CASE MANAGEMENT HEARINGS IN COURT OF SESSION FAMILY ACTIONS

Policy Proposal

1. To invite the Council to consider and approve a draft instrument (**Paper 8.1A**) which amends Chapter 49 of the Rules of the Court of Session ("RCS") by making provision for two hearings, namely a case management hearing and a pre-proof hearing.

Background and rationale

2. At its meeting on 13 February 2017, the Family Law Committee ("the Committee") considered the draft rules at **Paper 8.1A**, which were developed by the Court of Session Family Actions User Group ("the User Group"). The aim of the User Group is to provide a forum for discussion in which family law practitioners can highlight any practical or operational issues encountered in family actions in the Court of Session. A document outlining the purpose of the User Group and how it is distinct from the Committee is set out at **Annex A**, for information.

3. Over the course of three meetings in late 2016 and early 2017, the User Group considered a voluntary protocol that is currently used in Court of Session family actions. A copy of the voluntary protocol is set out at **Annex B** ("the protocol"). As members will note, the aim of the protocol is to facilitate case management.

4. The User Group proposed to the Committee that the two hearings referred to in the protocol should be provided for in the Court of Session Rules. It was recognised by the User Group that any additional case management provision would best be dealt with as part of the Committee's wider consideration of case management in due course. The Committee accepted the User Group's proposal and approved the draft rules.

Legal Advice

5. While the protocol has no formal status and is not binding, it is understood that the hearings it provides for take place in all family actions already. At present, when defences are lodged in a family action, the General Department (offices of court) notifies the family judge's clerk. The family judge is given sight of the summons and defences, and the clerk fixes an initial by order hearing.

6. The draft instrument provides for two hearings: a case management hearing (referred to in the protocol as an "initial by order hearing") and a pre-proof hearing (referred to in the protocol as a "pre-proof by order").

7. It is acknowledged that the draft instrument would formalise a situation whereby the rules that apply to Court of Session actions would differ from those that apply in the sheriff courts. However, it is understood that this is already the position in practice. The Committee accepted the User Group's submission that it would

provide greater clarity to Court of Session practitioners if the RCS more accurately reflected how family actions are actually run.

8. The Committee appreciates that the proposed changes to the RCS may only be an interim measure, and that further changes might be made further down the line (for example, if the Committee decides to align the rules that apply in the sheriff courts and in the Court of Session). On that basis, if members are content with the draft instrument, LPPO's view is that it would be appropriate for the rules to be made.

9. SLAB has been provided with a copy of the draft rules for consideration. SLAB's initial view is that the rules do not give rise to any concerns from a funding perspective.

Compatibility with SCJC guiding principles

Principle	**Compatibility**
The civil justice system should be fair, accessible and efficient	The proposed amendments introduce hearings that already take place under a voluntary protocol. Since the aim of these hearings is to facilitate effective case management and to help family actions run more efficiently, it is considered that this principle will be complied with.
Rules relating to practice and procedure should be as clear and easy to understand as possible	The proposal is to amend existing rules by making provision for two hearings. As such, a fundamental rewrite is not proposed. However, consideration has been given in the drafting process as to the extent to which the Rules Rewrite Style Guide can be applied.
Practice and procedure should, where appropriate, be similar in all civil courts	As noted at paragraphs 7 and 8 of this paper, it is recognised that the proposed amendments would formalise a difference that already exists in the procedures followed in the Court of Session and sheriff courts. Regardless of this, the changes are proposed for the time being on the basis that they will more accurately reflect what currently happens in practice. It is envisaged that the wider issue of case management will be considered by the Committee in due course, and that at that stage, there will be an opportunity to align the rules that

	apply across the courts.
Methods of resolving disputes which do not involve the courts should, where appropriate, be promoted	This principle is not applicable to the proposed amendments.

Links to other initiatives

10. As discussed above, the issues raised in this paper are linked to the wider work that the Committee will undertake in the area of case management in due course.

Implementation

11. It is envisaged that these rules will require minimum implementation in the form of ensuring that the judiciary and court staff are made aware of the changes. The Court of Session family judges and family clerk are already aware of and supportive of the proposals.

Consultation

12. There has been no public consultation in relation to this proposal. However, User Group members have indicated a wish to share the draft instrument with colleagues in the FLA (Family Law Association) and AFLA (Advocates' Family Law Association), and have been encouraged to do so. No comments have been received.

Recommendations

13. The Council is invited to consider and approve the draft instrument at Paper 8.1A and agree that it be submitted it to the Court of Session for consideration, subject to any stylistic or typographical amendment.

Lord President's Private Office/Scottish Civil Justice Council Secretariat

May 2017

ANNEX A

Family Actions User Group

The Family Actions User Group ("the User Group") was established in 2016 by the Lord President in response to Lord Brailsford's suggestion that it would provide a useful forum for discussion. In particular, Lord Brailsford considered that it would enable family law practitioners to highlight any practical or operational issues encountered in family actions.

The User Group is distinct from the Family Law Committee of the Scottish Civil Justice Council ("the FLC"), whose remit is concerned with: *'the power to make provision about the practice and procedure to be followed in the Scottish civil courts in relation to family actions and proceedings relating to children.'* Among other things, the FLC has a remit to keep the relevant civil rules under review, which involves the making and consideration of proposals for changes to court rules and the submission of draft rules to the Scottish Civil Justice Council. In the event that the User Group raises any issue which would entail a change to court rules, that matter would need to be referred to the FLC for consideration. The User Group would be entitled to make recommendations to the FLC for changes to the Rules of the Court of Session.

The purpose of the User Group is therefore to provide an informal forum for practitioners, counsel and clerks to exchange views in relation to any problems that arise from an operational or administrative perspective in Court of Session family actions.

The members of the User Group are:

Lord Brailsford, Chair

Lady Wise (alternate family judge)

Chrissie Stark, Outer House Clerk (clerk to Lord Brailsford)

Yvonne Anderson, Depute in Charge, Offices of the Court of Session

Rhona Adams, Morton Fraser

Lynda Brabender, Advocate

Janys Scott, QC

Shona Smith, Balfour & Manson

John West, SKO Family Law

Victoria Wilkinson, Drummond Miller

Secretariat: Inez Manson, Deputy Legal Secretary to the Lord President, Lord President's Private Office

ANNEX B

DRAFT PROTOCOL FOR FAMILY CASES IN THE COURT OF SESSION

1. Introduction

This is a Protocol established by the Family Law Judge, Lord Brailsford, after discussion with the Advocates' Family Law Association for the effective case management of family law cases in the Court of Session. It applies to cases currently proceeding under chapter 49 of the Rules of Court. The initial pilot scheme came into operation on October 17, 2012. The Protocol has since then been developed and refined. The Protocol is neither part of the Court Rules, nor a Practice Note. Participation might be said to be voluntary, but it represents the further development of systems to make litigation of family cases in the Court of Session more efficient and effective. The general view is that the scheme is working well. It may now be appropriate to suggest that the Protocol be incorporated into a Practice Note and consideration given to whether it may apply in the sheriff court.

2. Initial By Order hearings

2.1 The Family Law Judge will fix a by order hearing on a date as near as possible to three weeks (and save in exceptional circumstances no earlier than two weeks) after the date on which defences are lodged. The period of three weeks should be sufficient to allow parties to consider their respective positions in the light of the pleadings.

2.2 At the by order parties will be expected to give their preliminary positions on:

- The points capable of agreement.
- The issues in dispute between them.
- The nature of the documents they will wish to recover.
- The valuations that are likely to be required.
- Any other expert evidence that is likely to be required.

2.3 Parties are encouraged to present written notes dealing with the above matters. Such notes are particularly useful in cases of any complexity. These notes will be appended to the Minute of Proceedings on the basis that they represent parties' positions at the time of the by order.

2.4 If possible at least 7 days notice will be given of the date of the by order hearing (or any subsequent by order hearing) which will be fixed for a specific time on that date. In most cases a period of 30 minutes will be allocated for the hearing. It will be the responsibility of parties' solicitors to advise the clerk of the Family Law Judge if it is expected that 30 minutes will be insufficient.

2.5 Parties should address the court on any steps required to give children the opportunity to express views or to inquire into the facts and circumstances relating to children, whether by means of a bar report or otherwise.

2.6 An interlocutor allowing proof will be pronounced 14 days after defences are lodged (in terms of Rule of Court 49.33(2)), and the Keeper of the Rolls may automatically fix a four day proof. The by order hearing, if it takes place after a diet of proof has been assigned will give parties the opportunity to make representations about the period necessary for preparation of the case and length of the proof, and to move any appropriate motions in relation to the timing and days required for the proof. In cases where the by order hearing takes place before any proof is fixed representations may be made to the Keeper in advance upon the necessary duration and timing of the proof.

2.7 On its own initiative or at the request of a party or parties to the action, the court may fix a second or subsequent by order to ascertain progress in the preparation of the case and to consider any changes of position by the parties. Parties may apply for a by order hearing to the clerk of the Family Law Judge, but should ensure that any correspondence with the clerk is copied to all other parties.

2.8 There should, in any event, be a pre-proof by order (see 6. below), which should if possible be fixed at the initial by order.

3. Documents

3.1 It is recognised that the rule of court which allows productions to be lodged 4 weeks before proof can put enormous pressure on parties and may not be satisfactory in family actions. While a rule requiring productions to be lodged 8 weeks before proof would be welcome, steps can and should be taken under the current regime to alleviate difficulties.

3.2. Parties will generally be expected to identify and intimate the documents or classes of documents they wish to see as soon as practicable after the first by order hearing. Where such documents are held by parties or on their behalf it is expected that there will be an exchange of relevant documents on a voluntary basis by 4 weeks before the last date for lodging.

3.3 Parties should, where possible, exchange draft inventories of productions with a view to avoiding duplication in their inventories. They should consider whether it is possible to lodge a joint inventory of documents to which both parties will wish to refer.

3.4 Parties will be expected to confine productions to those that are relevant to the issues for consideration by the court. They will not generally be required to lodge documents in respect of matters that are agreed or admitted on record.

4. Experts

4.1 Parties will be expected to consider whether it is possible to appoint a joint expert to consider any particular aspect of the case.

4.2 Where parties cannot agree a joint expert, and both instruct expert reports they will be expected to use their best endeavours to exchange experts' reports at least 8 weeks prior to the proof, if it is intended that the expert's report and evidence will be relied on at proof.

4.3 It is recognised that there will be cases where only one party instructs an expert in the first instance. In such cases that report, if it is intended that it will be relied upon, should be disclosed at least 8 weeks prior to proof.

4.4 Where competing experts are to be led parties should, where possible, arrange a meeting between experts to take place at least 6 weeks prior to the proof to ascertain what matters can be agreed and what issues the court will be required to decide. They should then prepare and lodge a schedule listing the matters agreed by the experts and the issues the court will be required to decide.

5. Evidence

5.1 Parties should consider what steps should be taken to limit the extent of the oral evidence at the proof.

5.2 A Joint Minute should generally be prepared setting out facts that are agreed and do not require to be proved by evidence. Where appropriate parties should include a chronology of significant events. Unless otherwise ordered by the Family Law Judge it will be the responsibility of the pursuer to prepare a draft joint minute in the first instance for revisal by the defender.

5.3 Where affidavits or reports have been lodged they may be treated as all or part of the evidence in chief of the deponent or author.

5.4 It is recognised that the use of affidavits limits the length of proofs. There should however be care in selecting cases and witnesses within cases where use of affidavits is appropriate. In cases where credibility is an issue, or the court requires to form an impression about the witness personally, affidavits are unsatisfactory as a substitute for chief. If affidavit evidence is subjected to cross-examination then it will fall to be treated in the same way as oral evidence. If the deponent does not attend for cross this may imply either (a) that the evidence is accepted, or (b) that the affidavit should be treated as hearsay and taken into consideration by the court subject to any submission as to its competence, relevance and truthfulness (as mentioned in *Glaser v Glaser* 1997 SLT 456). Parties should endeavour to agree and advise the court which of these is the case.

5.5 Agents' attention should be drawn to the observations of the Inner House in *Luminar Lava Ignite v Mama Group* 2010 SC 310. It is recognised that the involvement of counsel in the preparation of affidavits should be limited to indicating the questions to be answered by the witness and, in relation to draft affidavits, areas for clarification.

5.6 Affidavits cannot usually be prepared until the pleadings are in final form and the productions are lodged. It is recognised that dealing with this in the 4 weeks prior to proof is difficult, reinforcing the point that a last date for adjustment and lodging 4 weeks before proof may be tight. However all affidavits should be lodged 1 week prior to the proof diet in order to allow the opposing party to decide whether it will be necessary to call the witness for the purpose of cross examination.

5.7 In cases where there is a claim for sharing of the net value of matrimonial property under section 9(1)(a) of the Family Law (Scotland) Act 1985, each party should lodge, at the outset of the proof a schedule of matrimonial property.

6. Pre-proof by order

6.1 There will be a pre-proof by order hearing about 8 weeks before proof and in any event no later than 6 weeks before the proof to ascertain:

- Whether the above steps have been taken and if the above steps have not been taken, to agree a timescale within which they will if possible be taken;
- The issues remaining for proof;
- In the event that agreement has been reached in relation to any issue, whether that issue may be disposed of by joint minute or by the granting or refusal of decree;
- What further issues may be raised in averments prior to the end of the adjustment period mentioned in Rule of Court 49.33(5);
- Whether it is necessary for the deponent of an affidavit or author of a report to attend court to give evidence in person.
- Whether there will be vulnerable witnesses at the proof and if so the special measures that are sought.
- If there are other considerations relating to witnesses, such as evidence by video link.
- Whether the days allocated for the proof remain appropriate as regards timing and length.

7. Notes

7.1 While this protocol may improve practice in the Court of Session in privately funded cases, it cannot be fully applied to legally aided cases as the necessary work is not funded.

7.2 This protocol is primarily directed to cases proceeding under chapter 49 of the Rules of Court. Adoption and permanence proceedings under chapter 67 have a dedicated procedure for case management. Practice in such cases will however be expected to conform, so far as possible, to the above.