Responses to
Scottish Civil Justice Council consultation on the simplified procedures for divorce and dissolution
from Elaine E Sutherland

Question 1 – Do you agree that both the '*simplified procedure for divorce'* and the '*simplified procedure for dissolution'* should be extended to parties who are able to agree suitable arrangements for the upbringing of any children still under the age of 16? If not, why not?

Yes, subject to there being adequate oversight of the welfare of any children under 16.

Where the parties to a marriage or civil partnership have decided that it is time to terminate their formal relationship, there is no public interest in making the process any more onerous than it needs to be.

Where the parties have reached agreement on property matters, the only public interest relates to the welfare of the children involved (see response to question 2). Assuming that can be addressed satisfactorily, then, as the consultation document points out, there are considerable cost (to the parties or the public purse), time and efficiency advantages in permitting these couples to use the simplified procedure.

Question 2 – Do you think the 4 new forms added *(F33B / CP30A / 49.73-D / 49.80B)* on the arrangements made for children will gather sufficient information for the court to consider the welfare of the children of a marriage or civil partnership? If not, why not?

I am conflicted on my response to this question and would simply like to flag up some issues.

The question of the appropriate level of judicial oversight of the arrangements made for care of a couple's child post-divorce is challenging. On the one hand, it can be argued that meaningful oversight would require an enquiry to be conducted by an independent third party into to the proposed arrangements for the future care of every child whose parents are divorcing with the third party producing a child welfare report.

On the other hand, it can be argued that such an approach intrudes unduly into family privacy and creates unnecessary expense. In any event, there is no automatic oversight of the arrangement for the care of a child when unmarried cohabiting parents separate, nor when a parent, whether married or not, dies.

It is also worth bearing in mind that the parents may be living separately already and, in any event, what they have determined is a workable arrangement may be all that is on offer.

In addition, as far a child welfare is concerned, there is also the two-fold safety net comprising:
(a) the option for an interested party who is concerned about the child's welfare to take the matter to a court, and
(b) the, albeit overstretched, child protection system.

One further issue is worth noting. The Children (Scotland) Act 1995, s.6, requires that, when making a major decision in the course of fulfilling parental responsibilities or exercise parental rights, the decision-maker gives any child involved the opportunity to express views and take account of those views. "Major decision" is not defined but, arguably, the arrangements for the care of a child after parental divorce is such a decision. Consulting the child is addressed in Question 10 on Forms F33B, CR30A, 49.73-D and 49.80B but, assuming the parent answers "Yes" and indicates that the child is happy with the arrangement, there does not seem to be any way to verify whether the child was actually consulted. Not is it clear what would result from a "No" response.

Question 3 – Do you agree that for OCR rule 33.73 (1) and 33A.66 the term "mental disorder" should be replaced with a reference to "mental capacity"? If not, why not?

Yes. "Mental disorder" is an antiquated and insensitive term, whereas "mental incapacity" is widely used in other contexts (e.g. Adults with Incapacity (Scotland) Act 2000) and has a certain neutrality about it.

Question 4 – Are there any additional changes you would suggest regarding the procedures for a simplified divorce or a simplified dissolution?

While it is outwith the ambit of the current consultation, thought might be given, in the future, to streamlining the procedure for divorce and dissolution further. One option for couples who have agreed to terminate their marriage or civil partnership – but only those who have no children under 16 and are not in dispute over property matters – would be to make provision for a wholly administrative process free of any judicial involvement. Essentially, the parties would simply complete a form to be processed in much the same way as the forms used where a person applies for a change of name. While there would be additional costs involved at the point of processing (staff and infrastructure), there would be savings within the court system, including in terms of judicial time.