

Civil Justice Conference - 10 May 2021

Sheriff Wendy A Sheehan, President, Sheriffs' Association

I am grateful for the opportunity to speak on behalf of the Sheriffs' Association this afternoon. There has been a high level of shrieval engagement on a broad range of issues, a very high shrieval response rate to the survey, discussions on our Council and many emails and phone calls with colleagues the length and breadth of Scotland. I will focus on the key issues given the time constraints in today's programme.

Sheriffs are eager to engage with new technology, to learn and adapt to change. We have done so to a huge extent over the last year. We have had to develop skills not only in utilising technology but in effectively engaging with parties on digital platforms.

We appreciate the rapid development of the technology for virtual hearings which have kept the civil courts running over the last year against the background of Covid-19. WebEx is a vast improvement on telephone conferencing. It works well as platform for many types of civil court business – in particular in the Sheriff Appeal Court, the ASPIC and for commercial cases. We accept that WebEx is likely to remain the default platform for civil/ordinary court business - where hearings are either procedural, based on written submissions or legal argument by agents/counsel.

The convenience offered to agents and litigants, particularly in sheriffdoms where travel to court may be significant, is acknowledged as is the fact that virtual hearings can offer increased access to justice for some litigants.

These positive observations come with significant caveats:

- There is a significantly greater administrative burden involved in setting up hearings, document sharing, upwards delegation from clerks to the judiciary and the time spent in both preparing and tidying up courts;
- The efficient conduct of hearings is dependent on appropriate digital connectivity, speed and familiarisation with technology - we are still at the bottom of a very substantial curve in this regard;
- We appreciate the work being undertaken by the Civil Lab to upgrade ICMS, to devise digital processes and better document management systems. The importance of this to sheriffs and the current levels of frustration encountered must be emphasised. We are keen to be closely involved in the development of ICMS. If we are given that opportunity, then it is more likely that user friendly tools will be developed which sheriffs will deploy with confidence;
- Occupational health issues – fatigue, isolation, orthopaedic and ophthalmic issues. Low morale and loss of job satisfaction. Sheriffs describe WebEx hearings as 'demoralising' 'exhausting', 'soulless' and 'sterile'.

Evidential hearings/proofs

There are real concerns about a diminution in the quality of the evidence. There tends to be an increased reliance on affidavit evidence in virtual hearings. Affidavits are filtered through the lens of the agent drafting them and may be a product of the circumstances in which they are produced. Sheriffs are cautious about placing as much weight on them as oral evidence. There is an increasing movement towards evidence by live link in the Scottish courts and whilst in some cases this may work well, in cases where there are sharp issues of reliability and credibility, virtual hearings may be less appropriate. There are concerns that the significance of taking the oath in the solemnity of a court setting may be lost on WebEx. It can be difficult to verify that witnesses are alone when giving evidence. The evidence is more stilted and the flow of questioning can be lost and is sometimes described as 'flat' and 'robotic'. There are time delays and issues with sound quality. The image on the screen falls short of a real life opportunity to assess a witness' reliability, credibility and demeanour in a courtroom setting. Only the head and shoulders of the witness can be seen. Body language cannot be observed. There is a loss of interaction compared to the dynamics of a live courtroom.

Sheriffs also express concerns regarding their experiences of addressing issues of contempt and prevarication through the WebEx medium.

Problems have been encountered when conducting cases involving interpreters and cases with multiple parties.

Sheriffs should be trusted to manage cases effectively – focussing the issues in dispute and identifying the hearings where an in person hearing is necessary in order to make findings in fact in a particular case. Many such hearings are now a hybrid of in person evidence and video links used for expert and skilled witnesses.

Other types of case less suited to virtual hearings

Sheriffs often preside over **problem-solving courts**. This involves skilled interaction with agents and parties, the use of mediation skills and emotionally intelligent, well-timed interventions. This is very challenging on a digital platform. This type of hearing is most prevalent in family courts - in particular, child welfare hearings, which account for the bulk of family cases and a substantial part of the civil court programme in most sheriff courts. Well-managed child welfare hearings resolve cases prior to proof. The most effective child-centred decisions are made when the parties engage meaningfully in the process. The increased emphasis on involving children in these hearings and the requirement to explain our decisions to them will further exacerbate these challenges.

Our summary sheriff colleagues who undertake simple procedure cases also report difficulties in engaging with parties and attempting to resolve cases at an early stage, to refer parties to in court mediators or to adopt a problem solving approach to resolving cases prior to evidential hearings via this medium. Agents and parties settle cases by attending court and speaking to one another at hearings. Whilst the

challenges may be ameliorated by training and the development of judicial skills in conducting such hearings digitally, there is sometimes a benefit in litigants attending court.

Turning to **adoption, permanence and children's referral cases** – multiple concerns arise;

The birth parents of children involved in such proceedings often encounter digital poverty, learning difficulties and other adverse life experiences which make it virtually impossible for them to effectively participate in virtual proceedings, which at the best of times are difficult for them to understand. They are often acutely stressed, anxious and angry. They require to be supported by their agent in person throughout the process. Granting a child protection order or permanence order where the parent is on a screen, participating alone from home or worst still, as a disembodied voice down a phone due to their lack of digital connectivity, precludes their effective participation in what is a crucial decision about their family life. This is suboptimal at best and the view of many sheriffs simply inappropriate. Those concerns are not unique to the Scottish family courts.

When the requirement for social distancing eases and the footfall in our courts can safely increase, it should be noted that even in uncontentious cases, the granting of adoption orders and parental orders are important hearings for parties. Petitioners have an investment in the ceremony of the process, which is akin to a wedding or funeral. They attend with family members, take photographs and celebrate afterwards. This is an important date in the child's life which becomes part of their life story book. There has been a loss of public service to a significant group of court users in cancelling such hearings over the last year.