SHERIFFDOM OF TAYSIDE, CENTRAL & FIFE

PRACTICE NOTE NO 1, 2009

ADOPTION AND CHILDREN (SCOTLAND) ACT 2007: GUIDANCE FOR SHERIFFS AND PRACTITIONERS

Purpose

1. The purpose of this Practice Note is to secure the efficient management of contested applications and other proceedings under the Adoption and Children (Scotland) Act 2007 ("the Act"). It should be read subject to the detailed rules of procedure to be found in the Sheriff Court Adoption Rules 2009 ("the Rules") – see the Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 (2009 SSI 284). It will be revised in the light of experience and any new primary or secondary legislation.

Commencement

2. This Practice Note applies to all applications lodged, or proceedings commenced, on or after 28 September 2009.

Minimum of delay

3. It shall be the duty of the court to secure that all applications and other proceedings under the Act are dealt with as expeditiously as possible and with the minimum of delay. Such applications and proceedings require the co-operation of all concerned and active and firm case management by the sheriff throughout their course.

Identity of sheriff

4. Unless the sheriff principal otherwise agrees, the sheriff presiding at any stage in the proceedings must be a sheriff of this sheriffdom. In the interests of

continuity and consistency in management, every stage of each case must, whenever possible, call before the same sheriff.

5. In the event that a proof has to be taken by a sheriff other than the sheriff who has conducted the previous hearings, the whole process in the case must be made available to the sheriff who is to take the proof not less than three working days before the date upon which the proof is scheduled to commence.

Representatives

6. At every calling of a case any representative of any party must be familiar with the case and must have sufficient authority to deal with any issues that are likely to arise at that calling.

Record of discussion to be kept

7. At every hearing prior to any proof the sheriff should not only pronounce an interlocutor regulating further procedure but should also prepare and keep with the process a brief written record of the main points of the discussion at that hearing.

The application

8. Subject to any issue of confidentiality that may arise, wherever possible a copy of the petition or application (as the case may be) should be sent to the sheriff clerk in electronic form on the same date as the date upon which it is lodged.

Court programming

9. The programming of all classes of business in the courts of the sheriffdom remains exclusively the responsibility of the sheriff principal. In this respect he generally acts through the sheriff clerk. It is therefore essential that the assigning of diets by the sheriff should be undertaken only after consultation with, and with the agreement of, the sheriff clerk.

The preliminary and pre-proof hearings

10. Any preliminary or pre-proof hearing fixed in terms of the Rules should be of sufficient duration to allow for a proper consideration of the issues likely to be canvassed at it. Consideration should be given to the advisability of intimating any such hearing by sheriff officer in order to avoid any possible delay due to ineffective postal service.

11. Where the date of a hearing requires to be intimated otherwise than by the sheriff clerk, the sheriff clerk should advise the applicant or petitioner or his or her solicitors forthwith of the terms of the interlocutor appointing the date of the hearing in order that they may intimate it as soon as possible. If so requested (and subject to any issue of confidentiality that may arise), the sheriff clerk should be prepared to send to the applicant or petitioner or his or her solicitors a copy of the interlocutor by fax or in electronic form as soon as it has been signed. Any such request should be accompanied by the appropriate fax telephone number or e-mail address as the case may be.

12. At any preliminary hearing the sheriff should ask the respondent or his or her solicitor whether the respondent has applied, or proposes to apply, for legal aid. The sheriff should also enquire whether it is intended to instruct counsel or any expert witness and, if so, whether legal aid for that purpose has been or is to be applied for.

13. The sheriff should ensure that the parties have sufficient access to all the documents lodged in process. The sheriff should ask the parties whether they will be seeking to recover any documents and, if so, which documents. The sheriff should ask the other parties if they will make these available informally without the need for a commission and diligence and, if so, should fix a date by which those documents should be lodged with the court.

14. At a preliminary hearing, which failing at a pre-proof hearing, the sheriff should give consideration to ordering parties to intimate to every other party and to lodge in court (i) a list of witnesses, including any expert witnesses, on whose evidence it is intended to rely at proof, and (ii) a list of the documents

or other productions which it is intended should be used or put in evidence at proof.

Assigning a diet of proof

15. Where it appears that a proof will be necessary, the parties should be in a position to give the sheriff a carefully considered forecast of the time which the proof is expected to take. The sheriff should ask each party to specify in detail how long he expects to take in the presentation of his own evidence and in the cross-examination of the witnesses of the other party or parties. On the basis of this information the sheriff should assess how many days should be set aside for the proof (including closing submissions). At the proof itself, parties may expect to be held to the estimates previously given by them, unless in exceptional circumstances.

16. In the fixing of a diet of proof it is not generally a valid ground of objection to a date proposed by the court that a party wishes to instruct particular counsel. If need be, that party can always instruct another counsel.

17. Consideration should be given at an early stage in the proceedings to where the proof will take place and whether the evidence at the proof should be recorded. The holding of a proof elsewhere than at the courthouse may be anticipated to cause administrative problems, for example for the sheriff clerk. But such administrative problems must not be permitted to get in the way of the expeditious disposal of an application or other proceeding under the Act.

18. It will be seen that rules 20 and 37 of the Rules provide that a proof is to be taken continuously so far as possible, but the sheriff may adjourn the diet from time to time. To allow for this, in particular in the smaller courts in the sheriffdom, consideration should be given to the possibility of holding the proof elsewhere than at the courthouse – see the preceding paragraph. Bearing in mind the time limits in rules 22 and 38, the sheriff should consider too whether he or she is likely to require any writing days in order to produce the judgement. If so, provision for this should be made when a diet of proof is fixed. As in the case of an application to free a child for adoption under the

Adoption (Scotland) Act 1978, the reason for such provision is that the sheriff should "be released from other duties so that he can give priority to the case without interruption and until it has been completed by the issuing of his interlocutor. Special arrangements of that kind are clearly necessary if the sheriff is to maintain the continuity of thought throughout the proceedings which is so necessary to a proper disposal of the case" (*Lothian Regional Council v A* 1992 SLT 858 at page 862A-B).

Legal issues

19. At a pre-proof hearing the sheriff should ask the parties if there are any questions of admissibility of evidence or any other legal issues, including any questions under the European Convention on Human Rights, that are likely to arise at the proof. If so, the sheriff should consider whether they could with advantage be determined at this hearing rather than at the proof. Alternatively, the sheriff may adjourn the pre-proof hearing to another date in order to enable any such issue to be argued and determined. If a legal issue is not raised at the pre-proof hearing, the sheriff may refuse to allow it to be raised at the proof except on cause shown. A solicitor who intends to raise a legal issue at a pre-proof hearing should intimate it to the other parties' solicitors beforehand.

Evidence

20. It should be noted that evidence may be presented in the form of affidavits or other written documents (Civil Evidence (Scotland) Act 1988, section 2; *McVinnie -v- McVinnie* 1995 SLT (Sh Ct) 81; *Glaser -v- Glaser* 1997 SLT 456). The sheriff is bound to consider reports placed before him or her even if the authors are not called to speak to them, and the strict rules of evidence do not apply (*T, Petitioner* 1997 SLT 724 at 730L). Such considerations may render the attendance of certain witnesses unnecessary, although for other reasons it may be preferable to call the author of a document. The parties should therefore apply their minds to the question whether any evidence might be appropriately presented in the form of an affidavit or other document and the sheriff should encourage them to decide that question at the pre-proof hearing. The sheriff should also encourage the use of affidavits to cover non-contentious (or indeed contentious) issues where that would save the time of

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witnesses and the court. Notwithstanding that an affidavit has been lodged, its author may be called to give evidence at the proof (see paragraph 3 of the judgment of Lady Smith in *Petitions of Aberdeenshire Council to declare A, B and C free for adoption*, Court of Session, 22 June 2004).

21. Where the author of a report or the maker of a statement which has been or is to be lodged is to be called as a witness, the sheriff may order that the report or statement is to be held to be equivalent to the witness's examination-in-chief, unless for special reasons he or she otherwise directs.

22. The sheriff should discourage the unnecessary use of expert witnesses. If expert evidence is essential, the sheriff should encourage the joint instruction of a single expert by all parties. If one party instructs an expert report, it should be disclosed to the other parties with a view to the agreement of as much of its contents as possible.

23. The sheriff should ask the parties what further productions, if any, they intend to lodge. Any difficulties over the obtaining or lodging of documents should be raised and if possible resolved at the pre-proof hearing.

The proof

24. At a proof it should be borne in mind that "there is a heavy responsibility on the parties' representatives to exercise all reasonable economy and restraint in their presentation of the evidence and in their submissions to the court" (*Lothian Regional Council -v- A* at 862B). The sheriff may therefore exercise his or her existing common law power to intervene to discourage prolixity, repetition, the leading of evidence of unnecessary witnesses and the leading of evidence on matters which are unlikely to assist the court to reach a decision.

25. At the conclusion of the evidence parties must be heard orally thereon by the sheriff. In anticipation of this the sheriff may require the parties to submit, in electronic form or otherwise, draft findings in fact, or skeleton arguments, or both.

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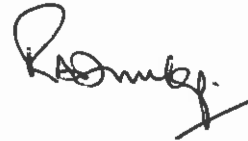
The Practice Note No 1, 2005: Adoption of Children, Etc.

26. The Practice Note No 1, 2005: Adoption of Children, Etc. is revoked subject to the qualification that it shall continue to have effect for the purpose of any application to which it applies which has been made and not yet determined before 28 September 2009.



Sheriff Principal of Tayside, Central & Fife

25 September 2009