

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
FAMILY LAW COMMITTEE
MONDAY 13 FEBRUARY 2017 AT 10 AM
JUDGES DINING ROOM, PARLIAMENT HOUSE, EDINBURGH

MINUTES

Members Present: Lord Brailsford (Chair)
Marie Louise Fox (Scottish Legal Aid Board representative)
Simon Stockwell (Scottish Government representative)
Sheriff Principal Lewis
Sheriff Tait
Lynda Brabender (Advocate, SCJC member)
Stephen Brand (Solicitor)
Fiona Jones (Clan Childlaw)
Rachael Kelsey (Solicitor)
Professor Frances Wasoff (Edinburgh University)
Ian Maxwell (SCJC member)

In attendance: Nicola Anderson (Legislation Implementation Team, Scottish Courts and Tribunals Service)
Yvonne Anderson (Acting Deputy Principal Clerk of Session)

Support: Inez Manson (Deputy Legal Secretary, Lord President's Private Office)
David Ross (Policy Officer, Scottish Civil Justice Council)

Apologies: Catriona Whyte (Scottish Legal Aid Board)
Gillian Prentice (Principal Clerk of Session)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those members present and noted apologies from Catriona Whyte and Gillian Prentice. He advised members that Marie-Louise Fox was attending in place of Catriona Whyte, and that Yvonne Anderson was attending in place of Gillian Prentice.

2. The Chair informed members that Robert Marshall has moved to a different role within Scottish Government and has left the Committee. The Chair recorded thanks for Robert Marshall's contribution. He advised members that on 23 January

2017 the Council approved Tom McNamara as Robert Marshall's replacement as the alternative Scottish Government member of the Committee.

3. Members agreed not to publish the following papers: **2.2, 3.2, 4.1, 4.1A, 4.2.**

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

4. **The Committee approved the minutes from the previous meeting.**

Item 2.2 – Progress of actions from previous meetings (Paper 2.2)

5. **The Committee noted the progress that had been made on actions since the previous meeting.**

Item 3: Work programme

Item 3.1 – Update from the Scottish Government (Oral)

6. Simon Stockwell provided an update on legislative developments in the Scottish Government. In particular, he advised that amendments were tabled to the UK Children and Social Work Bill on 7 December 2016 which would enable local authorities in England and Wales to continue to be able to place children in secure accommodation in Scotland. The amendments provide for cross-border recognition of the court orders authorising those placements.

7. Simon also advised that there are plans in England and Wales to prohibit the personal cross-examination of domestic abuse victims in the family courts by party litigants; that the Scottish Government plan to consult late this year or early next year on reviewing Part 1 of the Children (Scotland) Act 1995; and that the Scottish Government will send a policy paper on case management to the Committee for consideration at the meeting in May.

8. The Chair informed members that he is due to meet Lord Justice Munby in March to discuss cross-UK-border recognition of court orders. The Chair invited members who wish any related issues to be raised at that meeting to provide details to Inez Manson or David Ross.

Item 3.2 – Forward Work Programme (Paper 3.2)

9. **The Committee noted the content of Paper 3.2 and the progress that has been made on actions since the last meeting.**

Item 3.3 – Points previously discussed by Sheriffs Principal (Oral)

10. Sheriff Principal Lewis provided members with an update regarding a number of points which have been considered by the Sheriffs Principal.

11. Sheriff Principal Lewis confirmed that she had again raised with the Sheriffs Principal concerns about parties being excluded from child welfare hearings. The Sheriffs Principal are troubled about the on-going nature of what they consider to be vague allegations and repeated their previous recommendation that if there is a problem, it should immediately be drawn to the attention of the appropriate Sheriff Principal. Sheriff Principal Lewis reported that there are no current complaints relating to this issue before any Sheriff Principal. A previous issue in a particular court has already been addressed by the Sheriff Principal. Simon Stockwell noted that the Scottish Government has not received any recent correspondence regarding this issue, but has recently experienced an increase in correspondence about family actions in general.

12. Sheriff Principal Lewis advised members that the Sheriffs Principal would have no difficulty in child welfare reports being shared with the Scottish Legal Aid Board if the legal aid regulations were changed to require this. Marie-Louise Fox asked if a decision had been made that such a requirement is a matter for regulations rather than rules. Inez Manson confirmed that this is the position of the Lord President's Private Office, because the purpose of the provision would be to facilitate an assessment of the ongoing entitlement to legal aid rather than to address an aspect of court procedure.

13. Sheriff Principal Lewis advised members that the Sheriffs Principal discussed the matter of evidential child welfare hearings. Sheriff Principal Lewis advised that she wished to reserve her position in relation to this matter meantime, but agreed to reflect on the discussion and revert with comment to the next meeting. Discussion took place regarding the nature and purpose of evidential child welfare hearings. Simon Stockwell advised that a petition calling for the recording of discussions at child welfare hearings has been lodged with the Scottish Parliament and that this may lead to the Scottish Government submitting a paper to the Committee. Members noted that further discussion of evidential child welfare hearings would likely take place when the Committee considers the research report into case management in family actions.

14. **The Committee noted the update provided by Sheriff Principal Lewis.**

Item 4: Proposals for rules

Item 4.1 – Case Management Hearings in Court of Session Family Actions (Papers 4.1 and 4.1A)

15. Inez Manson provided an overview of **Papers 4.1 and 4.1A**. Inez advised that the draft rules amend Chapter 49 of the Rules of the Court of Session by making provision for two hearings, namely a case management hearing and a pre-proof hearing. The rule change was proposed by the Court of Session Family Actions User Group. The purpose is to formalise an existing voluntary protocol. Members discussed the outline draft rules contained in **Paper 4.1A**.

16. **The Committee approved the draft rules and agreed that they be submitted to the Scottish Civil Justice Council for consideration and approval.**

Item 4.2 – Opinion in the appeal by SM v CM [2017] CS1H1 (Papers 4.2 and 4.2A)

17. David Ross introduced **Paper 4.2**. He advised that the postscript to the recent Opinion the appeal by SM v CM commented on a number of matters of concern, one of which was the length of time taken up by the proceedings in the sheriff court. **Paper 4.2** invited the Committee to consider whether it would be appropriate to address this concern by amending the rules to include a provision about avoiding delay.

18. Members held a detailed discussion about the issue of delay in family actions. Rachael Kelsey said that a distinction should be drawn between the passage of time and delay, as the passage of time is often necessary to achieve resolution. Members agreed, and thought the problem was one of *undue* delay. Lynda Brabender suggested that it may be more appropriate to include a provision about avoiding delay in primary legislation, as is the case in England and Wales, rather than in rules. Simon Stockwell said that such a provision could be considered in the Scottish Government's upcoming review of Part 1 of the Children (Scotland) Act 1995. The consensus amongst members was that no change to the rules was required.

19. **The Committee agreed that the rules should not be amended to include a provision about avoiding delay.**

Item 5: Research and consultations

Item 5.1 – Case Management in Family Actions – Update on Phase Two Research (Oral)

20. Inez Manson provided an update on the progress of the research by Dr Richard Whitecross into case management in family actions. Inez advised that Dr Whitecross has carried out a total of fourteen interviews so far, consisting of four sheriffs, three sheriff clerks, and seven practitioners. A further two sheriffs will be interviewed by 14 February. Arrangements are being made to interview the final

sheriff clerk, and 3 more practitioners. A draft report should be ready in the week commencing 20 February 2017.

Item 5.2 – Hearing the Voice of the Child – update on F9 consultation sessions
(Oral)

21. Inez Manson provided an update on the consultation sessions on the new Forms F9.1 and F9.2. Inez advised that she and Fiona Jones attended two sessions arranged by the Children’s Parliament in January with children aged nine, ten and eleven. Inez said that the children were very comfortable with the forms and did not find them patronising. Inez advised that the Children’s Parliament will carry out a further session with older children at the end of February and that Scottish Women’s Aid is in the process of seeking the views of younger children. Fiona Jones advised that one of her colleagues at Clan Childlaw received positive feedback on the forms from a thirteen-year old girl. Ian Maxwell asked about the timescale for implementing the new forms. Inez Manson advised that the Committee will require to see the consultation reports from the Children’s Parliament and Scottish Women’s Aid before implementation of the forms can be taken forward, but anticipates being in a position to progress the project between now and the Committee’s meeting in May.

Item 5.3 – Feedback on consultation meeting about Family Dispute Resolution Pilot
(Oral)

22. Inez Manson advised that a consultation meeting about the proposed Family Dispute Resolution Pilot coordinated by CALM Scotland took place on 14 December 2016. The pilot is due to commence in April and will involve Hamilton, Paisley, Dumbarton and Aberdeen sheriff courts. A number of Committee members attended the consultation meeting. The aim of the pilot is to ensure that parents/carers in dispute over contact arrangements fully explore the different options available to them for resolving matters. This would be achieved by inviting parties to an ‘Information Meeting’. Members discussed a number of issues that might be raised at the Information Meeting, the possibility of the pilot being rolled out nationwide, and the example of Mediation Information and Assessment Meetings (MIAMs) in England and Wales (which appear to have had an unintended negative impact, in that they have driven people away from using mediation). Details of the pilot and issues relating to how it will be funded are still under discussion, so members agreed just to keep a watching brief on this.

Item 6: A.O.C.B.

23. Ian Maxwell asked when the proposed training scheme for child welfare reporters will be implemented, in light of recent correspondence between the Scottish Government and the Lord President’s Private Office which has been

published on the Scottish Government website. Discussion took place regarding the existing arrangements for the appointment and training of child welfare reporters. It was noted that the letter from the Lord President's Private Office to the Scottish Government expresses the Lord President's reservations about 'regulating' child welfare reporters in the absence of any clear power to do so.

24. Simon Stockwell noted that, in the light of the comments from the Lord President's Private Office, the question of the regulation of child welfare reporters would be considered in the Scottish Government's review of Part 1 of the Children (Scotland) Act 1995. However, this work would take a number of years – perhaps around four – given the need to consult, find legislative time in the Scottish Parliament, put a Bill through the Parliament and then carry out implementation work.

25. The Committee noted the position.

26. Fiona Jones asked if the Committee has any plans to address Brexit. Simon Stockwell noted that the Scottish Government may meet with the Family Law Association to discuss the use of European Protection Measures, but it is too early to say if and when this will take place. Lynda Brabender advised that the Faculty of Advocates has held preliminary discussions with Mike Russell, MSP, Minister for UK Negotiations on Scotland's Place in Europe. The Chair noted that it would be premature for the Committee to consider the matter further at this stage.

27. The Committee agreed that until the terms of the Great Repeal Bill are known it cannot consider the effects of Brexit on family law in Scotland any further.

Item 7: Dates of future meetings

28. Members noted the date and time of the next meeting:

- Monday 08 May 2017 at 10am

Scottish Civil Justice Council Secretariat

February 2017