CHILDREN (SCOTLAND) BILL
CONSIDERATION BY THE FAMILY LAW COMMITTEE OF THE SCOTTISH CIVIL JUSTICE COUNCIL OF RULES ON CASE MANAGEMENT IN FAMILY AND CIVIL PARTNERSHIP ACTIONS

We promised at the Stage 1 oral evidence session on 25 February 2020 on the Children (Scotland) Bill to give an update on the work of the Family Law Committee (FLC) of the Scottish Civil Justice Council (SCJC).

There was a public consultation by the SCJC on case management in family and civil partnership actions in 2018. After the consultation, the SCJC also published responses it had permission to publish and a consultation report (i.e. an analysis of the responses). All of these documents are at: https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations

The consultation was based on a report by an FLC subcommittee. This report is at https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-5-1a---report-by-flc-sub-committee-on-case-management-in-family-actions

The consultation provided the background on the circumstances that led to the formation of the subcommittee. These circumstances include a UK Supreme Court judgment in the case of NJDB v JEG https://www.supremecourt.uk/cases/uksc-2011-0173.html which raised concerns about delay in sheriff court proceedings relating to the welfare of children; research commissioned by the FLC into the operation of Chapter 33AA of the Sheriff Court Ordinary
The report by the FLC subgroup made a total of thirteen recommendations on how to improve the case management of family and civil partnership actions in the sheriff court.

The recommendations included:

- A new case management structure for all family and civil partnership actions in the sheriff court, not just those with a crave for an order under section 11 of the Children (Scotland) Act 1995;
- allocating actions to a “fast track” or “proof track” procedure, as appropriate;
- greater judicial control over the sitting of family and civil partnership actions;
- the adoption of abbreviated pleadings and more detailed witness lists;
- judicial continuity insofar as possible;
- provision allowing all family and civil partnership actions to be referred to mediation; and
- greater judicial control over the use of expert witnesses.

After the consultation closed, the FLC decided that the responses should be considered by its subcommittee or a new sub-group (please see the minutes of the FLC meeting on 8 October 2018 – paragraphs 22 and 23 refer

The subcommittee was subsequently reconvened. The FLC then considered the subcommittee’s work at its meeting on 25 March 2019

The FLC’s meeting on 8 July 2019 provided an outline of what the new rules could look like. The minutes of this meeting are at

Key points are:

- Chapter 33AA will be removed from the Ordinary Cause Rules;
- there will be an Initial Case Management Hearing (ICMH) in family actions.
- there will also be a full Case Management Hearing (FCMH) where there is a crave for an order under section 11 of the Children (Scotland) Act 1995;
- the rules will allow for further FCMHs where necessary, to be fixed for no more than 6 months later;
• the Sheriff will have the option to send cases to proof at an early stage. [However, the intention now is not to proceed with the previous proposal that cases be allocated to a to a “fast track” or “proof track” procedure];
• there will be a checklist of matters to be considered at both the ICMH and FCMH;
• sists will be for a finite period of time;
• witness lists will require a brief outline of matters to which each witness will speak to;
• provision will be made that there should be judicial continuity where this is feasible and practical (and noting that it may not always be appropriate for a sheriff who has dealt with Child Welfare hearings in a case to also preside over a proof in that case);
• provision will be included in the rules on the unnecessary use of expert witnesses;
• one of the points which should be considered at an early stage of proceedings is whether the case may be suitable for alternative dispute resolution;
• the Scottish Government agreed to provide a policy paper on whether Ordinary Cause Rule 33.22, which empowers the sheriff to send a section 11 case to an accredited family mediator, when appropriate, should be extended to all family and civil partnership actions. This policy paper is mentioned in the Family Justice Modernisation Strategy (FJMS) at https://www.gov.scot/publications/family-justice-modernisation-strategy/pages/9/ (paragraph 7.20). As paragraph 7.20 of the FJMS says, this policy paper will take account of domestic abuse as outlined in paragraph 4.27 of the FJMS. The Scottish Government intends to send this policy paper to the FLC for its next meeting. The policy paper will be open (i.e. published on the FLC’s website) in line with all policy papers sent by the SG to the FLC;
• the changes to case management rules might have implications for legal aid regulations and for court fees.

It has been decided that points on abbreviated pleadings should not be taken forward at this stage.


In terms of when revised rules might be in place, you will appreciate this is not in the Scottish Government’s hands as it depends on when meetings of the FLC take place and on discussions at these meetings. We have checked with the SCJC Secretariat on when the next meeting of the FLC is likely to happen. There is no firm date yet but we understand the next meeting is likely to take place in late Spring.

I would hope that the next meeting of the FLC should be able to make significant progress. Once the FLC has approved draft rules, they then go to the full SCJC for approval. If approved there, an Act of Sederunt containing the draft rules is laid before Parliament. I would hope that new rules could be in place by the end of 2020.

As well as the draft rules themselves, we will need to consider, as indicated above, any implications for legal aid (which the Scottish Government would need to discuss with the Scottish Legal Aid Board) and for court fees (which the Scottish Government would need to
discuss with the Scottish Courts and Tribunals Service). I would intend that we start considering these points in detail at the next meeting of the FLC.

I hope this is helpful. The Scottish Civil Justice Council have confirmed they would be happy to assist with any further inquiries the Justice Committee may have in this area.

I am copying this letter to the Scottish Civil Justice Council secretariat.

ASH DENHAM