

RESPONSE BY THE FAMILY LAW ASSOCIATION

TO

SCOTTISH CIVIL COURTS REVIEW

Introduction

As will be clear from many of our answers, the Family Law Association is strongly in favour of the formation of a distinct family court. This has been our policy for a number of years. It is also clear that such a family court could take many forms. Ideally there would be separate premises, purpose-built to suit the range of cases and the several forms of dispute resolution which are appropriate for the various types and stages of cases that we deal with. We would seek a specially recruited and trained bench with a range of support and ancillary services available either on-site or close at hand. Such a court would be a centre for the dissemination of information and would be recognised as an appropriate, user-friendly place to access both information and services for families in conflict or difficulty. Its creation would facilitate a sympathetic and flexible gate-keeping system to ensure that only cases which required a judicial remedy accessed the courts, while ensuring that other methods of resolving disputes were readily accessible.

We are however aware that such a state of the art provision is unlikely to be achievable in the short term, given present funding restrictions, and especially given the need to ensure Scotland-wide consistency in access to such a court. We have therefore given careful consideration to alternatives which, while less ambitious, still see us head in the right direction in the hope of keeping Scots law in the vanguard of best practice in the field of family law. Each aspect of the court system addressed in

the review has been approached in this way, seeking to identify what is good, or acceptable, in present practice and identifying what needs to be changed. We have attempted to offer practical solutions which could be achieved without great cost while achieving the object of creating a family court which serves the needs of the Scottish people.

There are some changes which we consider are essential. These are:-

- Dedicated family sheriffs
- Extensive training for sheriffs in child development
- Comprehensive revision of the rules of pleading in family cases
- Nationwide provision of mediation services
- Creation of an accreditation process for court bar reporters and provision of relevant training
- Provision of a properly-funded and remunerated legal aid system to ensure all Scots have access to justice

These changes are achievable. They could be introduced in a phased basis in order to spread the cost. We do consider that the first is the most important since the creation of a dedicated bench would in itself go some way to resolving a number of issues such as delays in progressing cases due to lack of court time or prioritising of other business before family cases. A family bench would be committed to making full use of the present rules for direct intervention with parties. Judicial expertise in family law would benefit all court users and indeed would have a knock-on effect in negotiations and other forms of alternate dispute resolution, as it would inevitably

lead to more consistency and certainty in decisions at all stages of a case. The experience of the family court pilot in Glasgow Sheriff Court seems to have been wholly positive. The creation of a family bench would help drive forward all the other changes we recommend with the goal of providing a court service fit for the 21st century.

We trust that our contribution will be of assistance to the review group in the challenging but vitally important task they have taken on.

Chapter 1

1.1 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?

Current good practice in family law, and in particular that of members of the FLA, is to encourage early resolution of disputes. The role of experienced, well-motivated solicitors in achieving pre- and out-of-court settlements should be recognised. It is our experience that the majority of cases we deal with are resolved without litigation, using lawyer to lawyer negotiation, mediation or collaboration. We support the Scottish Executive's initiative in introducing the Parenting Agreement and we encourage, where appropriate, the use of mediation and collaborative law. Family mediation has been in use for several years and there are well established bodies such as Family Mediation Service and CALM. Collaborative law is newer to Scotland. Its aim is to reach a civilised, respectful solution so that a reasonable relationship can be retained by the parties. A key difference from the standard solicitor involvement is that where parties have signed up for collaboration their

solicitors are completely debarred from litigating for the clients if no agreement is reached..

There could be merit in providing that in family cases before a warrant on a Writ could be obtained in any action in relation to a child, the parties are either required to have attended mediation which has been unsuccessful or have good reason for not being able to do so, such as urgency in relation to possible child abduction, or allegations of abuse. In an action for divorce where there are ancillary issues such as children, finance etc, the same rule would apply.

If this is to operate successfully, mediation and other related services would require to be fully funded to enable them to deal with the number of referrals which would be passed to them. We recognise that there are drawbacks to making use of mediation compulsory prior to a warrant being granted or indeed at any stage of a case. An attempt to introduce compulsory mediation in England has proven unsatisfactory. For mediation to be successful, there requires to be a willingness on the part of both parties to engage in mediation in a meaningful way. One mediation session is rarely sufficient and several sessions of at least 2 hours duration each are usually required to resolve issues. It is unlikely that the use of compulsory mediation would assist in identifying those cases that can only be resolved by court procedures.

We consider that a more appropriate way of deciding which cases can only be resolved by court action is to consider a gatekeeping procedure whereby before a case is warranted an experienced family law practitioner, or indeed the Sheriff(provided that the sheriff had substantial experience of family law cases), is required to assess the case and determine whether or not court procedure is required or if some other form of dispute resolution model would be more appropriate..

1.2 Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review's recommendations? Should they be supplemented by other factors?

While the principles and assumptions are sound they do not fully provide for the special issues raised in family cases. For instance the question of proportionality is focussed on cost and time and value issues. It does not properly provide for an assessment of the importance to a family, and indeed wider society, of resolving family disputes.

1.3 Are there any matters within the Review's remit about future concerns but which are not dealt with in this paper?

The review makes no specific reference to family cases, although reference is made to protecting the interests of children. Does the concept of proportionality and value for money sit well with family law cases? In para 1.12 (iv), "the cost of participants having access to funding and lawyers having access to reasonable remuneration being proportionate to what is at stake". does not take account of the non monetary considerations in actions where contact and residence of children are in dispute. Should a price be put upon determining properly, with due speed and diligence, what is in the best interests of a child? The same issue applies in divorce and other family actions. Resolving a dispute about division of a family's entire resources whether it be £5,000 or £5m is of the utmost importance and value to the family involved.

Therefore it is our position that it is essential to recognise that family cases are fundamentally different from other actions due to the importance, to each family, and to society as a whole, of the issues involved. Their special nature requires

procedures tailored accordingly. It should not be a question of tinkering with certain parts of the court system to make it accommodate family cases a little better, but rather there is a need to separate family cases from other types of civil action and form procedures designed to fully to address the special nature of family cases..

In relation to 1.14, we endorse the view that a good justice system should work for the benefit of those it is intended to serve. We do not however accept that this means it should not also serve those who work within in it. The two are not mutually exclusive, rather we would argue that one serves the other. A well-run court is one where the staff, solicitors and bench are well-trained, well-qualified and well-motivated to work together. A proactive approach by all concerned in a family action is essential, as is consideration to family actions being dealt with on an inquisitorial basis rather than an adversarial basis as at present. We consider that if a sheriff dealt with a case on an inquisitorial basis this would enable him or her to take ownership of the case and ensure not only full disclosure of all relevant information but also speedier conclusions for families and children.

CHAPTER 2:

2.1 What contribution can public legal education make to improving access to justice?

Litigation involving family law relates to one or more of 3 main subjects: the breakdown in the personal relationship between adults, resolving consequent financial claims, and the care arrangements for a child, whether within the family or in a public law context. Awareness of rights and obligations is fundamental to the proper working of society. Many people are unaware of these rights and obligations or have misinformed views about them. This leads to difficulties where one party

adopts a position which is contrary to law and from which they cannot be moved.. Therefore better legal education can only help as people would be more likely to approach a situation without mistaken preconceptions. A classic example is the mother who believes the decision about whether her child has contact with its father is hers to make. If there was more awareness of the concept of shared parental rights and responsibilities such mothers would be more open to the concept of continuing to share them post-separation.

Public legal education also has a role in alerting families to all the resources available which might help minimise the difficulty of relationship break-up. A family court would have a central role in disseminating such information and could be accepted as a “one-stop shop” for information and various types of support as well as for resolution of disputes. At the moment good family lawyers serve this purpose by providing advice about different ways of resolving disputes and about the various support agencies available. There is however no duty to do this and no resourcing or training specifically for this. The provision of this information and education needs to be consistent and well-supported.

2.2 Are there any particular geographical or subject areas in which there are gaps in provision in relation to civil legal advice or representation? If so, where?

So far as family law is concerned, the country as a whole is well served by family law solicitors in private practice.. There is a recognised gap however where a party seeks legal aid. Fewer firms now offer legal aid. Some restrict the type of cases taken on, with many firms throughout Scotland not taking cases involving financial provision and some refusing to take on interdict and protective order work. There is also an increasing geographical restriction with areas such as the major cities, the north west and the Highlands and islands having fewer solicitors offering legal aid. In

addition there are small pockets throughout the country where there is no firm offering civil legal aid such as West Lothian and Selkirk. This results in restricted choice or even inability to find representation. It has been suggested that solicitors directly appointed by the Scottish Legal Aid Board could resolve this issue. We do not accept this would provide a solution. We suggest a better solution would be to improve the rate of remuneration under legal aid to a realistic level enabling firms to offer this service without incurring financial loss. Thus the provision of legal advice throughout the country would be protected. It does not serve access to justice for legal aid rates to be so low that firms either have to subsidise legally-aided clients with private fees or for those who cannot do this to have to take on cases at sufficient volume that they have decent income but at the cost of providing a full and proper service. This question is going to become more acute as a result of the introduction of the new complaints procedure with its risks of higher claims.

2.3 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?

Families in crisis are unlikely to be able to resolve their difficulties without assistance of some sort, nor should they be asked to do so. Family cases can be more protracted, more stressful and therefore more expensive particularly given the nature of the present court system which does not cater well for the requirements of family cases. Where the underlying reason for a breakdown in family relationships is an imbalance of control or power it is necessary and appropriate to offer protection and assistance to the weaker party,

There is an argument that an individual should have the freedom to represent himself in court. It is not desirable that this should be encouraged. Party litigants

cause delay through lack of awareness of rules, procedure and the law. Hearings often have to be postponed or continued and when they do take place they tend to last a lot longer than if both parties were represented. Thus a case involving a party litigant takes up more court time than it should. Furthermore, lack of knowledge of the law leads to cases without legal merit being pursued, sometimes through more than one appeal. (see *Muirhead v G*, 2007 Fam LR 160.) There has also been one notable case where a party litigant lost at every stage until he won in the House of Lords (*Ali v Ali*). It should be noted however that had he had the benefit of legal advice it is more than likely that he would have won at an earlier stage, thus saving a considerable amount of court time. There may be some merit in introducing some form of sift but this may fall foul of ECHR provisions, particularly Articles 6 and 8. A better response would be the introduction of specially trained family sheriffs with an inquisitorial approach who could fairly carry out a form of sift at an early stage of proceedings, while providing a fair hearing.

There is some justification for a simplification of procedures, particularly in family cases. There is already authority for the view that where a case involves the welfare of a child, the court should not prioritise observance of court rules where the needs of the child require a different course. (*Girvan v Girvan* 1988 SCLR 493).

Court rules do however serve a purpose. They protect rights and ensure fairness. Any move towards simplification would have to bear this in mind. Rather than aim to achieve simplification to aid party litigants, the aim should be to remove unnecessary steps and ensure that all litigants have access to the rules which apply to their case. The rules are not complicated, simply numerous as they have to apply to so many different situations. Providing a litigant with a copy of the relevant rules at the point

where they enter the action, for a reasonable charge, would seem to satisfy the requirement for fairness.

2.4 What contribution, if any, can (a) “self-help” services for party litigants and (b) court based advice services make to improving access to justice?

There are some areas of unmet legal need where few lawyers have the interest or experience to provide advice. Social welfare and housing are two examples. Advice services may be useful if targeted towards these. Information services could be useful as referred to above. They do not however represent adequate assistance sufficient to afford access to justice in family cases where equality of arms is particularly important. Consider the fairness of one party being represented by an experienced family lawyer and the other by an advice service where the issue is where a child should reside. Some of this imbalance could be corrected by a specialist family sheriff using an inquisitorial approach but not all. In the interests of fairness, and to ensure compliance with ECHR, the proper provision of legal aid to ensure equality of arms, wherever possible is essential.

2.5 Are there any other issues which impact on access to justice in Scotland which the Review should consider?

The amount of time provided for family cases is insufficient to establish effective intervention. All too often, cases are heard together in a queue system; where pressure is put on the judge and the staff who manage the system, to achieve targets at the expense of providing a thorough and effective service. Giving priority to criminal business also causes unacceptable delays. Reasonable eligibility levels allowing access to legal aid for those of modest means should be introduced.

Reasonable remuneration for legally-aided work is needed to ensure that solicitors continue to provide this service and are able to do so to the same standards as private work.

2.6 Is there a case for a new method of dealing with low value cases? If so, should this be within the existing court structure or separate from it? What kind of cases would be suitable for such treatment?

Presumably this is a reference to low 'financial' value, as opposed to value in the public interest or trivial proceedings. Measuring 'value' in family proceedings is not appropriate. How does one measure 'value' in family cases, unless one simply concentrates on the financial issues to the exclusion of everything else in dispute?

CHAPTER 3:

3.1 What, if any, information can you give the Review about levels of legal expenses in litigation, and how such expenses compare with sums awarded by the court or settlement figures?

There is no direct relationship between the expenses incurred in a case on a solicitor/ client basis and the sum in dispute between the parties. There are a number of factors that influence the level of expenses. In family law cases these can include the level of anger and hostility between the parties, the complexity of the legal issues, the inability or unwillingness of parties to agree matters in relation to child issues and the failure of one or both to provide financial information. Lack of cooperation can lead to repeated hearings, delay and therefore expense. A more pro-active court would help to resolve this. In child cases, where no finances are involved, the level of expense relates even less to the subject matter, and even more to the level of deterioration in the relationship and the complexity of the issues.

3.2 To what extent does the cost of litigating deter people from pursuing or defending cases in court?

Significantly. It is a subject which is very important to clients and to the solicitor who needs to be satisfied about prospects of being paid. It is also important to the Government, who have historically underpaid solicitors doing legal aid work in comparison to the rates chargeable for the same work undertaken on a private basis. In cases where parties are legally aided and there is no financial claim there is little deterrence .. In cases where parties are legally aided and there is a financial claim, deterrence is determined by the possibility of clawback being exercised against the settlement by SLAB. Where a party is legally-aided and there is no financial claim it can be argued that such a party can litigate without regard to cost and this can lead to unfair advantage.

3.3 Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?

In non legal aid cases, the system will affect access to justice depending upon the level of fees charged.. When the system was introduced, there was an outcry about the principle of having to pay to access justice. As the years go by, the objections have become fewer and the system seems to be accepted. Court fees are a minor part of the costs of litigation, at the moment. If they rise significantly this would no longer be the case. As the criminal court is almost entirely funded by the public purse one would have to question the fairness of making litigants in family cases pay to access justice. If a child is snatched , should the other parent have to suffer significant financial cost to be able to have a court address where the best interests of the child lie?

3.4 Are the current rules for recovery of judicial expenses satisfactory? The present procedure is open to abuse, particularly by party litigants. Several hearings can be required, without any merit in the objections. If taken to appeal the amount of the expenses awarded may be reduced to a completely uneconomical amount. There is no provision for payment for all the additional work involved in dealing with objections and attending at hearings.

3.5 Are the current arrangements for the taxation of judicial accounts of expenses satisfactory? The procedure can be cumbersome with the need to prepare a detailed account and to have lengthy taxation before an auditor. Taxation outcomes can vary depending on the quality of the auditor. Significant delays, up to a year, can occur between the hearing and a decision being issued.

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

Legal aid is nowadays limited to the poorest in society, and is managed by and large by civil servants, whose remit is too narrowly defined by rules and regulations, as opposed to the pursuit of justice by an aggrieved party. The availability of legal aid is therefore limited and is principally determined by ability to pay. Undoubtedly, the inability of people to access a properly funded legal aid system has a direct bearing on access to justice and many in our society are currently denied access to justice because of the difficulties with our legal aid system.

3.7 Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?

Glasgow, Edinburgh Aberdeen , the north west, the Highlands and Islands, Dumfries and Galloway, as well as various small pockets.

3.8 What impact have speculative fee arrangements had on access to justice? In the sense that some firms are agreeing to be paid from a settlement where a party may be eligible for legal aid but the solicitor does not see it as economical to take on the case at legal aid rates.

3.9 Should legal expenses insurance, including “before the event” and “after the event” insurance, have a greater role to play in the funding of litigation in Scotland?

In family cases this is unlikely to be widely accepted or indeed offered. There is no reason why it would not work, subject to satisfying an underwriter on the prospects of the case, which may be difficult given the variables in family cases.

3.10 What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation? This might, sometimes, be useful as counsel usually advise clients that family cases are always settled on the no expenses basis, so this provision might make a difference.

CHAPTER 4:

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

Yes, in most jurisdictions. In all stages of proceedings the progress of civil cases is regularly affected. Common problems are sheriffs and judges being given deferred sentences to deal with before commencing the day’s civil business or finishing early to allow themselves time to read reports for the next day’s criminal court. It has been known for judges to be taken from courts where proofs are due to commence in

order to deal with custody courts. These are regular occurrences in almost every court.

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

Yes, in particular we believe there would be considerable benefits in having dedicated sheriffs to deal with family cases. See answer 4.4

4.3 Should the Sheriff Courts be separated into civil and criminal divisions, what would be the advantages and disadvantages of such a separation?

The obvious advantage would be that there would be less delay to civil business due to the priority given to criminal business.

4.4 Should there be a greater degree of specialisation within the civil Courts in Scotland, if so in what types of cases and in which Courts?

Yes, . The same sheriff dealing with a case at every stage allows continuity and the more efficient use of court time. This would ensure business would proceed at the appointed time. It should be noted that at several stages of proceedings in family cases the parties are required to attend court personally. This is not the case in other civil cases. Many sheriffs try to prioritise such cases to reduce waiting times for such parties but there are all too many occasions when this is not possible and long periods of waiting in court ensue. This reflects badly on the administration of justice in many people's eyes.

We understand that the position may be worse in the Court of Session than in the sheriff courts as parties may be kept waiting for a day or more only to have their proof discharged due to lack of a judge. The cost of this is considerable and again reflects very badly on the system of justice.

There may be objection to this on the part of the existing bench who see dangers in “burn-out” in dealing solely with family cases. There are several responses to this. Specialist sheriffs and judges could be recruited from a pool of those with experience and enthusiasm for this area of law. Specialist sheriffs may still deal with other cases, as in the family court pilot in Glasgow Sheriff Court. There is also an argument that the present incumbents should not prevent progress which is seen to be in the interests of court. Specialist courts with dedicated judges have been a success already, for instance the commercial court, the domestic abuse criminal court in Glasgow and the family court also in Glasgow.

Another possible objection is the difficulty of providing a sheriff dealing with only family cases in smaller courts. This could be answered by having a team of family sheriffs who travelled to courts throughout a sheriffdom or indeed even a wider region. Current court buildings could continue to be used although additional facilities to encourage discussion, mediation etc would be welcome. Courts could be made less intimidating for cases involving children and some consideration could be given to dispensing with wigs and gowns.

Of more significance however would be the advantage of utilising procedures and rules geared more specifically to family cases. Setting out pleadings in a more straightforward way would assist in identifying issues requiring judicial resolution and dispensing with unnecessary and often unhelpful histories of allegation and counter-allegation to which parties in family cases can be prone. We see particular benefits in an early hearing at which issues are set out, orders and timetables for disclosure made, and procedure determined for the different orders sought. Commonly family cases raise issues of finance, care arrangements for children, protective orders as well as divorce or dissolution. Different orders and timetables could be made for

each aspect, if a sheriff were then to be in a position to control observance of these orders. Specialist judges within specialist courts would allow one judge to keep control of a case from beginning to end. Significant economies would surely be made simply by saving time setting out the background to the case each time. Once a judge had the measure of the issues and the parties appropriate orders could be made to ensure progress was made. This sort of management is not possible within the current system.

The provision of specialist judges also ensures that the sheriff or judge dealing with the case is fully abreast of all the complexities of law which applies, which is not currently always the case.

4.5 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?

The value and importance to the client, If there is a new or difficult area of law it may be felt that a Court of Session decision is going to be helpful, perhaps in reducing the possibility of an appeal where there is uncertainty. Some tactics apply where one party with resources may deliberately raise a case in then Court of Session in order to put pressure on his opponent. There is a tendency for “high value” cases to be raised in the Court of Session. See answer to 4.8

4.6 In what, if any, types of cases should (a) the Court of Session and (b) the Sheriff Court have exclusive jurisdiction?

The Sheriff court should be the sole court of first instance in family cases for reason of cost, accessibility and speed. In particular if there were dedicated family courts the benefits of expertise would be fully available in the sheriff court. It is noted that

dedicating judges to deal with child abduction cases has created expertise and the benefits of speed and efficiency. These same benefits would apply if such cases were dealt with by dedicated specialist family sheriffs.

4.7 Should the jurisdiction in the Court of Session and the Sheriff Court be unified to create a single civil Court?

If family courts were created, yes.

4.8 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 benefits of having skilled counsel instructed can be that a case is resolved quickly or issues focussed more clearly. It is our position that specialist family courts would foster the same expertise in the family bar at those courts. Indeed many sheriffs would acknowledge these same benefits from very experienced solicitors in family cases at the moment. We therefore believe that a specialist family sheriff court would most effectively deal with cases at first instance leaving the Court of Session as an appeal court.

Specialist family sheriffs would resolve the issue of inexperienced judges dealing with complex family cases. The question is the degree of complexity or difficulty, not its value alone. A high value case can easily have the most straightforward issues behind it. Equally a low value case can have several complexities. Similarly, if sheriffs are trained in issues such as child development, high conflict resolution and the effects of abuse, they will be far better prepared to handle these cases than present “generalist” judges.

4.9 If the current structure of the Courts is retained at what level should the privative jurisdiction of the Sheriff Court be set?

We have no particular view on this

4.10 Are the current powers to transfer cases between Sheriff Courts and between the Court of Session and the Sheriff Court satisfactory?

Yes although we see concurrent jurisdiction as unnecessary if we had family courts.

4.11 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.

No.

4.12 Alternatively should there be another level of judiciary within the Sheriff Court to deal with “third tier business”?

Again we would not see this as improving the service for family cases

4.13 Does the current division of the Sheriff Court into distinct geographical jurisdictions present difficulties or does it have advantages?

The present jurisdictions are outdated and unhelpful as they bear no relation to the current distribution of the population and are based on outdated considerations. For instance the business of Linlithgow Sheriff Court derives largely from Livingstone and surroundings. Most court users therefore have to travel to Linlithgow and so the is not serving the major population in its area.

There are advantages in local sheriffs with local knowledge. However it has to be questioned how great a benefit this provides in practice. Within each jurisdiction there are areas with particular characteristics, such as a significant ethnic minority population or identified multiple deprivation. It would not take any judge long to become aware of such areas and take this into account where relevant.

Increasingly too there are cases involving parties living in different areas of the country or even different countries. Rules of jurisdiction could usefully be changed to allow a test of “forum conveniens” to be applied at an early stage.

4.14 Are the current arrangements for dealing with undefended actions satisfactory?

It should not always be necessary to follow the same rules of procedure for undefended actions as for a defended action. For instance, if a minor amendment is necessary full intimation on an uninterested defender may be inappropriate particularly where initial service had to be by sheriff officers or whereabouts are unknown. An element of discretion on the part of the court would resolve this. On the other hand should there not be a requirement for an acknowledgement of service to be required in addition to a recorded delivery slip or an advertisement on walls of court? These methods are no longer as effective as they once have been.

4.15 Are the current arrangements for the disposal of cases raising issues of public or administrative law satisfactory?

Children’s hearing referrals and related procedure tend to be better served by the courts than other civil business presumably because most courts give them a degree of priority. While this is entirely appropriate it does tend to emphasise the problems we face in obtaining prompt hearings for other , equally urgent and important family issues.

4.16 Are there types of business in the Sheriff Court which could more efficiently or appropriately be dealt with by administrative rather than judicial process? For example, are the current arrangements for the disposal of commissary business satisfactory?

A number of procedural matters could sensibly be devolved to sheriff clerks, such as fixing diets for hearings.

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

We think there are advantages in having a more local service although not based on the present sheriffdoms and with more flexibility to move between areas to deliver particular services. See answer 4.4 notional jurisdiction need not mean national delivery of service of course. Local courts should still be used but with more movement of sheriffs between them. It is important that people should not have to travel significant distances to access justice. See also our argument for a "forum conveniens" approach, above, answer 4.13

4.18 Is there a case for all Sheriffs to have an all-Scotland jurisdiction?

In family cases a Sheriff with a degree of local knowledge would be preferable to a Sheriff anywhere in the country dealing with these issues.

4.19 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? Is so, what factors should be taken into account?

Yes

4.20 Are the existing appeal arrangements satisfactory?

Appeal to the Sheriff Principal has the benefits of speed continuity and economy. The Court of Session has the disadvantages of delay and high cost, but it is useful to

have the option of proceeding straight to the Court of Session in cases of greater difficulty, novelty or complexity.

4.21 Should the office of Sheriff Principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?

See answer 4.20

4.22 Should the majority of statutory appeals continue to be dealt with by the Inner House of the Court of Session

We have no particular view on this

4.23 Should there be a limit to the number of levels of appeal through which an action can progress? Is so, how many levels would be appropriate? What provision, if any, should be made for exceptional cases and how should these be defined?

If, as we recommend the Sheriff court were to have privative jurisdiction in family cases at first instance, appeal provision could be usefully streamlined. There are advantages in having a sift procedure to stop appeals which are misguided or frivolous from taking up court time.

4.24 What are the advantages and disadvantages of reliance on temporary Judges and part-time Sheriffs?

Advantages of having temporary or part-time Sheriffs/Judges is probably for those appointed to obtain experience in the function of Sheriff or Judge. The disadvantages are uncertainty for agents appearing before a particular Sheriff or

Judge to know how they operate in the Court, they would be unable to advise their clients on what to expect. In particular in family cases being allocated a part time Sheriff who has a background purely in criminal work or reparation, can be unhelpful as the practice and procedures in family cases are distinct, and in our view should become more so. Special training is required to deal as directly with parties as the family rules require and also to deal with children and child issues.

CHAPTER 5:

5.1 Should the rules of civil procedure have an over-riding objective or statement of philosophy and, if so, what should the main elements of that overriding objective or statement be?

An overriding objective requires that all else is subservient to that objective. While the objective of proportionality is laudable, it is not acceptable that this should be applied to family cases particularly those involving children. This would create a potential conflict with the over-arching principles set out in the Children (Scotland) Act 1995 which the court must follow. A statement of philosophy would fit better with the court's duties but would allow application of a proportionality test where appropriate, for instance in financial disputes. Such a statement should provide that access to justice is speedy, fair and effective.

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

Mediation in family disputes has been available for a number of years. The uptake has been patchy. In areas such as Ayrshire a significant number of solicitors trained with CALM and became accredited mediators. The number of referrals was found

not to justify the time and cost of training required to maintain accreditation and as a result the number of accredited mediators in Ayrshire has now fallen to only two.

Some sheriffs were more enthusiastic than others in referring parties to mediation in the course of a court action, under rules 33.22 and 33A.22. for instance the sheriff at Falkirk encouraged the use of mediation almost as a matter of course. We are not aware of any research which has looked at the success or otherwise of this approach.

We are aware that compulsory mediation in child cases in England is not regarded as successful. The compulsory session is not adequate to achieve benefits. Any compulsory use of mediation would require significant resources to ensure that the sufficient sessions were available to suit each case. One of the underlying principles (and benefits) of mediation is that it is driven by the parties who identify the issues to be discussed and the timetable for doing so. A compulsory session flies in the face of this and perhaps undermines at the outset any possibility of success. However the parties should be asked by the judge at the outset of a child case if they are aware of the mediation services in their area and if they are not willing to attend to enquire why not and ask them to reconsider if the court considers that they should go to mediation. This could quite easily be formulated in a court rule. In our view courts should encourage and facilitate use of mediation but not require it.

The issue of parties' article 6 rights is critical particularly when linked with article 8 rights. There is already some criticism of the use of closed courts for cases involving children mainly from the grandparents' rights lobby.

It follows from the above that mediation should be available as and when required by the parties at whatever stage. The request would have to be mutual but if made

should be recognised by the court and allowed, notwithstanding any duty of the court to manage the case. There should also be adequate legal aid funding for the cost of mediation where the parties are eligible for legal aid. Currently solicitor mediators are paid £86 per hour, a rate which was set almost 10 years ago and despite repeated requests has never been reviewed. Given that mediation can often resolve issues and avoid lengthy court proceedings, and is usually dealt with by highly experienced family solicitors/mediators, the rate paid should be fair and reviewed regularly

5.4 Are there any particular kinds of dispute in which the use of mediation or ADR is not appropriate and in which a judicial determination is essential?

- Adoption
- Interdict and exclusion orders
- Cases under Part II of 1995 act
- Where there is an allegation of abuse against one party or a child
- Where mediation has failed.

Arbitration can be appropriate for resolving family cases involving children. A panel of family law specialists trained in arbitration is worth considering. It is more likely to work in financial disputes. However the objective under the 1985 Act is fair division of matrimonial property and fairness in financial provision. Commonly there are a number of competing factors to be weighed up for and against each party's claim. It is not simply a matter of establishing and then applying the relevant law. An element of discretion in weighing up the claims is needed and we are of the view that arbitration may be too blunt an instrument for many cases.

In family cases in general it is doubtful if judicial determination can ever be completely dispensed with. There are, and will remain, many cases where negotiation or mediation brings matters to a successful conclusion. Negotiations are however carried out “in the shadow of the law”. If there is no judicial determination process at the end of the line where does that leave negotiation? Equally, if mediation is partially or wholly unsuccessful there has to be a further option.

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

At present there are two forms of mediation available in family case, that provided by qualified lawyers through CALM and that provided by Family Mediation Service. The former provides mediation in financial as well as child issues. The availability of CALM mediation across the country is patchy. That provided by FMS is more widespread, although in most areas financial issues are not dealt with. As the latter is presently funded principally by the public purse, either through local authorities or the Scottish Government it would be more easily rolled out as a nationwide provision. If the government wishes to have parties resolve issues outwith the court process then it requires fully to fund mediation services. At present those wishing to use a CALM mediator require to pay a standard hourly rate, which is met either by private funds or through sanction granted by SLAB. If there were to be government support for funding of CALM mediation this may lead to an increase in trained mediators and improve access. However additional financial support for CALM mediators is unlikely and there would seem to be no reason why the additional resources could not be effectively used to develop FMS services. The cost to users of FMS is voluntary although a contribution according to means is requested.

Mediation is a very important tier in the provision of access to justice and should be properly funded for those who wish to use it and cannot afford to pay.

Collaborative law is proving effective and popular in resolving family cases out of court. The service is presently provided only through solicitors who have completed training with the Scottish Collaborative Law Group and there is no legal aid or other assistance available.

5.6 In what respects can modern communications and IT be harnessed to improve access to civil courts?

If written pleadings remain, once an action becomes defended all adjustments and amendments could be exchanged by e mail. The question of party litigants would have to be addressed as it may not be assumed that all would have access to the internet.

Options and other hearings which are procedural in nature could be dealt with by audio conferencing. If the necessary technology was not available to a party equipment could be lent to them or made available at a public library. Documentary productions could be scanned and debated could be held by tele-conferencing.

We question however if this would be an effective method of dealing with a contentious child welfare hearing for instance. The benefit of such hearings is that the sheriff is able to speak directly to the parties, and obtain a sense of what is driving their position. This would not be achieved by audio conference.

Significant use of technology will work well where both parties are represented. However it is an increasingly frequent feature of family cases that one of the parties is unrepresented. While eligibility for legal aid is so restricted and the number of firms offering legal aid is diminishing, this is going to remain the case.

5.7 To what extent should the court control the conduct and pace of litigation?

We see benefits to all concerned if the conduct and pace of litigation were controlled by the court. Early identification of relevant issues and discarding of those with not merit limits the amount of time and preparation and therefore the cost and length of time a case takes. Where children are involved an early resolution is usually beneficial. This is not always the case though and sometimes the degree of hurt, anger, bitterness or other emotions running in family cases is such that the passage of time is needed. A degree of flexibility is therefore necessary, particularly in family cases. If we had specialist judges they would be better able to control the pace of cases.

5.8 What types of case would benefit from (a) judicial case management and what types would benefit from (b) case-flow management?

Noticeable improvements have been achieved in progressing cases to conclusion since limited case-flow management –by way of timetabling was introduced. There are still many cases which remain sisted for long periods. Equally there are many cases where the issue is the care of a child where a sequence of child welfare hearings take place with the Options hearing being discharged and sometimes not even defences ordered-with no great impact on the court's ability to deal with the case. Thus we have in practice at the moment a hybrid system which allows for an element of both case-flow and case management. This flexibility is an essential component of an effective family court, however there are disadvantages at the moment as a result of inconsistency of sheriffs operating the present rules.

the existing rules do however provide for an opportunity for case management which has largely been disregarded by sheriffs. This is the options hearing. The purpose of

these hearings was to determine which issues were still outstanding and which were being insisted on. As parties require to be present this should be an opportunity for an element of “reality testing” of a party’s position. For instance where grounds of divorce are denied but both parties admit that there is no prospect of reconciliation the sheriff can encourage the defender to drop his plea against divorce, thus limiting the question requiring to go to proof. While many sheriffs have embraced the opportunity for direct discussion with parties at child welfare hearings, the same opportunity is largely missed at options hearings. If the responsibility of case management lay more directly with the sheriff, pleas with no merit could be dismissed at an early stage and the appropriate type of hearing assigned. Where a party litigant was involved, issues of fairness if this approach were adopted would arise. However case management would be of great benefit where one party represents himself as these cases often take longer while the party gets to grips with the law and the procedure. If reliance on written pleadings was reduced and the judge was able to be more directly involved some of these issues would have less impact.

We are therefore in favour of more judicial case management rather than simply case-flow management.

CHAPTER 6:

6.1 What are the advantages and disadvantages of pre-action protocols

The only relevance in family actions is where there is a financial question to determine. It is commonly accepted that there is a duty to make full disclosure of relevant resources in such cases. Where there has been a period of negotiation much work to establish capital and income, at relevant date and currently, will have

been done. However there are often other orders sought in the same action, for instance for protection from abuse or relating to children which may require an action to be raised urgently. Where this occurs, financial claims may have to be included, for instance where the action is one of divorce or dissolution, or a question of aliment arises. There may be no time to obtain disclosure in advance. There is a distinct advantage in a pre-action protocol for financial disclosure, where possible. This encourages cooperation at an early stage and allows the court to determine if one party is not cooperating and impose the appropriate sanctions. This has the benefit of speeding up the process and reducing costs. It also assists agents to focus issues and negotiations.

6.2 Should there be a greater use of pre-action protocols? If so, in what courts and for what types of action?

For the reasons stated above, in family actions, rather than a mandatory pre-action protocol, a duty to disclose once the action has started would be more beneficial.

6.3 Should compliance with pre-action protocols be voluntary or compulsory.

We are not in favour of pre-action protocols in family actions, but are in favour of a compulsory early duty to disclose as above.

6.4 Should there be a greater requirement for leave to bring or to take steps in proceedings? If so, at what points in proceedings and what criteria should the court apply in deciding whether leave should be granted?

In family cases there is a benefit in limiting the procedural rules so that parties have a better understanding of their case. The nature of these disputes is such that determinations will have a better chance of success if the parties feel “ownership”. This can be better achieved if parties understand the issues and factors taken into

consideration. Limiting formalities is helpful. However we still see a clear requirement for formal rules. Family cases which require to be dealt with in court are commonly of some complexity or high conflict. In these situations a clear framework for procedures to which all must adhere assists the process. This is particularly true given the high incidence of party litigants. Rules for intimation of motions would benefit from streamlining and greater use should be made of new technology such as e mail for court/solicitor/party communications

6.5 Are the current arrangements for making the rules of civil procedure satisfactory?

No. If the Rules of the Sheriff Court and the Court of Session are to be rationalised, in line with what had been policy for some years, that it makes sense to have one body. Also because of the concurrent jurisdiction of the Court of Session and Sheriff Court in so many areas two Councils often have to make Rules in relation to the same piece of legislation and a single body could do this more efficiently. Emerging of the two bodies might also have the added benefit of bringing a fusing of the distinctive approach of each of the two bodies taking something from the detached policy approach of the Court of Session Rules, Counsel and a more detailed approach of the Sheriff Court Rules Counsel.

There is a significant problem with the Rules in the Sheriff Courts and that is “local” Rules and compliance. This can cause particular difficulties in family cases where, for example, there are a variety of “Rules” about the personal appearance at the Options Hearing. There is also the widespread tendency to treat family cases as not requiring to have regard to the Rules. While there might be circumstances in children cases where some flexibility is both desirable and appropriate this is

seldom the case where the issues in dispute are largely financial. There is not much point in creating a new body to deal more efficiently with the making of Rules unless there is some method of making sure what Sheriff's are reasonably familiar with the Rules and properly apply them.

6.6 Should there be a single set of rules of civil procedure in both the Court of Session and the sheriff court?

No. If the outcome of the this review is that the Court of Session retains its first instance jurisdiction then it must be because it has something distinctive to offer and that may well need difference procedures and therefore different Rules to the lower Courts. It should not be beyond the wit of a Practitioner to master two sets of Rules and it is neither possible nor desirable to design Rules for the Court of Session or higher level procedure (currently Ordinary actions) in the Sheriff Court to be accessible to the party or litigant.

6.7 Should there be a single initiating document for (a) all types of action and/ or (b) at all levels of court structure? If so, what format should that document take?

There is an argument for simplicity and accessibility for all litigants but particularly in family cases for the reasons discussed above. Small claims and summary causes-if both remain, - should be the simplest as they are more commonly going to be used by party litigants and this is part of their *raison d'être*. Ordinary civil actions may still require technicalities of pleading. What is the benefit of different styles of initiating

document in various actions and courts/ if there is no clear benefit then streamlining should take place.

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

In family cases simplicity and accessibility should be the over-riding requirements. A list of craves, as at present, seems sensible. A supporting paragraph for each provides necessary notice. However the temptation to list all the wrongs done to one party provides an unnecessarily negative focus. Greater reliance on affidavits where interim orders are sought? Need to give notice for instance where allegations of abuse are made. Do we need pleas in law? If there is a question about the legal basis of a claim this could be raised by the sheriff as part of his case management functions and written or oral submissions invited.

6.9 Are the current arrangements for summary disposal satisfactory?

Rarely an issue in family cases

6.10 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?

The difficulty here is in defining “ routine”. If procedural hearings were dealt with more effectively the routine matters would be subsumed. For instance an options hearing usually deals with the number of craves being insisted on and the type of hearing, and number of days. The procedural matters follow on from consideration of the substantive issues. See also answer 4.16

6.11 Are the current arrangements for dealing with routine procedural business satisfactory?

See above

6.12 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?

Sheriffs already exercise control over the number of days set. Practices differ from court to court. In some an accurate assessment of the number of days required for a proof is needed. That number of days will then be allocated. If at the start of the proof it is clear that more days will be needed, some sheriffs will discharge the diet until the correct number is available together. In other courts, the opposite view is taken. Only one day will be fixed and only if the proof goes ahead will further days be allocated. Which is better?

How can the court tell one or more of the parties that they have run out of time and cannot lead more witnesses or complete a submission? Flexibility is necessary. Better allocation of court resources would assist. Dedicated courts for family cases would prevent cases being put off for criminal business. One sheriff managing a case would allow better knowledge of how long a proof will take.

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

Oral argument allows more openness. Written argument allows more notice and better preparation. The party litigant is seriously disadvantaged by use of written argument. Court time is better used though. Oral argument allows discussion and interrogatories by parties and judge.

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

We already advocate a requirement for early disclosure?

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

If sheriffs were more inquisitorial and had the ability to fix an early hearing to fix procedure the possibility of agreeing to instruct one expert could be addressed where there was a requirement for such evidence. This could be particularly helpful in child cases where children can sometimes be over-interviewed by experts acting for different parties.

6.16 Should a system of pursuers' offers be introduced into the civil courts procedure? If so, what features should such a system have?

No great relevance to family cases where financial claims are often multi-facted and not given to being reduced to tenders.

6.17 Should civil jury trials be retained?

No relevance to family cases

6.18 Should written judgements be required in all cases?

Yes, as there would be difficulty in determining the basis of a decision if not written, particularly at the final stage/ a written judgement helps satisfy the requirement for openness and fairness.

6.19 Should the courts have greater powers to impose sanctions for non-compliance with court rules or where a party or his representative has behaved unreasonably? if so, what should these be?

If judicial case management is introduced/developed sanctions will be essential otherwise the system will not work.

The increase in party litigants has led to the wasting of court time, often due to deliberate awkwardness, , lack of awareness of time limits or ignorance of the law as well as the rules. Courts should make greater use of the facility to make awards of expenses at each stage. Such powers should be flexible and not mandatory...

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

Case management should allow a sift of issues with interim hearings to flush out whether there is legal merit or likelihood of evidence being available. However difficulties could still arise eg can a father be told he does not have the right to pursue an apparently hopeless case for residence or contact?

6.21 Is the current legislation on vexatious litigants in need of reform and, if so, how should that be done?

A controlling/personality disorder father does not necessarily fit the definition for vexatious litigant. The rules should be revised to deal with the intransigent party litigant who pursues a case with no merit, to bring such a person within the definition of vexatious.

6.22 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?

This is not likely to be of benefit to anyone. A party litigant should be encouraged to seek and accept legal counsel. Allowing unqualified representation for such parties would only exacerbate the difficulties the courts face in cases involving party litigants..

6.23 Would it be desirable to introduce separate procedures for multi-party litigation.

This is not an issue in family cases.

6.24 Is the rule governing the procedure to be followed for judicial review satisfactory?

Not an issue we wish to comment on.