



Law Society
of Scotland

Consultation Response

Case management of family and civil partnership
actions in the sheriff court

August 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Family Law sub-committee welcomes the opportunity to consider and respond to the Scottish Civil Justice Council (SCJC) consultation on the case management of family and civil partnership actions in the sheriff court. The sub-committee has the following comments to put forward for consideration.

Consultation questions

We have numbered the questions to correspond with paragraph numbers in the consultation questionnaire.

1. Do you agree or disagree with recommendation 1?

Agree.

Applying the case management procedures detailed in the report of the SCJC's Family Law Sub Committee to all family and civil partnership actions will simplify and consequentially expedite the court process for the parties involved. This expeditious approach reflects the court system's approach to looked after children.

2. Do you agree or disagree with recommendation 2?

Agree.

We agree with this recommendation in part. The proposal to front load case management – whilst also recognising the practical limitations of this – is welcomed. This should allow for earlier and more effective case management, all of which could assist with securing better and more consistent outcomes for children. However, there are some aspects of the specific proposals which are potentially problematic.

There is significant merit in allowing a sheriff the flexibility to assess the complexity of cases at an early stage in the court process. Recommendation 2 would enable a sheriff to be responsive to issues that may arise, for example by reallocating the case to the fast or proof track once it has commenced. The recommendations detailed also enable the court process to respond flexibly to the preparedness of the parties namely by allocating an additional case management hearing. Maintaining a separate child welfare hearing signifies the court approach to actions involving children and ensures that their best interests are not diluted by other discussions. However, the suggestion that these hearings should never be combined perhaps ignores their inter-relationship.

The level and extent of case management required in a section 11 action will be directly affected by interim decisions made by sheriffs, which are generally made at child welfare hearings. Given it is proposed that such case management hearings will occur in both the fast track and proof track, the removal of discretion from a sheriff to ever combine the hearings restricts the flexibility and discretion of the sheriff to make the most appropriate decisions for each individual case.

In relation to initial case management hearings, the proposal may cause difficulty in practice. While it is recommended that a sheriff still have discretion to fix child welfare hearings, the removal of the starting point for a child welfare hearing to be fixed in every s11 action is likely to lead to delay in the court considering interim orders and interim case management hearings being used by solicitors to seek interim orders in any event. If the court is unwilling to entertain such an approach, this will cause further delay. If the court does accept it, the practical effect of the change would be for these decisions will be made outwith the presence of the parties, which can be problematic in family cases. A better solution might lie in having the initial case management hearing (but only the initial case management hearing) automatically also set down as a child welfare hearing, and requiring parties to attend this. This would allow for the court to continue to make early, interim decisions where it feels it has sufficient information - which itself may affect the further case management required. The concern about the time cost of this is noted, but perhaps overstated. As noted, in every s11 case at present there is already a child welfare hearing. The court does already consider case management at the first hearing. The scope of decision making – the allocation of a track for a case – at an initial case management hearing is not likely to be particularly time consuming. In any event, that additional time is well invested to save future delay.

If a case is allocated to the “proof track” the proposal for the full case management hearing to occur within 28 days is unrealistic. In effect, given the purpose and requirements of the full case management hearing, a party would have four weeks to investigate and prepare their case to the extent that the sheriff is then satisfied that the case can proceed to proof. Under the present system, that timescale replaces the existing period of adjustment and associated procedure pre-options hearing as well as the period between the options hearing and the case management hearing under Chapter 33AA (normally a period of around 14 weeks or more). This makes no allowance for the wide variation in scope and complexity of cases requiring a proof and is inconsistent with the flexibility set out elsewhere in the rules for family cases which the sub-committee commends. This could lead to some cases requiring a number of continued full case management hearings, contrary to the intention of the rules. Instead, a provision that provided that the full case management hearing should be set for within 4-12 weeks from the date of the initial case

management hearing, taking account of the circumstances and complexity of the individual case would seem more realistic.

Lastly, the complete removal of pre-proof hearings seems unnecessary. These can still be useful tools for a sheriff and helpful to parties. The implication of paragraph (l) is that a case must be fully prepared before a proof is set. In some jurisdictions, this will cause substantial delay. Sometimes, a sheriff has to fix a proof when there are outstanding preparatory matters (for example an expert report) to allow progress.

3. Do you agree or disagree with recommendation 3?

Agree.

Reducing mandatory procedures will enable a swifter process and greater flexibility for the sheriff to set and amend the timetable as required.

Consideration should be given to making it mandatory for the sheriff to consider at the initial case management hearing whether these steps should be ordered, so that they are commonly and consistently used in cases where they are of value.

4. Do you agree or disagree with recommendation 4?

Disagree.

The requirement for six-monthly case management hearings in fast track cases is unnecessary. This presupposes that sheriffs do not already apply their minds to case management at child welfare hearings. Given the proposal to keep these separate (see comments relating to recommendation 2, above), this will simply create additional hearings with no obvious purpose. In fast track cases, the case management options available, which are largely aimed at ensuring a case is prepared to proceed to proof, are unlikely to be of value. The proposal that cases should only be sisted for time limited periods means that in every fast track case, there will now be either (a) a child welfare hearing or (b) a review of sist hearing. This should suffice to allow judicial control and avoid drift.

The need to justify the number of child welfare hearings – and, particularly, the implication of a threshold (four or five) as a cut off point requiring justification – runs contrary to the benefits of flexibility in such cases. Cases that need probation will already be allocated to the proof track, so this largely applies to the fast track. Experience of practitioners suggests that the ability to use a series of child welfare hearings to effectively manage a case to conclusion without the need for a proof is a critical tool available to the sheriff. The proposals run the risk of discouraging that use, and may lead to more cases proceeding to proof. This may lead to greater conflict between parties and a lesser focus on conciliation.

5. Do you agree or disagree with recommendation 5?

Agree.

6. Do you agree or disagree with recommendation 6?

Agree.

The proposal for abbreviated pleadings is welcomed, provided the rules make provision that a party must give clear notice in their pleadings of any line they intend to take at proof.

The wording of the Sheriff Principal's Practice Note No. 1 of 2018 for Glasgow and Strathkelvin for Children's Referral cases at para 4.21 is to be commended as a potential solution. That provides that "[n]o party will be allowed to lead evidence [at proof] or to follow a substantial line of enquiry without evidence not previously disclosed to the other parties and court, except with leave of the sheriff on cause shown."

7. Do you agree or disagree with recommendation 7?

Agree.

8. Do you agree or disagree with recommendation 8?

Agree.

9. Do you agree or disagree with recommendation 9?

Not sure.

There is an inherent tension in the principle of this recommendation, as against the response given to reassure the concerns raised by Scottish Woman's Aid. The concerns expressed justify careful consideration. In principle, given domestic abuse often includes coercive control of various forms, it is unacceptable for a victim of such abuse to be compelled to directly face his or her perpetrator (bearing in mind the court cannot access the truthfulness of such claims at the stage it is considering mediation, so must take these allegations at their highest).

The wording of the recommendation pre-supposes that a sheriff will refer a case to mediation. In practice, an interlocutor pronounced re this will normally provide that the sheriff 'ordains] parties to attend mediation. Such an order is just that, and must be complied with. If the power is to allow compulsion of parties to

attend then the issue above is live, and must be addressed as an exemption (and, indeed, there may be an argument against compelling parties who do not wish to mediate to do so). On the other hand, if the process is voluntary, then the power to refer becomes a blunt instrument. Parties can attend mediation without the sheriff referring them, if they wish.

A better solution – given the intention here is to encourage ADR – would be to require a sheriff at the initial case management hearing to raise ADR and ask parties for their views. The rules can provide that the sheriff should ‘encourage’ parties to access ADR, where it is appropriate, and they are willing to do so. ADR should also not simply be restricted to mediation and should include other resources (for example Parenting Apart classes).

10. Do you agree or disagree with recommendation 10?

Agree.

This recommendation has the potential to provide a sheriff with greater case management flexibility with the likelihood that the case will proceed at a quicker pace due to greater preparedness of the parties.

The rules already provide that expert evidence should only be used where necessary because opinion evidence from a skilled witness is only admissible where it is (amongst other things) necessary.¹ Amending the rules as proposed would simply reinforce this point. However, it is important if this is done that it properly expressed and understood that the sheriff is encouraging, and not compelling, the joint instruction of experts. A sheriff – including in adoption cases under the said practice note – has no power to compel parties to jointly instruct, nor to compel the disclosure of a report not being relied upon. That is for good reason. A party at common law has a right of litigation privilege. That right is absolute. That is based upon a longstanding recognition that a party should be able to prepare their own case without fear or risk of that private information being available to the other party. The sub-committee expressly recognise in the report that these proceedings are adversarial in nature. Any change that provides or implies a fettering of a party’s litigation privilege rights runs contrary to this, and is unlikely to be lawful.

11. Do you agree or disagree with recommendation 11?

Disagree.

While this is well intentioned, it does not take account of the important distinction between first and subsequent proceedings in the same case. The presently drafted rule 14 allows for minutes to vary to be dealt with summarily. A hearing will normally only take place when answers have been lodged. The rules allow for such proceedings to be determined summarily (the different permissible outcomes include the

¹ *Kennedy v Cordia LLP* [2016] UKSC 6

sheriff granting or refusing the minute at that first hearing). The imposition of the more detailed case management rules in every minute to vary takes away that flexibility, and may lead to sheriffs feeling obliged to allow probation or lengthy procedure in unmeritorious applications, which is unlikely to be in a child's best interests.

An alternative approach would be to vary rule 14 to allow a sheriff – in the event they feel unable to dispose of the minute at the first hearing – to determine to deal with the minute under the new procedure and to then allocate the case to either the fast or proof track, with the further procedure then determined under the new rule(s).

13. Legal Aid

Although there is no specific question on legal aid, we would take the opportunity to provide comments.

A significant proportion of family court actions in the sheriff court involve at least one party who is legally aided.

Since the introduction of Chapter 33AA on 3 June 2013 it is to be specifically noted that at no stage have the legal aid regulations been amended or otherwise updated to incorporate a specific payment for work being done under Chapter 33AA. Whereas the case management hearing in court is dealt with as court time and payment is available, specifically no pre-hearing conference meeting or minute to be provided thereafter is covered by legal aid payment. That essentially means that legal aid practitioners are not being paid for such work. Of course, that does not mean that the work is not being done, it just means that solicitors are not being paid for it.

That in itself must clearly have an effect upon (a) the amount of time a legally aided practitioner is spending in such a conference; (b) the likelihood of it achieving success; (c) the information provided within the pre-hearing note.

This is acknowledged in the report of the SCJC's Family Law Committee's Subcommittee on case management in family actions at para. 2.13, page 10. Although the rules for Chapter 33AA were introduced as long ago as June 2013 no payment has ever been allowed for the non-court attendance.

To ensure efficiency and compliance with any new provisions for case management (and for these to work properly) it would seem essential that legal aid was in place to cover the work such that practitioners were not being expected to do this work for free.

There are various other areas whereby the way in which a family action currently runs simply does not fit in with the legal aid structure. It is imperative that any new rules that are created that come along with legal aid provision allowing for payment.

For instance, at present if a case proceeds through child welfare hearings but there is no options hearing then what is referred to as the progress fee for legal aid is not paid. It may well be that a significant amount

of work or an amount equivalent to a case going through options hearing is done but no payment can be made.

That clearly has to be compared and contrasted with the privately funded litigant who will be paying for all steps in progress.

It is noted that a recommendation is that an options hearing will no longer be held in family and civil partnership actions. If that is going to be the case, then moving forward, the legal aid payment regime would have to be drastically altered to cover this. It would seem to be absolutely imperative that work in preparation of the initial case management hearing and further case management hearings be paid.

The recommendations clearly also look towards swift and expeditious progress of cases. Again, as family practitioners, there is absolutely no difficulty with that but at the same time there has to be an acknowledgement of the length of time that legal aid applications can take, particularly where an applicant is in employment. It is understood that the time period for a civil legal aid application to be granted is thirty working days, around six weeks. That time period only starts on receipt by the Scottish Legal Aid Board (SLAB) of a full application. That means all relevant financial information that has been asked for by SLAB must have been provided by that stage. In practice, a civil legal aid application for someone in employment or who has multiple sources of income can take many months.

Accordingly, where there is an issue of fast-tracking cases consideration will have to be given as to how legal aid could be fast-tracked.

Likewise, in cases that are sisted and involve a review of sist hearing, if the case has been sisted for legal aid, then there would need to be some form of emergency legal aid made available for such hearings. It may also be of assistance if information for those hearings could be obtained via the sheriff clerk from SLAB as to when legal aid may be made available and any difficulties (if encountered).

It is also noted in recommendation 13 that the committee should liaise with the Scottish Government and SLAB. We hope that this will be broadened to include engagement with civil legal aid solicitors. It is practitioners that, in accordance with clients' instructions, will be using the system. The Law Society of Scotland would be happy to provide input from the practitioner/users perspective.

14. Do you have any comments on:

(i) whether there should be a “fast track” for cases without a crave for an order under section 11 of the Children (Scotland) Act 1995?

(ii) the nature of the hearings or procedure that should apply in a “fast track” for cases without a crave for an order under section 11 of the Children (Scotland) Act 1995?

We do not believe that this procedure is necessary. The essence of the fast track is to monitor matters pending child welfare hearings. Child welfare hearings serve no purpose and cannot occur in non-section 11 cases. Given the proof track envisages early and effective case management before a proof is fixed, this would seem sufficient for other cases (such as financial provision)

15. Do you have any additional comments?

Two issues permeate the whole process of family justice and it is important to bear each in mind.

Hearing the voice of the child

The United Nations Convention on the Rights of the Child (CRC),² Article 12(1) requires respect for the child’s right to express his or her views freely in all matters affecting the child and to have those views given due weight, in the light of the child’s age and maturity. Article 12(2) expands on that general obligation, guaranteeing the child’s right to be heard in all judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body. The United Nations Committee on the Rights of the Child (UNCRC) elaborated on its view of what these obligations entail in numerous General Comments, particularly in General Comment 12³ and General Comment 14.⁴ In particular, the UNCRC emphasises the importance of child-friendly procedures that give children and young people meaningful opportunity to express their views.

The United Kingdom ratified the CRC in 1991 and Scots law makes strenuous efforts, in statute, to respect what have come to be known as the child’s ‘participation rights’: in the family setting;⁵ in family-related

² 1577 UNTS 3; (1989) 28 ILM 1448.

³ *General Comment No 12: The right of the child to be heard* (2009), CRC/C/CG/12.

⁴ *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) (2013), CRC/GC/2013/14.

⁵ Children (Scotland) Act 1995 s.6.

court proceedings,⁶ and in the child protection and children's hearings context.⁷ There are, however, very real concerns over the extent to which children are, in fact, listened to in the family setting⁸ and whether the mechanisms for hearing their voices in court proceedings,⁹ in the child in the child protection context¹⁰ and in children's hearings are as effective as they might be.¹¹

The SCJC will, of course, be aware of the issues since it is taking steps to ensure that children's rights are respected in court proceedings. However, we would draw attention to the following contexts where there are particular challenges in ensuring respect for children's and young people's participation rights:

- Parental agreement

While parental cooperation is highly desirable and, indeed, the solution agreed by parents may be the only practical option, it is essential that parents respect the child's participation rights in the course of reaching agreement and that the legal system ensures they have done so.

- Mediation

While mediation and other forms of ADR have much to offer in appropriate (but not all) cases, care should be taken to ensure that the child's voice is heard in the process. In this, child inclusive mediation has much to offer.

- Judicial continuity

Judicial continuity is of considerable importance in facilitating the child in expressing views throughout the course of a case and in ensuring that those views remain central to the decision-making process.

- Expert witnesses

While expert witnesses have much to offer, they are no substitute for hearing from the child.

- Training

All legal personnel would benefit from training in child development.

- Reviewing the number of child welfare hearings

⁶ Children (Scotland) Act 1995 s 11(7)(b).

⁷ Children (Scotland) Act 1995 s 16(2) and the Children's Hearings (Scotland) Act 2011 s 27.

⁸ Elaine E. Sutherland, *Listening to the Child's Voice in the Family Setting: From Aspiration to Reality* (2014) 26 *Child and Family Law Quarterly* 152.

⁹ Kirsten Mackay, *A Plea from Scotland: Preserving Access to Courts in Private Law Child Contact Disputes* (2013) 25 *Child and Family Law Quarterly* 294.

¹⁰ Susan Elsley, E Kay M Tisdall and Emma Davidson, *Children and young people's views on child protection systems in Scotland* (Edinburgh: Scottish Government Social Research, 2013), at [5.6]-[5.8], [5.16] and [5.45].

¹¹ Following a report by the Children's Hearings Improvement Partnership that highlighted common ground between children and practitioners on ways to improve the hearings system, *The Next Steps Towards Better Hearings* (Edinburgh: Children's Hearings Improvement Partnership, 2016), the Education and Skills Committee of the Scottish Parliament recommended steps that could be taken to improve children's participation in children's hearings: *The Children's Hearings System – Taking Stock of Recent Reforms* (Scottish Parliament Education and Skills Committee, 2017), at [140]-[150].

A child's views may change over time and it is important that listening to the child is an on-going process and not something that is done once, then forgotten, particularly in cases that take some time to resolve.

- Fast tracking of cases

It is important to ensure that efficient handling of cases is not achieved at the cost of listening to the child's views.

Consideration should be given to whether the rules should prescribe that at the initial case management hearing and at every subsequent hearing, the sheriff should (a) have to the requirement to allow the child the opportunity to express a view, in terms of s11(7); (b) give consideration to how that is best achieved, both now and during the currency of the litigation; and (c) give consideration to whether the sheriff requires to take any further steps to allow the child to effectively participate in the process, where appropriate and desired.

Ensuring that survivors/victims of domestic abuse are protected

Scots law has made considerable progress in addressing domestic abuse. Despite that, domestic abuse remains a significant problem in Scotland.¹²

If we are to make progress in tackling this problem, it is essential that we develop our understanding of domestic abuse and the inherently controlling nature of domestic abusers.¹³

One way in which domestic abusers may exploit the legal system is by misuse of the legal process, a phenomenon that has attracted growing academic attention comparatively recently. It manifests itself when the abuser uses the courts or other state agencies as a means of continuing to harass the survivor, and tactics include "filing frivolous lawsuits, making false reports of child abuse, and taking other legal actions as a means of exerting power, forcing contact, and financially burdening their ex-partners".¹⁴

¹² In 2016-17, 58,810 incidents of domestic abuse were reported to the police in Scotland, an increase of 1% on the previous year *Domestic Abuse Recorded by the Police in Scotland, 2016-17* (Scottish Government, 2017). The statistics do not reflect the true magnitude of the problem since only a fraction of abusive incidents are actually reported and what is recorded as domestic abuse encompasses only some abusive behaviour.

¹³ Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford: Oxford University Press, 2007).

¹⁴ Susan L. Miller & Nicole L. Smolter, 'Paper Abuse': *When All Else Fails, Batterers Use Procedural Stalking* (2011) 17 *Violence Against Women* 637, 637.

A facet of the coercive control dynamic at play in domestic abuse, this conduct has been characterised as “abusive litigation”¹⁵ “paper abuse”,¹⁶ and “custody stalking”¹⁷. While much of the research and scholarship comes from the US, the problem has garnered attention in Australia,¹⁸ Canada¹⁹ and a recent study from New Zealand highlighted the problem there.²⁰

Conclusion

The issues of seeking a child’s views, and the impact and influence of domestic abuse, are important factors that are relevant across the family justice system and should be given significant consideration when reviewing the procedures and practices in family court actions. These will be key issues when assessing the best interests of the child.

¹⁵ David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation against Domestic Abuse Survivors* (2015) 14 *Seattle Journal for Social Justice* 429.

¹⁶ Miller & Smolter, *op. cit.*

¹⁷ Vivienne Elizabeth, *Custody Stalking: A Mechanism of Coercively Controlling Mothers following Separation* (2017) 25 *Feminist Legal Studies* 185.

¹⁸ Emma Fitch and Patricia Easteal, *Vexatious litigation in family law and coercive control: ways to improve legal remedies and better protect the victims*, (2017) 7 *Family Law Review* 103.

¹⁹ Esther L Lenkinski et al., *Legal Bullying: Abusive Litigation within Family Law Proceedings* (2003) 22 *Canadian Family Law Quarterly* 337.

²⁰ Elizabeth, *op. cit.*

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