**SEPARATE SHEETS**

**RESPONSE FROM THE EDITORS TO THE ANNOTATIONS TO THE CHILDREN’S HEARINGS (SCOTLAND) ACT 2010 AND THE SCOTTISH CHILD LAW CENTRE**

**Act of Sederunt (Child Care and Maintenance Rules) (Amendment) (Children's Hearings (Scotland) Act 2011) 2013**

**1(1)**

We recommend a more abbreviated working title be substituted, eg ‘The Care and Maintenance Rules, 2013’.

**[3] 3.2**

We find this wording confusing. It seems on first reading to say that s 27 contains definition of ‘child’. We recommend inserting: ‘… where a sheriff is coming to a decision under section 27 of the 2011 Act’. **[6] 3.4(b)**

There seems to be no Form for application for extension or variation of an interim compulsory supervision order under s 98. This should be supplied.

**[7] 3.5**

(a)(ii) We find this wording confusing. See under 3.2 above. We would again recommend: ‘ … where a sheriff is coming to a decision under section 27 of the 2011 Act’.

(b) and (c). The change in wording to ‘any curator *ad litem*’ from ‘any curator *ad litem* appointed by the court’ is unnecessary as all curators ad *litem* are appointed by the court.

**[8] 3.5A**

We are concerned that the requirement for confidentiality may cause concern and confusion about the appropriate action that should be taken by a curator or safeguarder where important information affecting the safety of the child comes to the knowledge of that curator or safeguarder. It should be made clear that ‘confidentiality’ should not prevent this information being speedily passed on to relevant agencies, eg the police. The dangers of non-sharing of information were recognised by Susan O’Brien QC in her Report on the Caleb Ness case, published October 2003. At page 8 of this report it is said: ‘Generally, the lack of knowledge about the relevant guidance on sharing confidential information in a child protection context was a matter of concern’. We therefore recommend the addition of the following words at the end of r 3.5A(2)(b): ‘including the requirements of child protection’.

**[9] 3.6**

The provision in ‘(a)’ effectively deletes r 3.10, which provides that a safeguarder who decides not to become a party must make a written report, be told of interlocutors and may seek leave to re-enter. The value of a safeguarder’s report, even where he/she does not become a party, and the safeguarder’s right to be kept informed and to re-enter seem to us, from our experience, to be obvious. Accordingly, we can see no justification for this and recommend that ‘(a)’ be deleted.

**[10] 3.7**

(a) By adopting this wording, and by re-wording paragraph (b), the sheriff’s power under the old rule to appoint a different safeguarder is abolished. This power was sparingly used, but we think it should be retained, since it is important that that the sheriff should retain the power to appoint a particular safeguarder in the situation where the sheriff, from his/her experience, believes that a particular safeguarder will be appropriate in the particular circumstances of the case.

**[12] 3.10**

Already discussed above at 3.6.

**[13] 3.11**

In the sub-heading of Form 32A the term ‘set aside’ is incorrect – should be ‘terminate’.

[15] 3.13

(2)(c) The term ‘set aside’ has been left in here: this should be changed to ‘terminate’.

**[18] 3.21**

(3)(b) Form 43A uses terms ‘pursuer’ and ‘defender’ which are inappropriate.

**[19] 3.22**

This makes considerable changes to the existing ‘live link’ provisions in the old r 3.22.

[i] It excludes from the live link facility any ‘vulnerable witness’ (VW) as defined in s 11 of the Vulnerable Witnesses (Sotland) Act 2004. That section enacts a very wide definition of the VW, including under 16s and, for over 16s, persons who might be affected by fear or distress in giving evidence, including where this may be related to the actings of others. We believe that the whole purpose of the live link is to protect just such children and other vulnerable persons. We cannot think that it was intended to effect this exclusion and recommend that the words ‘except in circumstances where such witness is a vulnerable witness within the meaning of the Vulnerable Witnesses (Sotland) Act 2004’ where they occur in paragraph (2) should be deleted.

[ii] It removes, in paragraph (4), the provision that application should normally be made 14 days before the hearing concerned. We are rather against this – the former rule was qualified by allowing a later application on special cause shown. We think this gives enough protection. If the aim is to promote speed, then we suggest reduce the 14 days to 7.

**[21] 3.27**

We recommend that Form 46 (referred to in s 3.27(b) of the 1997 Rules) should also be changed (or a new Form 46A devised) so as to refer to refer to s 35(1) of the new Act.

The forms taken directly from the 1997 Rules seem to refer to the old Act. We suggest that drafter trawl through all these Forms to address this.

**[24] 3.32**

Sections 43(2) of the Act does not include a person in the category identified by the Supreme Court in *Principal Reporter v K* (“ … appears to have established family life with the child …”). Section 43(1)(f) allows for rules of court to add other persons to the list of persons to be notified. Thus the Editors of the Children’s Hearings Act and the Scottish Child Law Centre believe that this is a golden opportunity for this difficult issue to be addressed. We strongly recommend the insertion ofa new sub-paragraph:

‘(b) any person who appears to have established family life with the child;’ – with consequential re-lettering of existing ‘(b)’ as ‘(c)’.

**[28] ‘Part VI (Warrant for further detention of a child)’ is omitted.**

Consequential on the replacement of Warrants for Further Detention by Extensions of interim compulsory supervision orders. We note that this effects the removal of Part VI and r 3.41, however, the subsequent Parts and rules have not been renumbered. Any consolidation will require to insert a Note here explaining the absence of any Part VI and r 3.41.

**[31] 3.45(c)**

See our discussion of s 106 and procedural hearings in our extensive answer to Question 6.

**[33] 3.47(d)**

We recommend the insertion of ‘and/or curator *ad litem*’ between ‘safeguarder’ and ‘appointed’ in second line of paragraph (5).

**[34] 3.48**

This draws us back to s 89(3) of the Act which defines ‘statement of grounds’ as being:

‘(a) which of the 67 grounds the Principal Reporter believes applies in relation to the child, and

(b) the facts on which that belief is based.’

There appears to be no intention to depart from the well-established principle that what used to be called the ‘conditions’ for referral cannot be changed by the sheriff. However given the conflation of facts and grounds in s 89(3) we recommend that the emendation should be expanded so as to read ‘any statement of fact believed to support the statement of grounds.’

**(38)**

We believe that this rule as drafted is insufficiently clear. Under (b), a warrant signed by the sheriff clerk is to be ‘treated for all purposes as if it had been signed by the sheriff’, however in para (c), requires warrants to secure attendance to be signed by the sheriff. We recommend that the words ‘Subject to paragraph (c)’ should be inserted at the beginning of para (b).

**[39] Heading for Part VIII**

We question whether the words ‘relevant decisions’ are appropriate here, as they are non-statutory and may cause some confusion with relevant person decisions. We would recommend:

‘procedure in appeals to the sheriff against decisions of children's hearings’.

**[45] 3.58A**

* We recommend insertion in 3.58A of ‘(g) the name and address of any curator *ad litem* appointed for the child’ with consequent re-lettering of the rest of the list.
* We also recommend the addition of further sub-paragraphs at the end of paragraph (3):
* the reasons for making the application, and
* in the event of the application including a crave under s 166(8)(b) of the 2011 Act (for an order requiring the local authority now held to be the relevant local authority to reimburse the applicant local authority for any costs incurred in relation to the duty), a statement of such costs, with reasons why they were incurred.

**[47] 3.59**

We recommend addition of curator *ad litem* as (e) on the list in r 3.59(c).

**[48]3.60**

Minor grammatical point: ‘Information’ replaces ‘statement’ in sub-paragraph (a), but this is not followed through in (b) – we suggest perhaps ‘report, statement or information’ in both.

**(49)**

This is new – in the past procedure for leave to appeal was not specifically provided for. Nothing is enacted here to govern the procedure for considering leave to appeal, but the provision in square brackets for intimation to parties suggests that a hearing before the sheriff principal may be what the legislature has in mind. We recommend that there should be explicit provision for a hearing before the sheriff principal, since, for example, an opponent of leave might wish to draw to the sheriff principal’s attention some matter which may indicate that the appeal is frivolous.

**[51] 3.62**

Only non-consequential change seems to be substitution of ‘relevant person’ for ‘other party’ in list of people to be notified. The only ‘other party’ we can think of is any curator *ad litem* and we recommend that curator *ad litem* should be added to the list.

[52] 3.63

We do not see any advantage in omitting sub-paragraph (3) which is a normal enough procedural link with r 3.64 which provides for the hearing of evidence. We therefore recommend deletion of this proposed amendment.

**[53] 3.64**

This provision does not change the reference in the 1997 Rules to the provisions of the old Act. We therefore recommend substitution of ‘sections 115 to 117 of the 2011 Act.’ We further recommend that the word ‘as appropriate’ be left in: they do not add a great deal in strict law, but are the correct idiom where, as here, there are a number of choices.

**[56]**

Fine. Consequential, but we are unclear as to why the reference to Part 15 has been put in square brackets.

**Amendment of Schedule 1 of the 1997 Act of Sederunt**

**3.**

**(6)** Heading of Form 31 still refers to 1995 Act.

**(7)** Heading of Form 32 and Note in square brackets at end still refer to 1995 Act.

**Form 45.** We recommend insertion of CURATOR AD LITEM in list of persons in Form 45 to receive notice.

**Form 47.** We recommend insertion of CURATOR AD LITEM in list of persons in Form 47 to receive notice.

**Form 48.** We recommend insertion of CURATOR AD LITEM in list of persons in Form 48 to receive notice.

**(27)** We recommend insertion of CURATOR AD LITEM in list of persons in Form 52 to receive notice.

**(28) Form 53**. We recommend insertion of CURATOR AD LITEM in list of persons in Form 53 to receive notice.

**(29)** Form 54. We recommend insertion of CURATOR AD LITEM in list of persons in Form 45 to receive notice.

(31) Form 57. We recommend insertion of CURATOR AD LITEM in list of persons in Form 57 to receive notice.

**Amendment of Ordinary Cause Rules**

**33C.1 (1)** ‘Principal Reporter’ definition: the definition in s 93(1) of the 1995 Act is founded on ss 127 and 133(1) of the Local Government etc Act of 1994, both of which are repealed in Schedule 6 of the 2011 Act. We recommend change to ‘under Part 2 and Schedule 3 of the Children's Hearings (Scotland) Act 2011’.

**33C.3** We can see nothing wrong with this. The repetition of the words in s 68(3)(a) of the 2011 Act seems entirely appropriate.