

**Use and Implementation of OCR Chapter 33AA in Section 11 Order  
Proceedings**

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March 2017

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**Acknowledgments**

We wish to acknowledge the support of the Research Advisory Group: Stephen Brand, Ian Clark, Anne Hampson, Inez Manson and David Ross. We thank the Lord President, Lord Carloway, and Sheriffs Principal for permission to undertake the research. Finally, we would like to thank the members of the judiciary, court staff and members of the Family Law Association who made time to participate in the research.

**TABLE OF STATUTES AND ACT OF SEDERUNT**

Children (Scotland) Act 1995

Family Law (Scotland) Act 2006

The Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No.2) 2013 (SSI 2013/139)

## 1 INTRODUCTION

1.1 This report presents the findings of a small-scale study designed and undertaken by the researchers between October 2016 and February 2017. The research was commissioned by the Scottish Civil Justice Council. This chapter outlines the background to the research and the main provisions of Chapter 33AA.

### **Background: Case Management in Family Actions**

1.2 The *Children (Scotland) Act 1995* (the 1995 Act) came into effect in November 1996. The 1995 Act introduced the concepts of children’s rights and parental responsibilities and the need to consider children’s views in decisions affecting them. The Child Welfare Hearing (hereafter CWH) was introduced into Chapter 33 (family actions) of the Sheriff Court Ordinary Cause Rules (“OCR”) in November 1996 to give practical effect to the principles contained in the 1995 Act.<sup>1</sup>

1.3 Under the 1995 Act, the sheriff may make a range of orders relating to parental rights and responsibilities (for example, “residence orders” and “contact orders”) in respect of children under s11, commonly referred to as s.11 Orders. Rule 33.22A provides that a CWH will be held if the granting of a s.11 order is opposed (or, if in any other circumstances, the sheriff considers a CWH should be held). CWHs are conducted in private and all parties, including the child if he or she has indicated a wish to attend, must attend in person. This hearing, focussed on the welfare and best interests of the child, seeks to enable the sheriff to address the issues relating to that child separately from other issues in dispute, for example, the factors in the breakdown of the parents’ relationship or financial provisions on separation or divorce. Rule 33.22A OCR explicitly states that the sheriff is to use the CWH to seek to secure the “*expeditious resolution of disputes in relation to the child*”.

1.4 In August 2012 Lord Brailsford was appointed as the designated Court of Session Family Law judge and chaired a joint working group on family law. The Working Group comprised

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<sup>1</sup> CWHs are distinct from Children’s Hearings.

members of the Court of Session and the Sheriff Court Rules Councils – which have now been succeeded by the Scottish Civil Justice Council – with additional representation from the Faculty of Advocates, Law Society of Scotland and the Scottish Legal Aid Board. As well as professional representatives, the Working Group included academic and lay (consumer) representatives.

1.5 The remit of the Working Group was to consider procedures in family actions, notably to ensure that such actions are handled as expediently as possible. Amongst the procedures considered was the enhancement of judicial case management. The focus on case management in family actions reflects the Scottish Civil Courts Review published by the then Lord Justice Clerk, Lord Gill, and Mr Justice Ryder’s report in England and Wales for proposals to modernise family justice and, finally, the Supreme Court’s decision in *NJDB v JEG*.<sup>2</sup> The judgement issued by the Supreme Court was highly critical of the management of this particular case. Lord Reed commented, “*the glacial pace of the proceedings was itself inimical to the best interests of the child*”. The Supreme Court observed that there was no reason for a child contact dispute to take so long to resolve and that the court has a duty, particularly in matters involving children, to avoid such a delay in resolution.

### **Child Welfare Hearings**

1.6 Child Welfare Hearings (CWHs) are provided for in Rule 33.22A of the Ordinary Cause Rules. CWHs must be held in defended family actions in which a section 11 order is sought. As stated in Rule 33.22A(4), at the CWH, ‘*the sheriff shall seek to secure the expeditious resolution of disputes in relation to the child by ascertaining from the parties the matters in dispute*’. As such, in addition to the Chapter 33AA case management hearings introduced in June 2013 and discussed below, it is considered that CWHs provide an opportunity for judicial case management in family actions (or at least, it is understood that they are frequently used for this purpose).

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<sup>2</sup> *NJDB v JEG* 2012 SC (UKSC) 293.

## **Introduction of Case Management Hearings**

1.7 The Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No.2) 2013 (SSI 2013/139) came into force on 3 June 2013.<sup>3</sup> The SSI introduced a new chapter, Chapter 33AA, into the Ordinary Cause Rules (OCR). Chapter 33AA introduced case management hearings in certain Scottish family actions in the Sheriff Courts. It applies where a cause is proceeding to proof or proof before answer in respect of a crave for an order under section 11 of the Children (Scotland) Act 1995 (court orders relating to parental responsibilities, contact and residence.). Rule 33AA.2 deals with assigning a date for a case management hearing. Under rule 33AA.3 parties are required to hold a pre-hearing conference before the case management hearing and to lodge in the court a joint minute of the hearing or provide an explanation as to why there is no joint minute. Rule 33AA.4 sets out the matters to be addressed at the case management hearing. At this point, the sheriff requires to fix a diet for proof or proof before answer and a pre-proof hearing in accordance with OCR Chapter 28. The sheriff may make such orders as thought to be appropriate to ensure compliance with the rule. On cause shown, the case management hearing may be continued to a further hearing (Rule 33AA.4(5)).

## **The use and implementation of Chapter 33AA**

1.8 Concerns over the effectiveness and use of Chapter 33AA were raised anecdotally in June 2014, approximately one year after its introduction. The concerns raised were that:

- (i) the new case management rules in Chapter 33AA were not being used much;
- (ii) there appeared to be a general lack of awareness of the new rules;
- (iii) there was a reluctance to fix case management hearings; and
- (iv) there were concerns that legal aid rules meant solicitors would not be paid for case management hearings.

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<sup>3</sup> For a lawyer's view and discussion of Chapter 33AA see A Masson, 2014 "Family Actions: Be Prepared". *Journal of the Law Society of Scotland*, 19 May.

1.9 To understand these concerns a preliminary analysis of case management hearing data held on the SCTS Case Management System (“CMS”) was conducted by officials of the then Scottish Court Service (SCS) on behalf of the SCJC in December 2014. The results of this analysis were inconclusive. However, it did suggest inconsistency in the use of Chapter 33AA across Sheriff Courts. Considering these findings, the Scottish Civil Justice Council’s Family Law Committee decided that it wished to look more closely how the provisions of Chapter 33AA are used in s.11 order actions.

1.10 Seeking to understand the shrieval perspective on the use of case management hearings, a questionnaire was made available to sheriffs via the Judicial Hub.<sup>4</sup> The response rate was low.

1.11 The Committee’s focus has not changed and the current research for the Committee sought to give family practitioners and Sheriff Clerks an opportunity to discuss the CWH and the provisions of Rule 33AA.

### **Aims of the Research**

1.12 The aim of the research is to ascertain the reasons for the apparent variations in the use made of the judicial case management tools available for hearings in certain family actions (CWH, Options Hearing and Chapter 33AA Case Management Hearing).

### **Objectives of the Research**

1.13 The objectives of the research are:

- To analyse a further data extract of case management hearings and CWHs.
- To gather and analyse views on whether the hearings prescribed in the rules facilitate or impede case management, and the extent to which, if at all, use of these hearings varies under different circumstances, such as court size and judicial continuity.
- To inquire into local practice in relation to proceedings in applications to vary a final decree.

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<sup>4</sup> A judicial communications website maintained by the Judicial Institute for Scotland.

- To gather and analyse views on what changes (if any) interviewees would like to be made to the rules in order to improve case management in family actions.

1.14 The research is sensitive for it touches on a range of local practices and behaviours, indicated in the responses from the sheriffs to the questionnaire referred to above in 1.10. However from a court user perspective whether as a party to a family action or as a lawyer, it is important that there is consistency in the handling of these actions.

## **2 RESEARCH DESIGN AND METHODOLOGY**

2.1 This section provides details of the research design for this project, with discussion encompassing ethical approval, sampling and analysis techniques.

### **Ethical Approval**

2.2 The study received ethical approval at Edinburgh Napier University (ENU) and Research Advisory Group (RAG) approval through SCTS/SCJC in October 2016. All participants were informed in writing of the aims of the study on being approached for availability for interviews. A further participant information sheet was provided to all participants prior to written consent being sought. Examples of the participant information sheet and consent form are set out in Appendices B and C.

### **Research Design**

#### ***Approach***

2.3 The research is primarily qualitative in its approach, seeking to develop an understanding of the use and role of case management tools that are available in section 11 order cases. The research consisted of:

- Four face to face and two telephone interviews with sheriffs;
- Four face to face interviews and one telephone interview with sheriff clerks;
- Nine telephone interviews with solicitors.

2.4 Permission to contact sheriffs and sheriff clerks was granted by the Lord President, Lord Carloway, and the Sheriffs Principal of the four Sheriffdoms included in the study.

### **Sampling**

2.5 Four courts identified by SCJC were the focus of this study: Glasgow, Inverness, Jedburgh and Kirkcaldy. The four courts were selected to give a breadth based on the size and location purely to ensure that courts of different sizes were included in the sample, as well as courts that cover both urban and rural areas. In addition, a further interview with a sheriff in a

non-study court was conducted. The Family Law Association (FLA) facilitated contact with family law solicitors by advertising the study to their members through email. Similarly, local bar associations and the Royal Faculty of Procurators advertised the research on behalf of the researchers.

2.6 The sampling approach was purposeful sampling as we sought to interview those sheriffs, sheriff clerks and solicitors who are involved in family actions. No clients or party litigants were interviewed.

2.7 As part of this qualitative study, twenty participants were interviewed. These include Sheriffs, Sheriff Clerks and Solicitors, drawn from the geographical areas which were the focus of this study. Table 1 sets out the categories of participants interviewed.

<b>Role</b>	<b>Number</b>
<b>Sheriff</b>	6 (including two additional interviews)
<b>Sheriff Clerk</b>	5 (includes 2 sheriff clerks for one sheriff court)
<b>Solicitors</b>	9 (2 x Glasgow, 2 x Jedburgh, 2 x Kirkcaldy; 3 x Inverness)
<b>Total Interviews</b>	20

**Table 1:** Participants by category.

**Data Collection - Interviews**

2.8 For the sheriff and sheriff clerk interviews, face-to-face interviews were conducted for three out of four identified courts. The final sheriff and sheriff clerk interviews were conducted by telephone. An additional sheriff interview was conducted by telephone. The solicitor interviews were generally conducted by telephone due to solicitors’ schedules and geographical constraints; however one interview was conducted face to face.

2.9 The topic guide for the semi-structured interviews can be found in Appendix D. It focused on the participant’s experience of the Ordinary Cause Rules and their own role in the

process of managing family actions – from CWHs through to case management hearings under Chapter 33AA and then Proof or Proof before answer. Further questions sought to identify how post-decree Minutes to Vary were managed. At the end of each interview the participant was invited to add any further comments, for example, any recommendations the participant would like to make. Average interview timings were 36 minutes.

### **Data Analysis**

2.10 All interviews were audio-recorded and transcribed verbatim immediately after their conduct. This was to facilitate the iterative cycle of interviews, analysis and responsiveness to data. As data collection and analysis was an iterative cycle, this cycle was supported by Radnor's six stage guide to analysis.<sup>5</sup> The six stages are; topic ordering, constructing categories, reading notes and transcripts for content, completing coded sheets for all sources, generating coded transcripts and interpreting the data through analysis. Comparing data is also undertaken here as the researchers are looking for similarities and differences. The transcripts and coding were shared across the research team to ensure clarity of approach and refinement of thematic categories. The consistency of respondent driven themes emerging from the data set supported the validity and relevance of our analysis. In order to avoid identification and protect anonymity of participants, no qualitative data extracts have been included in the report or appendices.

### **Limitations of the Study**

2.11 A significant number of the participants commented on the small number of s.11 order cases based on their own professional experience that were required to be dealt with under Chapter 33AA before a proof or proof before answer. Therefore, a key limitation is that the information on the use and effectiveness of Chapter 33AA is based on very limited experience of this process. A further limitation arises from the opt-in approach and the self-selection to participate for solicitors.

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<sup>5</sup> Radnor, H. 2002. *Researching Your Professional Practice*, Buckingham: Open University Press, p71

### 3. RESEARCH FINDINGS

3.1 This chapter sets out the main findings from the interviews conducted with sheriffs, sheriff clerks and solicitors. It ends with a discussion of the quantitative data supplied by SCTS in October 2016 and March 2017.

#### **Sheriffs**

3.2 As noted in Table 1 six sheriffs were interviewed. These include five sheriffs from the four study courts and a sixth sheriff from another sheriff court for additional reference and confirmation of emergent themes. All six sheriffs had been in private legal practice before being appointed initially as a part-time sheriff, then as a full-time sheriff. Whilst in private practice, five were involved in civil law and one was an experienced criminal law practitioner. Five were full-time sheriffs at the time of the introduction of Chapter 33AA, whilst one was a part-time sheriff. Three of the sheriffs hear a range of civil and criminal cases, whilst three are dedicated to hearing family actions in their courts.

#### *Awareness of and Training on Ordinary Cause Rules Chapter 33AA*

3.3 All six sheriffs are aware of and use the rules set out in Chapter 33AA. Five sheriffs were aware of the rules but did not receive specific training on the rules or their application in practice. The sixth sheriff was very familiar with the provisions of Chapter 33AA.

#### *Allocation of Sheriffs*

3.4 In two of the sheriff courts there is an equal allocation of CWH to sheriffs based on availability. In both courts, it was noted that there was no guarantee that a sheriff would always be allocated the same case or indeed hear the proof if it reaches that point. Elsewhere, all the full-time sheriffs may be allocated to hear CWH and to deal with any case management hearings, whilst in one court the full-time sheriff seeks to handle all CWH if possible. It was noted that a sheriff may indicate that s/he wishes to hear future CWH. Shrieval consistency was commented as being useful but not always necessary. Indeed, it was noted that in the event of an action proceeding to a proof or proof before answer (possibly preceded by a Chapter 33AA Case Management Hearing), it might be preferable not to have the sheriff who had been hearing the CWH hear the proof.

*Sheriff control*

3.5 At CWH parties are required to be present with their solicitors. It was noted that this may not always be practicable, for example, a parent living at some distance or having to travel for work. In these circumstances the absent party must be contactable by their solicitor.

3.6 Four of the sheriffs consider the terms of Chapter 33AA empower them to take a robust approach to managing cases. It was highlighted that they could, as set out in Rule 33AA.2(1)(d) at their own motion, indicate that they considered that the case should go to a case management hearing. This approach was considered important because it allows sheriffs to be consistent in their handling of family actions.

3.7 Four of the sheriffs indicated that they would, subject to the circumstances of each case, consider whether there was a need for CWH to address disputes in relation to the child, or if it would be more appropriate for these to be decided at proof. Where proof was considered more appropriate, the sheriffs would decline to fix subsequent CWH and instead fix a case management hearing under Chapter 33AA, to allow the case to progress towards proof. All sheriffs commented that this can have the effect of focusing the parties on the key issues.

3.8 However, two sheriffs noted that they would not on their own motion require an action to go to a Chapter 33AA case management hearing. One noted that it was for the solicitors in the action to raise such a motion. The other commented that although it may appear that a case is being “churned” with a number of CWH that this may be for an acceptable reason. For example, it may be that at the beginning of the action there was no contact between parent and child. Steadily over time and with a series of CWH to monitor progress, contact may be initiated and gradually built up from contact by letter, to supervised contact to increased periods of unsupervised contact and finally contact and residence.

*Variation in approach between Sheriffs*

3.9 In several courts it was noted that the sheriffs are generally very similar in their approach. This reflects regular meetings and discussions of workload, case allocation and scheduling. In one court, note sheets in the CWH files allow sheriffs to leave detailed notes from each CWH, ensuring that any colleague hearing the case can see what was discussed in an earlier CWH. Of

course, it was noted that it did require other sheriffs to complete the note sheet, which was not always done. It was noted in one interview that some sheriffs might schedule an Options Hearing on the same day as a case management hearing. This was not viewed as appropriate by a colleague who noted that an Options Hearing provided focus and was a ‘driver’ for parties to do what they need to do. Without this then the process was viewed not to work.

#### *Variation in timescales*

3.10 Rule 33AA.2(2) provides that a case management hearing will be fixed for not less than 14 days and not more than 28 days after the interlocutor for proof. However, it was noted by some sheriffs that four weeks was not always enough time for the parties and their solicitors to hold the pre-hearing conference and agree the joint minute. As a result, the joint minute may not have been submitted prior to the case management hearing. On occasions this could lead to a further case management hearing, or indeed to several further case management hearings.

3.11 The sheriffs expressed both frustration with solicitors who failed to lodge a joint minute ahead of the scheduled case management hearing and a recognition of the potential practical challenges. For example, in rural locations it could be difficult to meet with a client reliant on sporadic bus services. However, a majority of the sheriffs emphasised that they would be critical of the solicitors who had failed to lodge the joint minute. It was noted that there is perhaps a need for a means of ensuring that solicitors comply with the interlocutor to lodge a joint minute before the case management hearing. This concern for a form of sanction was suggested in some of the responses to the sheriff survey that were received in late 2015.

#### *CWHs Held*

3.12 The pattern for the allocation of CWH varied with each court. It depends on the size of the sheriff court and whether there are sheriffs dedicated to hearing family cases. Case management in general and in relation to Chapter 33AA in courts which do have such dedicated sheriffs will be held on set days and times, when only family actions are dealt with. In other sheriff courts, case management in section 11 order cases may be held alongside procedural hearings in ordinary actions.

*Solicitors: Awareness of Chapter 33AA*

3.13 The sheriffs were generally positive about the solicitors appearing before them and their understanding and application of the provisions under Chapter 33AA. Two sheriffs interviewed explained that they had presented to the local bar on the rules in Chapter 33AA. This allowed them to be clear about their expectations of the solicitors appearing before them. Importantly, it allowed them to set out what they would require in terms of the joint minute. Although no style joint minute was proposed by them, the sheriffs referred the solicitors to the details of Rule 33AA.4(1).

3.14 In other study courts, it was noted that although there was no formal discussion with local solicitors about Chapter 33AA when it was introduced, there were various avenues for engaging with them. For example, a shared common room enables sheriffs to have discussions with solicitors. These discussions were described as “*frank*” but generally related to specific cases rather than broader procedural matters. Elsewhere, a local family law court user group provides a regular means of raising and addressing issues that have arisen or require to be discussed between sheriffs and solicitors.

*Compliance of Solicitors*

3.15 As discussed previously, (sections 3.9 – 3.10) sheriffs generally give solicitors up to 28 days to prepare the joint minute, unless cause is shown for allowing a longer period. It was recognised, especially in geographically spread areas, that solicitors could face practical problems, for example, being able to consult with their client in time to discuss the case before meeting with their counterpart. If there are delays in preparing the joint minute, solicitors should advise the court.

3.16 All the sheriffs stated that if, after assigning an action for case management under the rules set out in Chapter 33AA, no joint minute was lodged prior to the case management hearing, then the solicitors would be given very clear instructions to do so before the case management hearing would take place. Sheriffs have experience of solicitors attending court for case management hearings when no joint minute was lodged in advance. It was noted that in the absence of the joint minute the information required by the sheriff under Rule 33A.4(1) would not be available to consider, meaning that the sheriff would not be able to fix a diet for proof or

proof before answer. Accordingly, sheriffs emphasise the importance of solicitors holding the pre-hearing conference and lodging the joint minute setting out the matters that are agreed and the matters remaining in dispute.

*Effectiveness of Case Management under Chapter 33AA*

3.17 In those cases that proceed to case management under Chapter 33AA, all of the sheriffs commented on the importance of the joint minute to clarify the key issues in dispute.

3.18 There was a general view that the joint minute was constructive, for it requires the parties and their solicitors to actively identify the key issues in dispute. It was noted that the process of setting a pre-hearing conference could lead parties to reach an agreement out of court. This is provided for under Rule 33AA.3(1)(a). Although sheriffs were reluctant to give a percentage of cases in which settlement occurred, it was noted by all of those interviewed as occurring on a regular basis. As result, the case would not then proceed to a case management hearing.

3.19 In one study court, two sheriffs hear all case management hearings. This enables them to ensure a consistent approach to the application of the rules set out in Chapter 33AA and in particular to 33AA.3 (pre-hearing conference). In other sheriff courts, the practice was more varied. Where possible, two courts would try to ensure continuity of sheriff. In two others, this was not the case. We will return to consider the role of judicial continuity when discussing the solicitors' perspective.

3.20 If the solicitors have lodged a joint minute, sheriffs consider the information set out in it useful for identifying the key issues to be examined in the proof or proof before answer. It enables them to discuss the evidence to be given by each party, whether by examination in chief, oral evidence or affidavits. Importantly, it enables the sheriff to discuss the duration of the proof and based on the discussion with the solicitors schedule the proof or proof before answer.

3.21 However, it was noted by some sheriffs that they may, because they feel there is a need to make either an interim or final decision in the CWH, invite evidence to be heard during a CWH. This was similarly mentioned by solicitors as an "*evidentiary hearing*". It was noted by one sheriff when asked about whether or not during a CWH evidence would be sought to enable a decision to be made, that this was a problematic practice. For example, a proof or proof before

answer requires a shorthand typist to provide a record of the proof, whereas there would be no written account of an “*evidentiary hearing*”.

#### *Minute to Vary*

3.22 It was noted that a minute to vary a final order could be lodged at any point after a final order is made. The timing could range from very soon after the making of the final order to several years later, reflecting a change in circumstances for the party seeking the variation or indeed the wishes of the child. The generally agreed approach outlined by the sheriffs was that once the minute is lodged, then there would be a procedural hearing to determine whether to go to a CWH or it would go directly to a CWH, and reopen the previous CWH.

#### *Recommendations*

3.23 Overall the sheriffs interviewed are content with the range of procedural tools available to them as they assist the managing of cases and as set out in Chapter 33AA. There are some areas where there are perceived to be some inconsistency and where further clarity could be provided. For example, there were concerns expressed over the lack of sanctions to ensure compliance, primarily in relation to the production and lodging of the joint minute.

3.24 The Options Hearing is provided for in Chapter 9. Rule 33AA.2(1)(a) does allow for the case management hearing to be fixed at an Options Hearing.

3.25 Four of the sheriffs thought that case management should be integrated more fully rather than as present restricted to Section 11 Orders. It was noted that case management could be appropriate in divorces in respect of financial provisions. This is a view shared by family law practitioners, see section 3.48.

#### **Sheriff Clerks**

3.26 Five sheriff clerks were interviewed from the four selected study courts as we had been directed to those clerks who dealt with family court scheduling and management. Due to the nature of the study courts in terms of their size and geographical location, there was not

consistency in scheduling sheriffs in hearing s.11 Order cases that included CWH and which then progress to Chapter 33AA case management hearings and proof/proof before answer.

#### *Training on Ordinary Cause Rules Chapter 33AA*

3.27 All clerks confirmed they had not received formal (desk) training on Chapter 33AA upon its introduction in 2013. Three of the five clerks were in post at the time of its introduction and all referred to reading the packs/letters sent to them. Two of the clerks had discussed the rules with their sheriffs. One clerk explained how it was the clerks who highlighted to sheriffs about tighter timescales within the new rules. One clerk arrived in post shortly after the introduction of Chapter 33AA and had spoken to one of the sheriffs about what was expected.

#### *Allocation of hearings*

3.28 All sheriff clerks confirmed that hearings were allocated based on diary space, equal allocation and cases would not consistently be heard by the same sheriff where multiple sheriffs were in situ. Where dedicated family sheriffs had been identified in two of our courts, clerks would keep CWH and case management hearings to these sheriffs. Challenges had been identified over the use of part-time sheriffs who came in to cover full-time sheriffs for holidays and illness, so scheduling would be worked around the full-time sheriff's calendar where feasible.

#### *Sheriff control*

3.29 Sheriff clerks introduced discussion of the control sheriffs had over the process of managing CWH and when to progress an action to CMH and proof. There was consistency in views across all clerks that there was a good degree of sheriff control in managing CWH and progression. Clerks noted how their sheriffs were consistent, applied the rules and were proactive about managing cases to prevent 'drift'.

#### *Differences in Local Practice*

3.30 Local differences in practices were noted in two forms by interviewees, time and process variations. The number of CWH per case being considered 'optimal' was not discussed by sheriff clerks. The first variation was in terms of timescales of having cases move through the

shrieval process to proof – in one court the timescale was 2-4 weeks, but in another it was 10-12 weeks. One court noted issues in case management hearings as some sheriffs were assigning case management hearings without there being a proof assigned but the majority had a proof assigned and then allocated a case management hearing. The second variation was the note that in one court, sheriffs sometimes '*forgot*' to schedule an Options Hearing.

3.31 To minimise variation and inconsistencies, one of the sample courts had a pre-formatted notes sheet which sat in each file. This was to allow for shrieval notes to be added, recognising that other sheriffs may hear the case. The use of this note sheet was an attempt to minimise differences in practice, as the notes would make clear what had happened at other stages in the proceedings.

#### *Solicitors*

3.32 Discussion of solicitors was introduced when sheriff clerks considered the current process they were working within. Challenges in terms of delays were recognised by two of the study courts as solicitors were recognised as not providing the joint minute or failing to undertake the pre-hearing conference, which created delays in the process. Two of the sheriff clerks recognised the local bar as working well with each other despite the complexity of issues they faced with clients. These complexities were recognised in terms of legal aid access and funding and the increasing emotional environment where additional police support was needed at court on occasions when family cases were being heard.

#### *Minute to Vary*

3.33 In managing a Minute to Vary, three out of four courts would open the case and start from the point of a CWH through to a case management hearing as provided under Chapter 33AA if required. One court however discussed managing a Minute to Vary under the minute procedure, so the Chapter 33AA rules were not applied.

#### **Solicitors**

3.34 Nine solicitors were interviewed. Two solicitors from each of the following Sheriff courts: Glasgow, Jedburgh and Kirkcaldy; three solicitors with experience of Inverness sheriff court. The most experienced has been in practice for 35 years and the most recent in practice for

eight years. All of them were practising family law before the introduction of Chapter 33AA in June 2013.

*Training on Ordinary Cause Rules (Chapter 33AA)*

3.35 The solicitors interviewed generally became aware of Chapter 33AA either through colleagues or from updates from the Family Law Association. Four of the nine were aware of Sheriffs highlighting the new rules with other colleagues. However, all noted that there was no formal training or advice provided to them on the application of the ‘new rules’.

3.36 The rules of Chapter 33AA are directly relied on by solicitors when preparing their joint minute. In one of the study courts, it was noted by sheriffs and practitioners that a template for the joint minute had been prepared by one member of the local bar. The sheriff approved the style and it was circulated among the local bar. Other solicitors noted that they simply referred to the terms of Chapter 33AA and any advice on the areas that the sheriff wants them to address in the joint minute.

*Concerns over the preparation and cost of the Joint Minute*

3.37 7 out of 9 solicitors interviewed have a significant proportion of clients who qualify for legal aid. Only two solicitors interviewed work for fee-paying clients. However, all the solicitors interviewed raised two main concerns about the preparation and cost of the joint minute.

3.38 This poses practical issues for solicitors based in rural locations. They commented that the time required arranging a meeting, preparing the joint minute and agreeing its terms could present challenges as both representatives sought to juggle a range of commitments. Even in urban areas, this can present problems. The main concern presented by all of the solicitors was that the time to meet and prepare the joint minute is not recoverable under civil legal aid.

3.39 It was highlighted that there was time to prepare for the meeting and to review the casefile to identify the issues that were or could be agreed and those that remained unresolved would be the focus of the proof. The time for the meeting and agreeing which lawyer would lead on drafting the minute and finally the time to draft and revise the joint minute would add to costs which are not recoverable under legal aid. These concerns have been voiced to sheriffs who also

commented that they were aware that the Scottish Legal Aid Board, at present, does not pay for this work.

### *Sheriff control*

3.40 In two of the sheriff courts the solicitors noted the sheriff taking an active role in guiding the s.11 order cases. Solicitors commented on the experience and understanding of family actions that distinguished particular sheriffs from others who lack a family law background or interest.

3.41 In relation to how actively sheriffs manage cases six of the nine solicitors interviewed commented on the positive steps and intervention by sheriffs to focus parties on the issues. If appropriate, the sheriff may indicate that it is time for the action to go to a case management hearing under Chapter 33AA. Only one sheriff indicated a maximum number of five CWH. However, it was noted that not all sheriffs take this approach due to the complexity of cases (see 3.7). As indicated in section 3.7, some sheriffs feel that they need to be guided by the solicitors.

3.42 Sheriffs' knowledge and understanding of the rules set out in Chapter 33AA were commented on. Although most solicitors believe that the sheriffs do know and apply the rules, one sheriff court was criticised for not applying them consistently. Equally, in another sheriff court it was stated that in one action the case had proceeded directly from a CWH to proof, without a Chapter 33AA case management hearing. It was also observed that some sheriffs will not fix a proof without an Options Hearing even though Chapter 33AA allows a proof to be fixed from the case management hearing.

### *Differences in Local Practice*

3.43 Perhaps the most contentious aspect of solicitors' feedback was the lack of consistency in some sheriff courts. Although certain courts do seek, in so far as practicable, to ensure shrieval consistency in CWHs, this is not always the case due to scheduling and diary constraints. However, when this issue arose it was often in relation to cases heard in sheriff courts not included in the study, notably the experience of Glasgow practitioners in sheriff courts outside of Glasgow.

3.44 Continuity of sheriff was viewed as important. It enabled the solicitors to prepare for each CWH with an understanding of the key concerns highlighted by the sheriff earlier. It ensures that there is a focus on the key issues to be addressed without having to provide the background. More importantly, it enables the sheriff to see the clients. In addition to these practical concerns, all solicitors noted the importance of knowing how sheriffs will handle the hearing and apply the court rules. These factors are important for the solicitor because they inform the preparation before court appearances and the advice to the client about how the case will progress.

3.45 Linked to concerns over continuity of sheriff are variations in the application of the Ordinary Cause Rules. Solicitors noted that these differences could present difficulties for them, especially if they were not regular users of a particular sheriff court.

#### *Sheriff Clerks and the Civil Office*

3.46 Over half of the solicitors commented positively on the role of the sheriff clerks and the civil office. This was notable in the largest study court with solicitors commenting on the practical advice that experienced sheriff clerks can give when asked.

#### *Minute to Vary*

3.47 In cases where a final order disposing of the s.11 order case has been made and a party seeks to vary it, all of the solicitors interviewed said that they would lodge a Minute to Vary. This would then usually lead to a new CWH being fixed. It was considered by one legal practitioner that it would be useful to be able to counterclaim a Minute to Vary which is not possible under the current Sheriff Court rules. It was noted that a Minute to Vary could be lodged very soon after a decision in a case. Equally, as children grow and develop new interests they may want to change the terms of contact or residence.

3.48 Finally, 6 of the 9 solicitors considered that the use of CMH for s.11 Orders should be more widely used in family actions. It was suggested that it would be useful in divorce actions, specifically on financial settlements. This reflects similar suggestions by some of the sheriffs interviewed.

### Scottish Courts and Tribunals Service Data

3.49 A data extract taken from Case Management System (CMS) for the period 1 January 2015 until 20 September 2016 was provided by the Scottish Courts and Tribunal Service. This data extract provided information on Case Management Hearings (CMH). A second data extract was provided containing information on Child Welfare Hearings (CWH) fixed in the period between 1 January 2015 and 20 September 2016 (in actions in which a NID was lodged and which have a case registration date of 3 June 2013 or later).<sup>6</sup> The data extracts provided the following information:

- Number of cases in which CWH fixed in each sheriff court
- Number of CWH held in each sheriff court
- The most CWH in a single case for each sheriff court.
- Number of cases in which case management hearings fixed in each sheriff court
- Number of CMH held in each sheriff court
- The most CMH in a single case for each sheriff court.

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<sup>6</sup> Second data extract was received by the research team on 23 March 2017. Information from the data extract was used to update the CWH table on 24 March 2017. The data extract came with several caveats. The SCTS data provided on 23 March 2017 included the following notes and caveats:

1. The statistics only give a ‘snapshot’ of hearings fixed during an 18-month period. They do not therefore necessarily reflect the numbers of hearings that took place over the complete ‘lifetime’ of each case. The statistics do not include undefended actions in which Child Welfare Hearings may have been fixed following minutes for variation after decree. The statistics only record Child Welfare Hearings that were fixed and not those which proceeded; some may have been discharged on the day. Several separate hearings may have been recorded as a single “event” on CMS if they called in the same case on the same day.
2. Due to the Scottish Court Service restructuring the following Sheriff Courts have closed with their business moving to the respective Courts

End of January 2015

Closed Court

Dingwall Sheriff and JP Court

Duns Sheriff and JP Court

Receiving Court

Inverness Sheriff and JP Court

Jedburgh Sheriff and JP Court

3. Number of hearings per case was counted. The case with the highest number of Case Management/Child Welfare hearings is displayed per court.

Sheriff Court	Number of cases in which CWH fixed	Total number of CWH held	Average CWH in a single case
Glasgow	860	2656	3 (11)
Inverness	97	286	3 (12)
Jedburgh	42	108	3 (6)
Kirkcaldy	200	760	4(14)

**Table 2:** CWH volume by study courts

3.50 From the data extract it appears on close examination of the information for all study courts that the average number of CWH per case are significantly lower than the highest number of CWH recorded by the data. The highest number of CWH in a single case in each study court is given in brackets.

Sheriff Court	Number of cases in which CMH fixed	Total number of CMH held	Average number of CMH in a single case
Glasgow	154	212	1 (5)
Inverness	5	5	1 (2)
Jedburgh	4	5	2 (2)
Kirkcaldy	34	57	1 (6)

**Table 3:** Case Management Hearings volume by study courts

3.51 As with the figures for “most CWH in a single case”, care must be taken in the interpretation of this data due to the lack of contextual data to explain high numbers of CMH in individual cases. As noted by sheriffs, there may be a concern that solicitors are failing to hold the pre-hearing conference on time and to submit, as directed, the joint minute. However, there may be other considerations in the two outlier cases identified in Glasgow and Kirkcaldy. When the other data is considered, and when compared with other sheriff courts not included in the study the average number of case management hearings per case is 2, with a significant proportion of cases only having one CMH.

3.52 To see if those cases with high numbers of CWH in the sample data provided eventually progressed to a case management hearing, all of the cases with a large number of CWH

identified in Table 2 were cross-checked with those cases that went to a CMH. None of the cases with a high level of CWH went to CMH.

3.53 This raises the important caveat about the data that was raised during interviews. The individual circumstances of each CWH influence and shape the direction of the case. As noted by one sheriff there may, for very valid reasons, be a high number of CWH without the case ever requiring to go to proof, and by extension, not requiring a CMH. When looking at all the cases set for CMH across all of the study courts, on average only one CMH took place. In some cases, the figure of 0 is recorded for CMH. It is unclear if this means that one was set to be held but the parties settled the case before the date of the CMH.

3.54 When the cases that went to the most CMH were compared with the volume of CWH, it was noted that in one case with six CMH, only one CWH had taken place. This suggests that the nature of the matters in dispute may have been identified at the CWH as requiring to be dealt with at proof (i.e. and that a CMH was therefore fixed). However, without looking at the individual case and its circumstances this cannot be confirmed. However, when comparing other cases with over three CMH it was noted that there seems to be no correlation between many CWH and high numbers of CMH.

#### **4: DISCUSSION AND CONCLUDING COMMENTS**

4.1 To reiterate from section 1.7, the aim of this study was to:

- Evaluate how case management provisions are understood and implemented in the study courts.

The four study courts, identified by SCTS for this study were Glasgow, Inverness, Jedburgh and Kirkcaldy.

4.2 In achieving this aim, the following objectives (as set out in 1.9) were identified:

- To analyse a further data extract of case management hearings and CWHs.
- To gather and analyse views on whether the hearings prescribed in the rules facilitate or impede case management, and the extent to which, if at all, use of these hearings varies under different circumstances, such as court size and judicial continuity.
- To inquire into local practice in relation to proceedings in applications to vary a final decree.
- To gather and analyse views on what changes (if any) interviewees would like to be made to the rules to improve case management in family actions.

The following sections will summarise the findings of the study in relation to the objectives set.

##### *Experiences of Sheriffs, Sheriff Clerks and Solicitors*

4.3 Overall, the current system was viewed to be effective based on the views of these groups of actors in being able to manage family cases effectively. Further discussion on the actual process of case management provision accompanies the process flow chart in Figure 1.

4.4 Areas of good practice were evident across certain study courts. Two of the study courts referred to how they had met with the local bar on the introduction of Chapter 33AA, which presented clarity over what was expected.

4.5 One court also discussed the introduction of a note within case files that was completed by sheriffs hearing cases. This mitigated some issues around uncertainty over what had happened

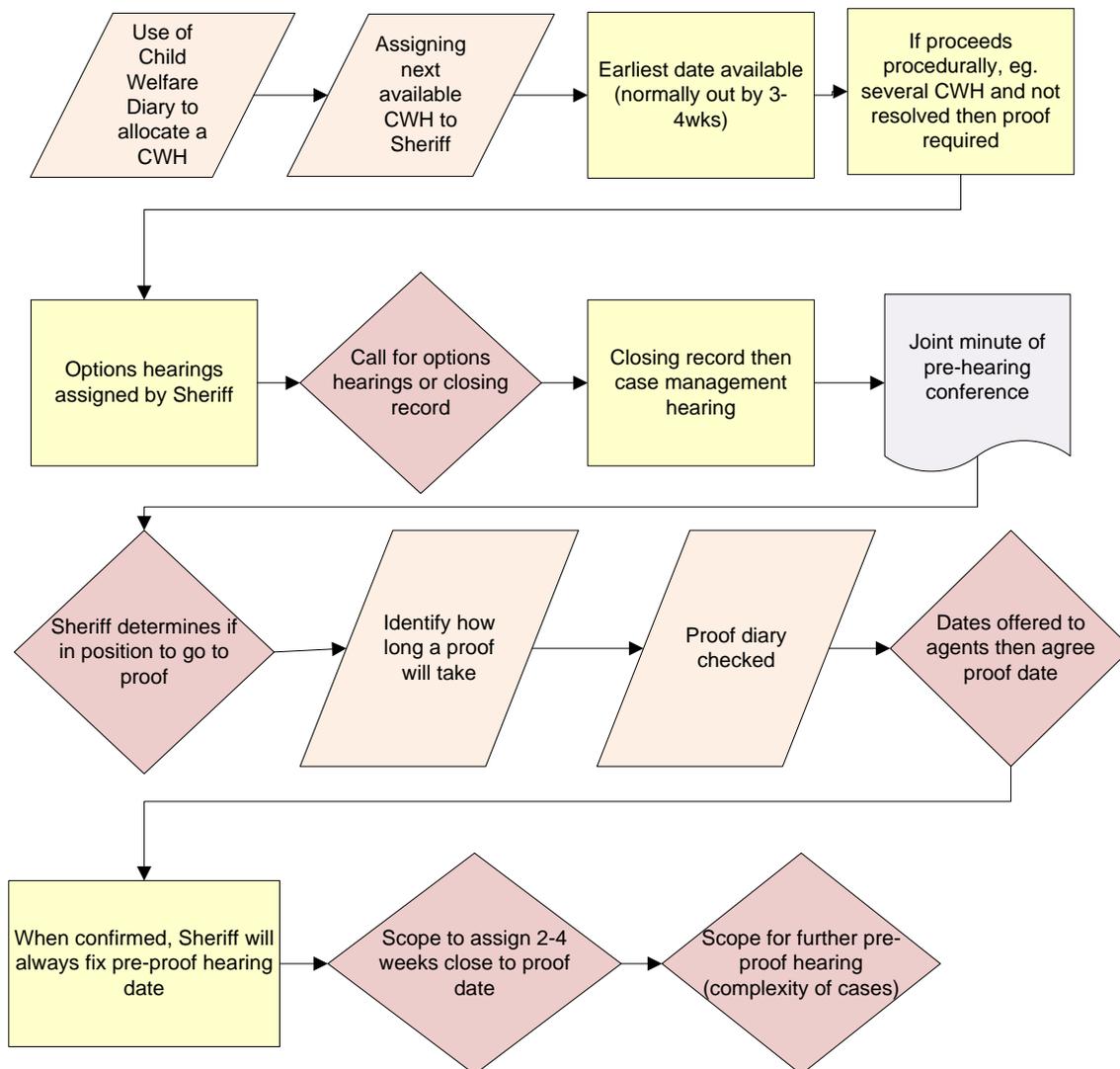
previously if a sheriff had not been involved in a case. This would be one way of addressing potential concerns over scheduling based on diaries, rather than an identified sheriff's availability, especially where it is not feasible to have dedicated family courts and sheriffs.

4.6 Limitations were identified. Training on new procedures and processes are communicated through notices sent to sheriffs and sheriff clerks. Where sheriffs have been proactive then time has been taken to discuss the implications of new rules. Where changes to clerks have been identified, e.g. for those arriving in post after the rules introduction, the view of '*muddling through*' was evident. A lack of desk training and regular training interventions may have implications for consistency of process.

4.7 Limitations also extended to the use of part-time sheriffs. No part-time sheriffs were interviewed as part of this research, although respondents highlighted issues in the application of the rules when cases were heard by part-time sheriffs. All courts discussed allocating CWH and case management hearings only to their full-time sheriffs to mitigate any of these issues.

4.8 For variation to final decree, 3 out of 4 courts would treat the case as a new case and start the process from CWH onwards. Only one court was discussed as following on by 'minute procedure' and there was uncertainty if the '*new rules*' set out under Chapter 33AA would apply to cases which pre-date their introduction.

4.9 From the sheriff clerk interview data, the researchers took the opportunity to provide a process flow map of what should happen from a CWH, through to where proof/proof before answer is required. Due to the sensitive nature of the data, this is being provided based on expected process rather than what happens at the individual study courts.



**Figure 1:** Process of Child Welfare and Case Management Hearings

4.10 Figure 1 provides a process flow of the expected CWH and Case Management Hearing (CMH) process, from the point where a CWH is scheduled. This data is mapped from interviews with sheriff clerks. Where courts had sheriffs dedicated to hearing family actions, diaries were used to allocate CWH. In smaller courts, family actions fell into general civil court scheduling. At all courts, scheduling was done on a sheriff diary availability basis so that work was spread equally.

4.11 One sheriff had indicated that there would be a maximum of five CWH before moving on to the case management procedure set out in Chapter 33AA. This was not consistent with all, as the nature of the case and complexity would inform the amount of CWH held. All of the sheriffs agreed there had been a limited number of case management hearings, with one court noting that moving towards Options Hearings ‘sharpened focus’ (as per section 3.8).

4.12 Challenges were raised around the joint minute in terms of bringing clients and solicitors together and how the joint minute was not funded by legal aid. Sheriffs sympathised with solicitors over legal aid constraints and the complexity of cases being managed. Despite these constraints, good practice had been discussed in separate sites where examples of joint minutes have been provided for greater consistency and effectiveness. However, one of the barriers to delays in the process was recognised by Sheriff Clerks as the failure of solicitors to produce joint minutes in time. This delay means that a further case management hearing has to be scheduled to ensure the production of the joint minute has taken place.

4.13 Options Hearings were discussed in various terms by interviewees. Sometimes it was noted that Options Hearings may have been forgotten about or there was confusion over this part of the procedure. This results in a move from CWH to CMH. As there is no consistency in sheriffs staying with cases, this can set the case back if one of the sheriffs is to hear a CMH but then realises the options hearing has not been held. Where that happens, certain sheriffs who endorse the use of Options Hearings will set the case back to the Options Hearing stage. The setting back of cases may also go some way to explain the quantitative data, detailing CMH by court, which lacks contextual detail.

4.14 As noted by the 9 solicitors interviewed, the number of cases in which CWH were fixed that went on to require or reach a point of requiring a CMH are very low. All the solicitors interviewed emphasised a preference to avoid unnecessary proofs or proof before answer citing cost, time and the emotional impact. 8 out of the 9 solicitors interviewed had experience of only one to three CMH. Only one had experience of more CMH but only marginally more than the others. This limited experience of CMH and its use was noted in two of the study courts. The CWH and CMH data further suggest that there is limited use of CMH, which those interviewed would argue reflects the individual circumstances of a case rather than a disregard for the provisions of Chapter 33AA.

4.15 Where discussions covered the process of moving towards proof, there were illustrations provided over sheriff control in this area, such as the types of witnesses, the amount and the use of affidavits so to avoid any delays in the process and this helps to limit the time and scope of the proof. As much of the work in the pre-proof stages should be done to support this, so that when a case reaches the proof stage, parties should be able to agree whatever they can.

### **Recommendations**

1: Training – although the sheriffs interviewed all were aware of and used the rules set out in Chapter 33AA, the research suggests that training on the rules and their interaction with other Ordinary Cause Rules, for example Chapter 28 and Chapter 33, should be provided. This could take the form of formal training offered to sheriff clerks through SCTS and also for Sheriffs through the Judicial Hub. This training would also provide clarity of process in how to manage a Minute to Vary as there was confusion over how this process would be managed and whether (depending on the date the action was originally raised) Chapter 33AA applied.

2: Option Hearings - the use of Options Hearings is the subject of variations in local practice in terms of whether they are fixed in cases that proceed to case management under Chapter 33AA. Rule 33AA.2(1)(a) does allow for a case management hearing to be fixed at an Options Hearing. Further consideration should be paid to the role of Options Hearings because of evidence highlighting the inconsistency in application, considering the points raised in sections 3.9 and 3.24.

3: Information - a note sheet was in evidence at one of the study courts and was in use to ensure information flows between sheriffs in situations where scheduling meant the same sheriff was not able to remain with the case. This is viewed as effective by sheriffs and sheriff clerks. Having notes of previous CWHs passed on to the next sheriff may go some way to alleviate solicitor concerns over the changing shrieval view of cases as noted in section 3.44. We recommend that this note is rolled out to sheriff courts as an example of good practice evident from this study.

4: Sanctions – overall sheriffs did not report any major problems with solicitors complying with Chapter 33AA. However, it was noted that at present there are no sanctions that they can

apply to ensure compliance, notably attending the pre-hearing conference, preparing and lodging the joint minute. Challenges with this have been noted (section 3.11). It was acknowledged that there could be a range of practical reasons for the delay and failure to lodge as directed by the court. Yet on occasion it would be useful for the sheriff to be able to sanction a solicitor.

5: Legal Aid – there is a need to clarify with the Scottish Legal Aid Board the position in terms of legal aid payment to cover the pre-hearing conference and preparation of the joint minute. This was raised as an area of concern by both solicitors and sheriffs.

6: Effectiveness – despite the inconsistencies, Chapter 33AA is viewed as an effective process for managing cases. The case management provision set out in Chapter 33AA is viewed as being suitable for other types of family actions but with a clear implementation strategy and clear process. This would minimize any ambiguities highlighted in this research with the process of managing Chapter 33AA.

## **APPENDICES**

### **A: OVERVIEW OF THE RESEARCH**

#### ***Initial work: October 2016***

For all research participants, the Research Team were guided by the ethical principles of anonymity, confidentiality and informed consent. Research integrity approval was obtained by the Research Team from their institution. A Risk Register was developed and maintained. Key potential risks were identified and actions to mitigate set out under two headings: Project Risks and Operational Risks.

Initial work included the analysis of the SCTS data (Quantitative data) and contacting potential research participants to raise awareness of the study. Working with the RAG, interview schedules for the sheriffs, sheriff clerks and solicitors were developed.

#### ***Qualitative interviews and analysis: November 2016 – February 2017***

Qualitative semi-structured interviews were undertaken with all participants. This allowed for previously unconsidered themes to emerge and inform discussions going forward. All interviews were transcribed by a qualified and experienced transcriber for analysis. Data was analysed thematically as the researchers were guided by the emergent themes in the research.

#### ***Reporting the Findings: January – March 2017***

Over half of the interviews were completed between November and December 2016. However, the absence of lawyer interviews for Glasgow meant that there was a delay. The Research Team met with the members of the RAG to discuss emerging findings and to discuss alternative approaches to address the lack of interviews with Glasgow practitioners. Another delay was the absence of one sheriff clerk and the need to identify an alternative participant. At this meeting, it was agreed that an initial draft report be prepared for 20 February 2017. Based on discussion of the research aims and objectives set out by SCTS/SCJC and as further developed in consultation a final report setting out the analysis of the court data supplied by SCTS and the interviews was provided in March 2017.

**B: INFORMATION SHEET FOR COURT PARTICIPANTS****CASE MANAGEMENT OF FAMILY ACTIONS**

I would like to invite you to participate in a research study being conducted on behalf of the Scottish Civil Justice Council.

1. I am a Law Lecturer at Edinburgh Napier University. My colleague, Dr Claire Lindsay, is a Lecturer in Operational Management at Edinburgh Napier University.

The aim of the study is to examine the use of case management in family actions in four study courts selected by the Scottish Civil Justice Council. These four courts were selected in order to gather information from courts that were different in size and geographical location.

2. You have been invited to participate in the study because you may be able to provide helpful insights from your knowledge, expertise and experience in family actions.
3. If you agree to participate in the study, you will be asked to take part in a face to face interview that should last approximately 45 minutes. The interview will be held at a location, date and time convenient to you. The interview will be semi-structured, based on topics and questions agreed with the Scottish Civil Justice Council. The interview will conclude by asking you for any other comments.
4. Your interview will be digitally recorded and later transcribed for analysis to ensure data quality. All of the transcribed discussion will be encrypted onto a word document on a USB, kept under lock. We may get in touch at some point in the future to discuss any points of clarification which may arise.
5. All information you provide is completely confidential. The anonymity of all participants will be preserved and information will not identify any participant in any way. No personal information that could reveal your name will be disclosed in draft reports or during the dissemination of research results. Your name will not appear in any publication resulting from this study. The research data will be analysed by the researchers alone. The findings of the study will appear in a report to the Scottish Civil Justice Council.
6. You have the option to decline to take part and are free to withdraw from the study at any stage.
7. If you would like to contact an independent person who knows about this project but is not involved in it, you are welcome to contact Dr Nicholas Grier, the Convenor of the Business School Research Integrity Committee, which has provided ethical approval for the work. His contact details are: [N.Grier@napier.ac.uk](mailto:N.Grier@napier.ac.uk) and 0131 455 4547.
8. If you have read this Information Sheet and you agree to be a participant in the study, please complete the Consent Form below which you should complete and send to me

electronically. You will be given another opportunity to ask any questions that you may have regarding the study at the interview.

**INFORMATION SHEET FOR LEGAL PRACTITIONER PARTICIPANTS**

I would like to invite you to participate in a research study being conducted on behalf of the Scottish Civil Justice Council.

1. I am a Law Lecturer at Edinburgh Napier University. My colleague, Dr Claire Lindsay, is a Lecturer in Operational Management at Edinburgh Napier University.
2. The aim of the study is to examine the use of case management in family actions in four study courts selected by the Scottish Civil Justice Council. These four courts were selected in order to gather information from courts that were different in size and geographical location.
3. You have been invited to participate in the study because you may be able to provide helpful insights from your knowledge, expertise and experience in family actions.
4. If you agree to participate in the study, you will be asked to take part in a face to face interview that should last approximately 45 minutes. The interview will be by telephone unless it is convenient to conduct a face to face interview. The interview will be semi-structured, based on topics and questions agreed with the Scottish Civil Justice Council. The interview will conclude by asking you for any other comments.
5. Your interview will be digitally recorded and later transcribed for analysis to ensure data quality. All of the transcribed discussion will be encrypted onto a word document on a USB, kept under lock. We may get in touch at some point in the future to discuss any points of clarification which may arise.
6. All information you provide is completely confidential. The anonymity of all participants will be preserved and information will not identify any participant in any way. No personal information that could reveal your name will be disclosed in draft reports or during the dissemination of research results. Your name will not appear in any publication resulting from this study. The research data will be analysed by the researchers alone. The findings of the study will appear in a report to the Scottish Civil Justice Council.
7. You have the option to decline to take part and are free to withdraw from the study at any stage.
8. If you would like to contact an independent person who knows about this project but is not involved in it, you are welcome to contact Dr Nicholas Grier, the Convenor of the Business School Research Integrity Committee, which has provided ethical approval for the work. His contact details are: [N.Grier@napier.ac.uk](mailto:N.Grier@napier.ac.uk) and 0131 455 4547.
9. If you have read this Information Sheet and you agree to be a participant in the study, please complete the Consent Form below which you should complete and send to me electronically. You will be given another opportunity to ask any questions that you may have regarding the study at the interview.

**C: CONSENT FORM**

**CASE MANAGEMENT IN FAMILY ACTIONS: RESEARCH CONDUCTED ON BEHALF OF THE SCOTTISH CIVIL JUSTICE COUNCIL**

**Consent Form for Participants**

- I have read the Information Sheet and this Consent Form.
- I have had an opportunity to ask questions about my participation.
- I understand that I am under no obligation to take part in this study.
- I understand that I have the right to withdraw from this study at any stage without giving any reason.
- I agree to participate in this study.
- I agree to the information obtained from my participation being used by the researcher for the purposes of this study.
- I agree that anonymous quotations of my participation may be used in any report on or publication of results from this research.
- I agree to the data obtained from my participation being used for any subsequent publications or conference presentations.

**Name of Participant:** \_\_\_\_\_

**Signature of Participant:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Researcher Contact Details**

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Telephone: 0131 455 4381

**D: OUTLINE FOR SEMI-STRUCTURED INTERVIEWS****FAMILY LAW CASE MANAGEMENT: Sheriffs****Background Only****Your Experience**

- 1 Before being appointed to the bench were you involved as a solicitor, solicitor-advocate or advocate in representing parties in family actions in the sheriff court?
- 2 How long have you been presiding over family actions in the sheriff courts.

**Section 2 – Case Management in Family Actions**

- 3 In your experience, what are the principal characteristics of ‘effective case management’ and ‘active case management’?
- 4 In your experience, would you consider that case management in family action operates effectively?
- 5 What factors contribute to case management in family actions operating effectively?
- 6 Are Case Management Hearings always fixed when required?
- 8 Do the Pre-hearing Conference take place?
- 9 Are the ‘case management tools’ (i.e. CWH, Options Hearing, Procedural Hearing and Case Management Hearing) used for active case management?

**Section 3 – Interaction with CWHs**

- 10 How often are procedural timetables dispensed with, thereby allowing for a succession of CWHs?
- 11 What other reasons are there for procedural timetables being dispensed with?
- 12 Are proofs sometimes fixed directly from a CWH?

**Section 4 – Other parties and their Representatives**

- 13 OCR 33.22A(5) requires the attendance of parties at CWHs except on cause shown. Is it practice in the court(s) for parties not to attend CWHs personally? If parties do not attend personally, why not?

- 14 To what extent do party litigants adhere to procedural timetables in family actions?
- 15 To what extent do parties' legal representatives adhere to procedural timetables in family actions?
- 16 Where there appears to be no prospect of the parties reaching agreement on the outcome of the case, are proofs fixed?

**Section 5 – Other comments**

- 17 What other comments would you make in respect of improving the arrangements and procedural rules for case management in family actions?

**Section 6 – Variation of Final Decrees**

- 18 If a party seeks a variation to a Final Decree, how do you deal with variation proceedings?  
For example, would you either fix a CWH or a case management hearing?

## **FAMILY LAW CASE MANAGEMENT: Sheriff Clerks**

### **Background Only**

#### **Your Experience**

- 1 How long have you been a Sheriff Clerk?
- 2 What areas have you worked in?
- 3 How long have you been a sheriff clerk in family actions?

### **Section 2 – Case Management in Family Actions**

- 4 After the introduction of Chapter 33AA of the Ordinary Cause Rules. What training was provided on the new case management requirements?
- 5 Can you recall how the new case management requirements were introduced?
- 6 In your experience, what are the principal characteristics of ‘effective case management’ and ‘active case management’?
- 7 In your experience, would you consider that case management in family action operates effectively?
- 8 Are Case Management Hearings always fixed when required?
- 9 Do the Pre-hearing Conference take place?
- 10 Are the ‘case management tools’ (i.e. CWH, Options Hearing, Procedural Hearing and Case Management Hearing) used for active case management?

### **Section 3 – Interaction with CWHs**

- 11 How often are procedural timetables dispensed with, thereby allowing for a succession of CWHs?
- 12 What other reasons are there for procedural timetables being dispensed with?
- 13 Are proofs sometimes fixed directly from a CWH?

### **Section 4 – Other parties and their Representatives**

- 14 To what extent do party litigants adhere to procedural timetables in family actions?

- 15 To what extent do parties' legal representatives adhere to procedural timetables in family actions?

**Section 5 – Other comments**

- 16 What other comments would you make in respect of improving the arrangements and procedural rules for case management in family actions?
- 17 Are there practical issues that impact on case management in family actions?

**Section 6 – Variation of Final Decrees**

- 18 If a party seeks a variation to a Final Decree, how do you deal with variation proceedings?  
For example, would you either fix a CWH or a case management hearing?

**FAMILY LAW CASE MANAGEMENT: Solicitors**

**Background Only**

**Your Experience**

- 1 How long have you been practicing law? What areas of law have you practiced and where?
- 2 How long have you been practicing family law?
- 3 In which sheriff courts have you conducted family cases, in particular, CWHs?

**Section 2 – Case Management in Family Actions**

- 3 How did you learn about the changes introduced by Chapter 33AA of the Ordinary Cause Rules and the new case management provisions in relation to s.11 orders?
- 4 In your experience, what are the principal characteristics of ‘effective case management’ and ‘active case management’?

Thinking about X Sheriff Court and your experience of case management .....

- 4 In your experience of X Sheriff Court, would you consider that case management in family action operates effectively?
- 5 What factors contribute to case management in family actions operating effectively?
- 6 Are Case Management Hearings always fixed when required?
- 7 Do the Pre-hearing Conference take place?
- 8 Are the ‘case management tools’ (i.e. CWH, Options Hearing, Procedural Hearing and Case Management Hearing) used for active case management?
- 9 Why are the ‘case management tools’ not used for active case management?

**Section 3 – Interaction with CWHs**

- 10 How often are procedural timetables dispensed with, thereby allowing for a succession of CWHs?
- 11 What other reasons are there for procedural timetables being dispensed with?
- 12 Are proofs sometimes fixed directly from a CWH?

**Section 4 – Other parties and their Representatives**

- 13 OCR 33.22A(5) requires the attendance of parties at CWHs except on cause shown. Is it practice in the court(s) where you sit for parties not to attend CWHs personally?
- 14 Why do parties not attend CWHs personally?
- 15 To what extent do party litigants, in your experience, adhere to procedural timetables in family actions?
- 16 To what extent do legal representatives adhere to procedural timetables in family actions?
- 17 Where there appears to be no prospect of the parties reaching agreement on the outcome of the case, are proofs fixed?

**Section 5 – Other comments**

- 18 What other comments would you make in respect of improving the arrangements and procedural rules for case management in family actions?

**Section 6 – Variation of Final Decrees**

- 19 In your experience, if a party seeks a variation to a Final Decree, how would X Sheriff Court generally handle the variation proceedings?

For example, would you either fix a CWH or a case management hearing?

**GLOSSARY**

Definitions are provided for the legal terms and acronyms contained in the report.

Action	Proceedings instituted by a person in a civil court.
Child Welfare Reporter	A professional person (solicitor or other) to whom the court may remit some aspect of a case for investigation or advice.
Contact	Communication between, or time spent together by, a child and parent who live apart from each other or a child and a person with whom the child is not living e.g. a parent, grandparent, other relative or other person; replaces the former term ‘access’.
Contact order	A formal order by a court regulating contact.
Crave	An outcome sought by any party in an action, specified in the initial writ or defences.
Curator <i>ad litem</i>	A person either entitled by law or appointed by the court to represent and protect the interests of a person lacking full capacity, including a child, for the purposes of a specific action only.
CWH	CWH, hearing with distinct procedural rules in a family action where one or more of the parties seeks an order regarding a child; the hearing is held in closed court with both parties to the action present and is intended to allow the judge to speak to the parties direct, identify the issues and establish how the issues are to be dealt with.
Decree	A final formal order from a court at the conclusion of the case.
Defences	The statement lodged at court by the defender outlining his or her position and sometimes also making his or her own craves for orders.
Defender	The party against whom a civil action is brought, who, if the pursuer’s craves are opposed lodges defences.
<i>Ex proprio motu</i>	On the court’s or sheriff’s own initiative.

<i>Form 9 (F9)</i>	Form of intimation in an action that includes a crave for a Section 11 order – it is a form that a child can complete and return to the Sheriff; a means available to obtain the child’s views.
Initial writ	The document by which ordinary civil proceedings in the sheriff court are normally initiated. This is lodged by the pursuer at the sheriff clerk’s office.
Interim	As applied to the ruling of a court, temporary or partial decision, e.g. for contact.
Interlocutor	An order of court made during the course of an action.
Interlocutor sheet	Part of the formal court process – document that contains chronologically all orders and directions made by the court during the course of an action.
Joint Minute	An application to court signed by both solicitors and possibly by the parties they represent stating an agreed position.
Motion	An application made in court for some subsidiary purpose during the course of an action.
Options hearing	Hearing during an action at which the sheriff will identify outstanding issues and consider the options for their resolution, for example by fixing a CWH or a proof.
Ordinary cause action	Relatively formal action initiated by initial writ in the sheriff court.
Process	Term used in civil procedure to denote all papers lodged with the court in respect of an action.
Proof hearing	Final stage of court proceedings at which a sheriff determines a case after hearing evidence.
PRR	Parental responsibilities and rights, which is shorthand for the terms used in the Children (Scotland) Act 1995, “parental responsibilities” and “paternal rights”.
Pursuer	The person bringing a civil action to court.

Reporter	The officer responsible for bring a case before children’s hearings panel.
Residence	Where a child lives or the rights of a person to determine this; effectively replaces the former term ‘custody’.
Residence order	A formal order by a court stating with whom a child should live or, if residence is shared, stating when the child is to live with each person.
SCTS	Scottish Courts and Tribunal Service.
Section 11 Order	An Order made under Section 11 of the Children (Scotland) Act 1995 in respect of contact or residence.
Sheriff	Judge in the sheriff court. They must have been qualified in legal practice for a minimum ten years and possess considerable court experience.
Sist	To stay or stop process in an action.
SLAB	Scottish Legal Aid Board – state funded body responsible for the use of public funds for the defence of criminal cases and for advice, assistance and representation in civil cases where the litigant is on low income.