support this proposal. It would be our preference for there to be a finite number of child welfare hearings after which the case has to be considered for the proof track. However this may not give the court sufficient flexibility to deal with cases where some additional child welfare hearings could be beneficial. Having a review of the process does at least mean that there cannot be an open-ended series of child welfare hearings with no real progress being made.

We have taken data from our systems about the numbers of child welfare hearings held in legally aided disputes. The table below covers numbers of hearings while a second looking at court location. The data shows that there were 871 applications where more than 6 hearings had taken place with 185 applications having over 11 such hearings

TABLE 1

Num CWH banded	Count of cases	Num of CWH	Mean	Column N %	Column Sum %
1 CWH	637	637	1	17%	4%
2 CWH	699	1398	2	19%	9%
3 CWH	605	1815	3	16%	12%
4 to 5	866	3810	4	24%	25%
6 to 10	686	5042	7	19%	33%
11 to 15	148	1828	12	4%	12%
16+	37	681	18	1%	5%
Total	**3678**	**15211**	**4.1**	**100%**	**100%**

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?

X Agree ☐ Disagree ☐ Not sure

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

Comments
Generally we would agree with this approach. Many cases can be sisted for long periods of time and often to allow elongated periods of monitoring contact to take place. Equally however there are cases where solicitors and applicants want to have the case sisted while contact takes place as a type of safety net in case the parties fall out and need to go back to court. So while limiting the length of sists is helpful as it moves parties towards a final solution and could promote a better approach to the case from the outset, for the hard to resolve cases which, for whatever reason, are not put on the proof track the approach might not work so well. There is also the possibility that if a sist is recalled and a decision is taken on the case it may mean that there is further litigation needed down the line by way of minute for variation for example or failure to obtemper but this should not generally detract from the fact that the proposal to have an end date for sists and to keep the process under review is desirable and prevents old cases from cluttering up the system.

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?

X Agree ☐ Disagree ☐ Not sure

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

Comments
We agree with this recommendation. Too many family disputes have lengthy pleadings covering issues which are historical in nature and bring no benefit to the consideration of the case before the court at that particular time. If cases run for any length of time the issues become even more historical and can lead to unnecessary court time being spent exploring issues which have little or no impact on the current position between the parties and particularly in relation to the order being sought in terms of section 11. They more often seem to be designed to pull in every last fault that there has ever been between the parties as part of the action. Keeping pleadings concise and confined to the key issues is long overdue and desirable.

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?

X Agree ☐ Disagree ☐ Not sure

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

Comments
We agree with this recommendation. At present proofs can run to a number of days hearing a large number of witnesses not all of whom may be considered to be directly relevant to the point at issue or in dispute. In addition some witnesses may not be necessary at all and/or the time taken to examine and cross-examine them may be disproportionate to the evidential value that they bring to the matter. As part of case management which, as was noted in NJDB, remains firmly the responsibility of the sheriff, controlling the number of witnesses who will give evidence and to some extent the value of their evidence is key.

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?

X Agree ☐ Disagree ☐ Not sure

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

Comments
We agree with this recommendation. It is accepted that it can be hard for there to be sustained judicial continuity for family disputes given the varying pressures on sheriff courts throughout Scotland. A view has been expressed that it may be easier for courts with large numbers of sheriffs and particularly those with family courts such as Edinburgh and Glasgow. It may also be easier in single sheriff courts where there are no options unless a sheriff is absent or a temporary sheriff is drafted in. It has been said that it is hardest to achieve in courts where there are three to five sheriffs. Nonetheless every effort should be made to have continuity in dealing with a case. It avoids the need for unnecessary repetition of information that may previously have been laid out before a child welfare or other hearing and it gives parties a degree of familiarity with the sheriff and the approach that will be taken to their case. It may be easier to adopt judicial continuity once the proposed changes to case management come into being with the allocation of cases to the proof or fast track. It would give fewer opportunities for delay or "kicking the case into the long grass" as can sometimes occur in the present system.

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?

X Agree ☐ Disagree ☐ Not sure

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

Comments
We are generally supportive of attempts to resolve matters without unnecessary civil litigation so the sheriff having powers to refer any appropriate family action to mediation is desirable

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?

X Agree ☐ Disagree ☐ Not sure

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

Comments
A restriction on the number of experts used in family cases could potentially generate savings for the Legal Aid Fund particularly in the more troublesome cases which can result in the employment of a number of experts and most commonly child psychologists. It is preferable if an expert speaks to all the parties and gives a balanced assessment of the situation rather than having separate experts each looking at matters from the perspective of one client only. The joint instruction of an expert will also avoid unnecessary interviews for any children involved in the dispute and is more likely to lead to agreement on certain matters without the need for extensive examination of the experts in court proceedings. In 2016/17 we spent £530,781 on experts across the categories of contact, residence and variation. This figure excludes the sums spent on reporters which is considerably more. As can be seen there is scope for a reduction in overall expenditure on experts if joint experts become the norm. It would also have the benefit of smoothing the court process.

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?

X Agree ☐ Disagree ☐ Not sure

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

Comments
We would agree with this recommendation for the reasons given in response to Recommendation 2. There is no obvious reason to distinguish the process for minutes of variation from that being set out for the initial action.

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?

Comments

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

Comments

From our perspective anything which gives a greater level of case management control and allows for a fast track procedure or an early identification of a case as suitable for proof is to be recommended. While most of the legal aid applications we deal with concern section 11 orders, for those which do not it would be desirable to see the same approach. In any event there would seem to be no obvious reason why family disputes involving children should be dealt with in a radically different way from any other type of family dispute.