

RESPONSE

by

THE ADVOCATES FAMILY LAW ASSOCIATION (“AFLA”)

to

SCOTTISH CIVIL COURTS REVIEW CONSULTATION

GENERAL

The Advocates Family Law Association is one of a number of special interest groups within the Faculty of Advocates. Our members are all advocates who specialise primarily in the practice of Family Law and who have an interest in the development of the law in that area. This Response has been prepared by the Chair and Secretary of the Association following a general meeting of members at which the various issues were discussed and many members contributed. It has been circulated to the other Office Bearers of the Association.

We intend to address only the questions within the Consultation Paper that appear to us to impact on the particular area of civil practice that we have experience of and in consequence of which we feel able to comment.

CHAPTER 1: INTRODUCTION

Question 1

Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?

The view of our association is that early resolution of disputes is almost always preferable to protracted and expensive litigation. While there will always be a “hard core” of cases that cannot resolve without judicial determination, most family disputes are capable of resolution, or at the very least, a narrowing of the issues in dispute.

To a large extent, family lawyers are already self regulating with a view to resolving disputes extra judicially. It is unusual for a Family Action to be raised without there having been a process of pre litigation negotiation, perhaps even formal Mediation or an attempt at a collaborative approach. Where litigation is raised without such alternative efforts to resolve matters, it tends to be because of the urgency of the matter (e.g. the threat of a child being abducted or of assets being taken out of the jurisdiction) or because there is an unresolved issue of principle that may require to be decided judicially. Even then, discussions and negotiations are likely to be ongoing throughout the case.

The Association is of the view that the civil justice system could encourage further the use of extra judicial methods of negotiation in Family Actions by (i) introducing or extending training for sheriffs and judges in Mediation, Collaborative Law and Arbitration, (ii) including in the rules of court a provision that requires sheriffs and judges to make enquiries at an early stage of a dispute about what pre litigation alternative dispute resolution methods, if any, have been adopted and (iii) extending the existing Rules of Court (RCS 49. 23 and OCR 33.22) so that parties may more routinely be referred to Mediation or a similar service in all types of Family Actions if the court is not satisfied that appropriate attempts to resolve matters have been made. These three suggestions are clearly inter-related, in that suitable training will give the judiciary a greater understanding of the processes to which they may in due course refer parties.

If such mechanisms were in place, it seems to us that it may well lead to an even smaller number of disputes finding their way to court, as advisers will be aware that if they have not made sufficient attempts to avoid litigation, they will require to answer to that in court early in the proceedings. Thus changes within the current court structure itself can be used to support resolution mechanisms that prevent disputes coming within its ambit unnecessarily.

CHAPTER 2: ACCESS TO JUSTICE

Question 3

To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?

In our experience, most litigants desire legal representation and represent themselves only where funding is an issue. There are of course exceptions and recent experience in England suggests that even high value “celebrity” divorce cases can involve party litigants. Generally, conducting litigation without legal representation in Family Actions will occur in low value cases or in child matters where a party has been unable to obtain legal aid but cannot afford to fund an action privately. Where these situations arise, it is important that the party representing himself is assisted in matters of form and procedure, so that the action progresses as smoothly as it can in the circumstances. The current position is that such assistance is given as a matter of course, by court staff and to some extent by those representing the opposing party.

A rule that representation be compulsory in all cases would in our view lead to difficult issues about funding, the nature and quality of that representation and the possibility of representatives being ordered by the court to provide advocacy services. It seems to us that there is no justification for the introduction of such a rule.

However, neither does it seem appropriate to widen the scope of lay representation. Members of our Association often hear positive feedback from the judiciary on an informal basis in relation to the quality of legal representation and the significant assistance it affords the decision maker, particularly in sensitive cases. Most Family Actions involve issues of personal and significant importance to the parties involved. A party litigant will often find themselves cross examining their spouse or partner. Such situations should be the exception rather than the rule.

The spectre of a party cross examining a family member raises the issue of whether, in the event that a party litigant is involved in such a case, it would be better if they could have assistance from and be represented by someone without a right of audience, a “Mackenzie Friend”. While superficially attractive, we consider that there would be

considerable difficulties in introducing such a scheme. If it was to be introduced, some of the issues that would require to be addressed include:-

- ❖ What qualifications and/ or experience in the law, practice and procedure of the courts, if any, would the person assisting the party require?
- ❖ Unless funding was in place to provide basic training for those assisting litigants in this way, they may be of less assistance to the court than the party himself. They may have a vested interest in the case on behalf of a special interest group. For example should a committee member of a group such as “ Families Need Fathers” be permitted to represent a number of individual fathers in child contact cases?
- ❖ At what stage in the litigation would the assisting party first appear? For example in a child case in the Sheriff Court, could such a person appear at a Child Welfare Hearing to speak for a party who felt they weren't articulate enough, or would such assistance be limited to a proof or similar hearing?

The view of the Association is that adding a layer of non legal representation to the existing system may create as many problems as it appears at first blush to solve.

CHAPTER 3: THE COST AND FUNDING OF LITIGATION

Question 6

To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?

The relationship between the availability of legal aid and the number of party litigants is apparent and that relationship is particularly direct in family actions. A party who cannot obtain funding to pursue a claim for breach of contract might drop the matter. A party whose former partner has taken their child to live in another home and is denying contact to the child less likely to give up for lack of funding.

There can be no doubt that the availability of legal aid provides and enhances access to justice. The current system of requiring to show “*probabilis causa litigendi*” to support an application for publicly funded litigation works well.

However, some of the current legal aid rules can result in a restriction of access to justice. For example, the provisions of section 17(2A) of the Legal Aid (Scotland) Act 1986 and relative regulations relating to financial provision on divorce actions, require an assisted person to pay to the legal aid board everything recovered in the action over a certain sum (currently £4,500) in order to meet their legal expenses. In other types of civil actions, clawback provisions have little effect as a successful Pursuer will almost always be awarded the expense of the action. In Family cases this rarely happens. The rule that expenses follow success is not applied in its full rigour in divorce actions (*Little v Little 1990 SLT 785 at 789*) and even where a Pursuer has been successful in obtaining awards in excess of any offer made by the Defender during the litigation, expenses prior to Proof are unlikely to be included in the award (*Sweeney v Sweeney 2007 SC 396*). In practice, full awards of expenses are very rare. Thus a party who obtains a capital sum in a financial provision on divorce case either on settlement or after proof will almost certainly require to pay that sum to the legal aid board to meet their expenses in the first instance. Many parties are understandably reluctant to embark on a litigation where this is the most likely outcome. The party holding the funds or property in dispute is far better placed to litigate.

CHAPTER 4: THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

Question 1

Do you agree that the conduct of the civil business of the courts is adversely affected by the pressure of criminal business?

In our experience, the pressure of criminal business can adversely affect the conduct of civil business both in the Court of Session and in the Sheriff Court.

In the Court of Session, we are aware of occasions when no judge has been available to hear either a proof or an unallocated motion in a family action. However, it appears from practical experience that since January 2008, the allocation of civil business has improved. On a number of occasions in 2007, there were insufficient judges available to deal with proofs or the judges who were present on the Tuesday morning were not available for the whole week or the number of days for which the proof was allocated. However, experience suggests that since January 2008, proofs set down to run have been allocated to judges although there have been instances when a judge has not been available for all of the days set down for the case.

There appear to be increasing difficulties with allocation of business in the Sheriff Court. There is no certainty that a Sheriff will be available to hear a proof on the date for which it is fixed as frequently other business takes priority. We understand that in some smaller courts, a Sheriff will have to deal with civil and criminal business on the same day which means that less time is available for civil business. However, the lack of certainty as to whether a Sheriff will be able to hear the proof on the allocated date has even begun to give rise to an expectation that it is more likely than not that the proof will not go ahead.

This is of particular concern in family actions where parties await the final determination of the issues between them to allow them to plan for such practical issues as where they are going to live, where their children will be schooled and how they will be able to sustain themselves financially in the future. Clients do not understand why a proof is fixed for a particular date if no Sheriff or judge will be available to hear it.

As noted in the consultation paper, a difficulty in smaller Sheriff Courts is that a diet of proof will be set down for no more than one day. This means that proofs can extend over lengthy periods of time. Again, this is detrimental in family actions, where parties are in a state of “limbo” whilst the proceedings continue. It is recognised that this may be due to a lack of court accommodation in smaller Sheriff Courts – i.e. only one court could be sitting at any one time. However, this could be resolved by remitting the action to a larger court in the Sheriffdom with more accommodation, as long as it is still convenient for the parties and witnesses to attend. However, even where a proof is allocated for a longer period, there are occasions when the Sheriff allocated to hear it is actually unavailable for the whole of the diet.

Even in the larger courts, there is pressure on court accommodation from criminal business – for example, in Edinburgh Sheriff Court, courts previously used for proofs, particularly in cases of freeing for adoption or parental responsibilities orders, have been converted for use as the district court. This has limited the number of proof courts available. It is likely that this will have the result that parties will have to wait longer for diets of proof.

In both the Sheriff Court and the Court of Session, criminal business such as deferred sentences or bail appeals will often be dealt with at the start of the court day thus delaying the commencement of civil business. This can have the effect of prolonging the diet of proof.

Question 2

Should (a) some judges of the Supreme Courts and (b) some sheriffs be designated to deal with civil business?

Given the increasing specialisation within the profession, it appears inevitable that such designations should be made. There was general support within the group for such a distinction in the Supreme Courts.

Question 3

Should the sheriff courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?

The advantages of such a separation ought to be an improvement in the allocation of business and resources in civil cases. However, the division may not be particularly effective or aid efficiency in smaller Sheriff Courts, in which one Sheriff would usually deal with both civil and criminal business.

The consultation paper suggests that this could even extend to the provision of separate court accommodation. This is obviously the case already in certain Sheriff Courts. However, it is unlikely to be practicable for all courts. We note that the consultation paper suggests regional civil justice centres as a potential solution to this – quite apart from the cost implications of such an approach, we are concerned that the removal of civil business from local Sheriff Courts could affect access to justice. We refer to our comments in answer to question 13 below.

Question 4

Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?

There was some support within the group for a degree of specialisation in family actions. In larger Sheriff Courts, there is benefit in having a number of sheriffs designated to deal with family business. These designations ought to be for a limited period of time. There may also be scope for such a system within the Court of Session, albeit that having only one or two judges dealing with family actions could also have disadvantages. We consider it to be important that the judiciary continue to have a breadth of experience in adjudicating on cases arising in different areas of law. Such experience is important to the development of law.

Actions of adoption and freeing for adoption or the new orders which will come into force following the implementation of the Adoption and Children (Scotland) Act 2007 ought to be dealt with by designated Sheriffs. The practice notes issued in relation to such applications require case management and it is therefore important that a limited number of judges are involved.

There is of course a great deal of scope for using sheriffs and judges who have a particular interest in an area such as family law. The pool of such is of course extended by the availability of part-time sheriffs and temporary judges who can be drafted in to hear particular cases.

Question 5

What are the key factors which influence the decision to raise an action in either the Court of Session or the sheriff court where jurisdiction is concurrent?

In actions of divorce/dissolution in which there are issues relating to financial provision between the parties, the key factors in deciding to raise an action in the Court of Session will be the extent of the matrimonial or partnership property, the location of that property (e.g. located abroad), the habitual residence of the parties, the complexity of the legal arguments involved and the avoidance of publicity in the local Sheriff Court. Other relevant factors are whether the case will involve the instruction of counsel, the likely duration of the final hearing and time within which a final hearing will be fixed.

Actions in which the sole issue is the care arrangements for children are very rarely raised in the Court of Session. The cases in which this is done usually involve an international element or a cross-border jurisdictional issue. In straightforward disputes involving children where the parties both reside in Scotland, the better forum for the resolution and determination of such actions is the Sheriff Court.

Where both financial matters and care arrangements are in issue, consideration will be given to all of the factors outlined above and, if the action is to be raised in the Court of Session, consideration will be given to an appropriate mechanism for assessing the

position of the children. This may involve the instruction of a report by a member of the bar, the appointment of a *curator ad litem* or a referral to a child psychologist.

Adoptions, freeing for adoptions and applications for parental responsibilities in terms of section 86 of the Children (Scotland) Act 1995 are raised only rarely in the Court of Session. Where there is concurrent jurisdiction, the Court of Session will only be chosen where there is significant legal complexity or a complicated factual background. In some cases, this may have involved earlier abortive applications to the Sheriff Court.

Question 6

In what, if any, types of case should (a) the Court of Session (b) the sheriff court have exclusive jurisdiction?

The vast majority of family actions can be raised in either court. It is our view that this should continue thus affording litigants the choice of the forum in which they wish to raise and progress an action.

The Court of Session should continue to have exclusive jurisdiction in petitions under the Hague Convention on the Civil Aspects of International Child Abduction. This is an extremely specialised area which involves international judicial co-operation and expedition of proceedings. There are significant benefits to the Court of Session continuing to deal with these cases exclusively. Recognition and enforcement of foreign orders should also continue to be dealt with by the Court of Session.

Reduction of decrees – which most commonly arise in the family context in relation to decrees of divorce – should continue to be dealt with exclusively by the Court of Session.

Other areas of family law have been reviewed recently in the context of the Family Law (Scotland) Act 2006. This removed the exclusive jurisdiction of the Court of Session in respect of declarators of marriage and nullity of marriage. We consider that there is no necessity for further amendment at this stage.

Question 7

Should the jurisdiction of the Court of Session and the sheriff court be unified to create a single civil court?

We consider that there ought to be a distinction between tiers of courts with the Court of Session continuing to deal with the most complex and high value cases. That will facilitate the best allocation of resources and experience to dealing with such actions.

Question 8

Should the Court of Session become a court of appeal only or should it retain a first instance jurisdiction? If so, for what types of action and why?

The Court of Session should retain a first instance jurisdiction in family actions. We consider that the Court of Session is invaluable as a court of first instance for the most complex disputes. The vast majority of family actions are raised in the Sheriff Court and only those involving high value claims or complex legal issues are raised in the Court of Session. It is also important for litigants to have a choice of forum and in particular, to be able to raise an action in a higher civil court.

In the event that the first instance jurisdiction of the Court of Session were removed, we consider that it would be detrimental to the interests of litigants. It is likely that there would be an increase in the number of contested actions, which would in turn give rise to a greater number of appeals thus increasing expense for parties, or to the state in the case of legally aided parties.

Question 10

Are the current powers to transfer cases between sheriff courts and between the Court of Session and the sheriff court satisfactory?

We consider that these powers are satisfactory. Their use is not widespread in family actions, but this may be the result of cases being raised in the most suitable forum at the outset. However, in appropriate cases, motions are made for remit both from and to the Sheriff Court.

Question 11

Given the range in value and complexity of civil business in the sheriff court, should there be a tier of civil court below the level of the sheriff court?

We do not consider that this would be necessary in the context of family actions.

Question 12

Alternatively, should there be another level of judiciary within the sheriff court to deal with “third tier business”?

We do not consider that any family action ought to fall within such a tier.

Question 13

Does the current division of the sheriff court into distinct geographical jurisdictions present difficulties or does it have advantages?

Quite apart from the fact that Sheriff Courts are established in certain towns and have been for many years, the primary advantage of the current system is that a person can

readily attend their local Sheriff Court. Parties are required to attend options hearings and child welfare hearings in family actions in the Sheriff Court. Access to justice would be affected if parties were forced to travel to a central court centre. Some would be unable to afford to go or would find it difficult to commit the additional travel time required to attending such hearings as a result of childcare or work commitments.

Question 14

Are the current arrangements for dealing with undefended actions satisfactory?

There is specific provision for undefended family actions and these are readily applied. The disadvantage of the affidavit procedure is that it is uncertain when parties will be granted decree of divorce and there can be administrative delays. It is often to the benefit of parties to obtain decree of divorce quickly. However, on these occasions, it is usually possible to seek to hold a brief undefended proof by way of parole evidence and this option ought to be retained.

Question 17

Is there a case for a national sheriff court which would allow cases to be raised at sheriff court level anywhere in Scotland? If so, what appeal arrangements should there be?

We consider that there would be no benefit in such a system in the context of family actions. It is important that litigants have access to justice at a local level. For example, in cases involving children, jurisdiction will be based on the habitual residence of the child. It is vital in such cases, that they are raised near to where the child actually is as that will be the focal point for enquiry.

Question 19

If the sheriff court becomes the primary court of first instance, should there be a power of transfer from the Court of Session to the sheriff court and a power for the sheriff to seek the leave of the Court of Session to transfer a case there? If so, what factors should be taken into account?

We consider that a system whereby all actions would be raised in the Sheriff Court in the first instance would be unnecessary and cumbersome in family actions. There are certain cases, including applications for return of children in terms of the Hague Convention on the Civil Aspects of International Child Abduction, enforcement of foreign orders and other cross-border disputes which ought to be raised in the Court of Session. Other cases for reasons of jurisdiction ought also to be raised in the Court of Session. Furthermore, a number of factors are used to assess whether a case ought to be raised in the Court of Session and these may not be readily apparent on the face of the initiating document – for example, a litigant may wish to raise an action of divorce in the Court of Session and may seek no financial award, however, they may do so as they will ultimately be the party against whom the financial claims may be made. Accordingly, a further step of procedure would have to be initiated in each case in order to remit actions to the Court of Session. In the event that leave had to be sought before transferring an action to the Court of Session, this would simply lead to further expense which could be avoided.

Use is made of the existing power of remit to transfer cases between the courts. However, it is very seldom raised as the system of self-selection of a forum by agents and counsel experienced in this area works very effectively. To add an additional tier of administration and procedure would simply result in added expense and delay for litigants.

Question 20***Are the existing appeal arrangements satisfactory?***

In general, the existing appeal arrangements are satisfactory. The major difficulty with some appeals to the Inner House, and also to Sheriffs Principal, is that they are raised and progressed without the benefit of legal advice. Sterile and fruitless appeals are proceeded with, with the result that a significant amount of court time is taken dealing with these matters. Furthermore, significant expense is incurred by the respondent. Such issues were highlighted by Lord Osborne in the case of **Muirhead v MG** ([2007] CSIH 77 31st October 2007). We respectfully agree with his Lordship's observations to the effect that a degree of control must be imposed upon the taking of such appeals. We comment on this further in response to Question 20 of Chapter 6 below.

CHAPTER 5: PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES

Questions 2, 3, 4 and 5

Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

If so, how should this be done and at what point or points in the progress of a dispute?

Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.

What form should mediation or other methods of dispute resolution take and how should this be funded?

The following comments address most of the above questions but not strictly in order.

There are some Family Actions in which the use of Mediation or other methods of dispute resolution such as Collaborative Law may be inappropriate. It is difficult to characterise such cases by reference to subject matter, as there will be exceptions. For example, it would rarely be appropriate to mediate an International Child Abduction case, where the dispute may centre on such issues as the nature of the “right of custody” in the foreign jurisdiction or the application of the law relating to habitual residence and where the issue for determination is not the substantive one of “custody”, but relates to the question of where that determination should take place. However, to rule out mediation for all such cases might be to lose the opportunity to mediate the whole substantive issue between the parties if they indicated that they would be willing to discuss an overall resolution that obviated the need for litigation in two separate jurisdictions. Thus the rules we suggested be implemented, in our answers to questions in Chapter 1, would require to take account of there being cases where it would be inappropriate to refer parties to mediation. This could be done on a “case by case” approach.

There are always cases in which an issue of legal principle requires determination and the development of the law requires cases involving principle to be judicially determined. Again one cannot say that all such cases are inappropriate for mediation. If the dispute is a financial one, the parties may well agree at mediation that they would rather

compromise and reduce the risk each of them faces than become a “test case” on a issue of interpretation of a statute. It might be unfair to compel the parties to mediate such a case if their representatives agree that judicial determination is required, but mediation should by no means be discouraged.

In our view, consideration should be given, as suggested in our answers to Chapter 1, to making provision in the court rules to see to it that mediation is always considered by parties, who would require to explain why it was not being attempted. In each case the sheriff or judge would then have a discretion to refer the parties to mediation where this had not been attempted and he or she considered it appropriate.

However, this raises the issue of whether mediation, one of the recognised features of which is its voluntary nature, should become compulsory for many litigants. One of the consequences of court referrals to mediate in family actions may be that vulnerable parties may have to meet their former spouse or partner in a setting where distance is not so readily kept. There are parties for whom the formality of the court setting is an effective inhibitor. We are aware that a view has been expressed that mediation would be inappropriate where any requirement for interim interdict has arisen. We would respectfully disagree with such a general rule being imposed. In many Family Actions involving financial provision on divorce, an interim interdict to prevent disposal or dissipation of assets may be sought and granted at a very early stage of the proceedings, before the Defender is represented. It would be unfortunate if at a later stage in the dispute a general rule prevented a referral to mediation simply because such a protective interdict had been obtained. A similar concern arises in the example of an interim interdict prohibiting the removal of children, which may well have been justified at the outset of proceedings after an ill advised threat was made by one party to the other. The passage of time may have removed the apprehension to the extent that various issues between the parties could be mediated. Where a non molestation interdict has been obtained, there is more force in the argument that it may be unrealistic to expect parties to mediate, but again we would regard it as inappropriate to rule it out completely.

It is difficult to compel parties to mediate. However, giving the court power to refer parties to mediation is subtly distinct from a compulsion to mediate as such. Mediation

takes many different forms, but we do not think that any experienced mediator would compel parties to sit in the same room as each other if that was unacceptable to one of them. Referral to a mediation service does not equate to an insistence that the parties engage with each other. It asks them to participate in a process that has that aim. It should be possible to formulate rules that will empower the court to make an order, but not to prescribe how that order will be carried out.

This raises an issue also touched upon in Chapter 1, namely the training of sheriffs and judges, particularly those who deal with family law. We consider it important to distinguish between training the judiciary so that they understand the process to which they may refer parties, and training them to act as “settlement brokers” in court. All of the suggestions that we have made assume that any training would have the former as its aim.

Another aspect of mediation that requires to be considered if rules are to be made empowering referrals to mediation more routinely, is the confidential nature of the process. The general rule that court hearings are public has relatively few exceptions, but there are useful provisions to prohibit publication of details identifying a child who is the subject matter of proceedings where appropriate. Many parties are attracted to mediation because of its confidential nature. In financial provision on divorce cases involving wealthy or well known parties, we see the confidential nature of mediation as something that should continue to be upheld and contrasted with the alternative of a public proof.

In our view there should be no restriction placed on the stage of a litigation at which mediation can take place. While mediation at an early stage of a dispute has clear cost saving advantages, there may be some seemingly intractable cases that become suitable for mediation at an advanced stage of court proceedings. The rule that we have suggested that would require a discussion in court about whether mediation has been attempted should ensure that the matter is aired as early as possible after proceedings are raised.

The issue of funding for mediation is a difficult one. In privately funded cases, an issue may arise as to which party should bear the cost or whether it should be borne equally.

Some parties will no doubt be reluctant to fund a court referred mediation. However, there have been rules in existence for many years that set out how a court ordered report in relation to children should be funded in the first instance, with the ability to review the matter at a later stage if required. (see RC 49.22). We think that a similar system could be adopted for referrals to mediation by the court in family actions.

In legal aid cases, public funding would be required. Again, by way of analogy with court ordered reports, the cost of mediation could be covered by legal aid in the first instance. If mediation leads to a higher extra judicial settlement rate, there is an overall saving to the public purse that would seem to justify an initial outlay on mediation.

We do not think it would be helpful for rules to prescribe too closely the form that mediation should take. The parties should be able to address the court on the identity of the mediator if there is disagreement about that. It may take some years for a system of court accredited mediators to evolve. Until then, the terms of a referral and the identity of the mediator will require to be discussed in each case.

CHAPTER 6: WORKING METHODS OF THE CIVIL COURTS

Question 8

To what extent should a system of abbreviated pleadings be introduced?

There was a divergence of views within the association in relation to the usefulness of written pleadings in family actions. Particularly in cases involving disputes as to the care arrangements for children, pleadings can become quickly outdated. A question was also raised as to whether it was in the interests of children or helpful to the resolution of disputes to have allegation and counter-allegation set out in detail. That said, a failure to focus the action in written form can make for unfocused evidential hearings. Accordingly, many felt that full written pleadings ought to be retained.

Members felt that the practice notes which have been promulgated in respect of adoption, freeing for adoption and parental responsibilities applications had been particularly effective in focusing disputes in such cases.

Question 10

Should routine procedural matters in both the Court of Session and the sheriff court be dealt with by judges (perhaps at a more junior level) designated for that purpose?

We do not consider that this would be necessary or beneficial – introducing a further layer with the possibility of transfer to a more senior judge would simply add expense and increase delay for parties.

Question 11***Are the current arrangements for dealing with routine procedural business satisfactory?***

In the Court of Session, the vast majority of motions in family actions are substantive – for example, interim aliment, sale of property *ad interim*, payment of school fees and care arrangements for children. These types of motions are rarely, if ever, allocated to a judge prior to the start of the court day. This means that parties have to wait at least an hour before being heard. On many occasions, parties themselves travel to court for these hearings as they are of particular importance to them. In the event that no judge is available to hear the motion it will have to be continued to another date with the consequent expense. Parties do not understand why, if a motion has been fixed for a particular date, and if they have been asked to attend court at a particular time, there is no judge available to deal with their case at that time. It ought to be possible to allocate such motions in advance, for example, to a judge who is not otherwise engaged in continuing hearings.

Uncertainty also surrounds the hearing of urgent motions, such as interim interdicts. In some Sheriff Courts, a time is set aside for a court to take place to deal with such matters. If agents and counsel were aware that such interim hearings always took place at a particular time, then they could prepare in order to meet that timeframe.

In the Sheriff Court, there are also difficulties surrounding the allocation of substantive motions. These often call initially in the ordinary court and, whilst in some courts, they are simply be heard at the end of the roll, in others, another date is fixed for the hearing of the motion. It is not always clear which method will be chosen and again, this can result in parties and their representatives travelling to court to find that no sheriff is available to deal with the matter. With adequate notice and advance specification of the likely time to be taken at the hearing of the motion, such issues ought to be capable of resolution.

Question 12

Should the court have a greater degree of input in allocating the length of time to be set aside for a hearing? Should hearings be time limited or conducted by reference to a timetable determined by the court?

We understand that the House of Lords can and does specify time limits upon certain parties. If greater use is to be made of written arguments in appropriate cases, then it ought be possible to focus on the issues arising from these submissions. Such limits would assist in cases, primarily involving party litigants, in which oral arguments are often unfocused and lengthy.

Question 13

In the conduct of substantive hearings should there be greater use of written rather than oral arguments?

Written submissions are increasingly called for with a view to reducing the time spent in addressing the court. In evidential hearings, it is generally difficult to produce written submissions in advance and in some instances, it can occasion further delay if an adjournment is sought in order to prepare them. However, when they can be prepared in advance, this often means that submissions can be focused and time is not spent setting out legal issues which are not actually in dispute. We consider that it would be best for further development of the use of written submissions to evolve naturally, rather than be prescribed by rules of court at this stage.

Question 14

To what extent should there be an earlier and/or wider disclosure of evidence?

In Court of Session family actions, there are very few procedural constraints.. Once defences are lodged, a proof is fixed and the next deadline is the last date for

adjustment and lodging of productions and lists of witnesses which is 28 days before the diet of proof. This system operates very effectively. Use is made of commission and diligence procedure where appropriate. The general obligation to make full relevant disclosure in financial provision on divorce cases usually results in more limited arguments about the scope of recovery of documents.

Question 15

To what extent should the court have control over the use of expert and other evidence?

In an adversarial system, the parties ought to be in control of putting forward their case in the most effective manner. The use of experts in family actions varies. In some instances, it is beneficial to have a joint expert instructed in order to investigate a particular matter – this is particularly so in cases involving children where it is usually desirable to limit the number of professional interventions. However, this is not in the interests of parties in every case.

In actions involving financial provision on divorce/dissolution, experts are sometimes jointly instructed in relation to the valuation of certain assets – for example, the matrimonial home. However, there are assets which require to be valued in family actions in which the exercise of valuation is more complicated and where that may be one of the primary issues between the parties. The answer is not necessarily the instruction of a joint expert to ensure that that issue does not arise – again, it may be in the interests of parties to highlight different approaches to valuation.

We do not consider that a rule giving the court control over the use of expert evidence would be appropriate for family actions, where the current system of control over this by the parties works well.

Question 20

What measures should be available to the court to identify and manage unmeritorious causes or appeals brought by party litigants?

While the current system of legal aid requiring *probabilis causa litigendi* and representation by professional advisers in private cases is usually sufficient to weed out such cases, a rule allowing the court to dismiss clearly unmeritorious appeals at a short early hearing would be useful. The terms of the rule would have to set out clear criteria for dismissal at such a stage.

Question 22

Should a person without a right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?

We would refer to our response to Question 3 in Chapter 2.

Morag Wise QC, AFLA Chair

Ruth M Innes, Advocate, AFLA Secretary

30th March 2008