



SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

Practice Note No 2, 2018

CHILDREN'S REFERRALS

I, MHAIRI MARGARET STEPHEN, QC, Sheriff Principal of Lothian and Borders in pursuance of the powers conferred by section 27(2) of the Courts Reform (Scotland) Act 2014, hereby directs as follows:-

Purpose

1. The purpose of this practice note is to secure the efficient management and disposal of children's referral proceedings and appeals under the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") and Act of Sederunt (Childcare and Maintenance) Rules 1997 (as amended) ("the rules"). This practice note applies to the following, all of which are collectively known as children's referral proceedings:
 - Proof applications by the children's reporter;
 - Applications to extend or vary interim compulsory supervision orders ("ICSOs");
 - Appeals against decisions of the children's hearing.

Commencement

2. This practice note applies to all applications lodged or proceedings commenced on or after 24 September 2018. This practice note revokes any previous practice notes which regulate the conduct of children's referral proceedings.

Minimum of delay

3. Children's referral proceedings concern children who are vulnerable and may be in need of compulsory supervision. It is vital, in the interests of the child, that such referral proceedings are conducted fairly and concluded efficiently and expeditiously with the minimum of delay. This requires the accurate estimation and allocation of hearings, the reduction of repeated appearances and the elimination of unnecessary or repetitive evidence at hearings. Such cases require the cooperation of all concerned and active and firm case management by the sheriff court throughout their course.

4. Representatives

At every calling of a case, all representatives must be familiar with the case and must have sufficient authority to deal with any issues that are likely to arise.

5. Organisation of referral proceedings

- 5.1 Court business on Fridays will be allocated into two sessions commencing at 10am and 11.30am. All papers required for such business will be lodged no later than 12 noon on the preceding Wednesday. The Locality Reporter Manager or delegated reporter will liaise with the sheriff clerk regarding the court loadings and the allocation of business in each week.
- 5.2 10am business will include first callings of proof applications, procedural hearings in respect of appeals, case management hearings, pre-proof hearings and ICSO applications (except those where the court determines the application will call

alongside an allocated proof diet). Reporters and agents should be available to attend court and to discuss matters from 9.30am with a view to the court starting promptly at 10am.

- 5.3 11.30am business will comprise appeals and proof hearings (in single day/non-complex cases). Hearings of appeals and non-complex proof matters may also be allocated to other slots in the court timetable in order to ensure that cases are dealt with expeditiously depending on the volume of business in the Friday court.

6. Proof applications: General

Lodging of Applications

- 6.1 When lodging an application to establish grounds for referral under section 93 or 94 of the 2011 Act, the children's reporter must at the same time lodge a provisional list of witnesses containing a summary of the matters to which these witnesses are expected to speak.

- 6.2 At the same time the children's reporter should draw to the sheriff clerk's attention any factors indicating that a multi-day proof, or complex procedure, may be required.

6.3 Cooperation of Parties

Parties are expected to assist the court in achieving the fair and expeditious determination of the application with the minimum of delay. In particular, parties are expected as a matter of routine to:

- cooperate in agreeing evidence wherever possible;
- make full and frank disclosure of their position, well in advance;
- provide any additional information on the progress of the application required by the sheriff;
- be informed as to the availability of witnesses; and
- lead only relevant evidence and do so in an efficient manner.

First Hearing

6.4 A first hearing in respect of the application will be fixed for the Friday court at 10am. At that hearing, the sheriff will seek to progress the application expeditiously and, to that end, will expect parties to be able to address:

- (if not already determined) whether a safeguarder should be appointed;
- whether the reporter (and where viable at this stage in proceedings, agents for the parents) have disclosed relevant information and, if not, what arrangements will be made for disclosure;
- whether the requirement on the child to attend that or subsequent hearings should be dispensed with in terms of section 103(3);
- whether any party proposes to lead evidence from a child or other vulnerable witness, including what special measures may be required for such evidence to be taken directly;
- whether any party proposes to rely on a hearsay statement in the absence of a witness and what counter-balancing measures, if any, require to be taken into account in consequence thereof (parties are directed to the cases of **JS v Children's Reporter** 2017 SC 31 and **NM v Children's Reporter and IM** [2017] SAC (Civ) 37 in this regard);
- in the case of an application falling within rule 3.47(1A) whether to dispense with the hearing of evidence and deem the grounds for referral to be established;
- any other steps that may be necessary to secure the expeditious determination of the application, including but not limited to those listed in the 1997 Act of Sederunt, Rule 3.46A as amended;
- whether the case should be treated as a complex case in terms of Part 7 below.

6.5 If the application is not disposed of at the first hearing, unless the application falls to be considered as a complex case, the sheriff will fix a second procedural hearing, which will normally be treated as a pre-proof hearing.

- 6.6 The sheriff will fix a proof hearing when satisfied that the parties are ready to proceed to proof at the proof hearing, and that the hearing of evidence is likely to be required.

Subsequent Hearings

- 6.7 At any second procedural hearing, parties must be able to address the sheriff regarding the matters listed at paragraph 6.4. The sheriff will consider whether a hearing of evidence is required and, if so, the parties' state of preparation for proof. If the application cannot be determined at the second hearing, the sheriff will fix a proof hearing unless satisfied, on cause shown, that a further procedural hearing should be fixed.
- 6.8 Where a third or further procedural hearing is fixed and the application still cannot be determined at that hearing, the sheriff will fix a proof hearing unless satisfied, on special cause shown, that a further procedural hearing should be fixed.

Proof Hearing

- 6.9 When a proof hearing is fixed, the expectation is that the proof will proceed at that hearing. Once fixed, in normal circumstances, the court will grant an adjournment of the proof hearing only where satisfied on cause shown, that to do so is in the interests of the child and is likely to result in the fair and expeditious determination of the application.

7. Multi day proofs/complex cases

- 7.1 Multi day proofs/complex cases are those which will require a specially allocated diet and will not call for proof at 11.30am during the Friday children's referral court.

- 7.2 Throughout the progress of a multi-day/complex case, all parties are under a duty to cooperate to achieve efficient management of the proceedings and the best use of court time. In particular, parties are expected to:
- make full and frank disclosure of their position;
 - be prepared for each case management or pre-proof hearing;
 - agree evidence wherever possible;
 - comply with the requirements set out below regarding expert evidence; and
- lead only relevant evidence, avoid unnecessary repetition and adduce evidence in an efficient manner.

Case Management Hearings

- 7.3 At the first procedural hearing, or as soon as an application is identified as likely to be a multi-day case, after considering the matters listed at paragraph 6.4 above the sheriff will fix a case management hearing.
- 7.4 The purpose of the case management hearing is to clarify the scope and duration of proof required, and any other logistical or procedural matters likely to affect the progress of the case.
- 7.5 In advance of the case management hearing, each party shall lodge a copy report from any expert witness, and a case summary. Parties shall also lodge a joint minute of admissions in relation to any statements of facts, or any evidence, that is agreed. Where a further case management hearing is fixed, each party must lodge an updated case summary.
- 7.6 A case summary is a document which gives fair notice of a party's position and state of preparation by setting out in concise terms:
- the identity of those who will represent the party at proof;
 - (for each party other than the reporter) the extent to which the grounds for referral and statement of facts are disputed;

- (for the reporter) what disclosure has been effected and any reason for non-disclosure of relevant evidence;
- a list of witnesses which should disclose the nature and scope of the evidence to be led (one succinct but informative paragraph per witness);
- where the party proposes to lead evidence from a child or other vulnerable witness, what special measures may be required for such evidence to be taken directly;
- whether a party proposes to rely on a hearsay statement in the absence of a witness and if so, what counter-balancing measures, if any, require to be taken in consequence; (see paragraph 6.4 above)
- the manner of the party's compliance with the requirements regarding expert evidence at paragraphs 7.10 to 7.12 below;
- a list of productions lodged or to be lodged by that party or, wherever possible, by parties jointly;
- an estimate of the number of days likely to be required to hear that party's evidence (including cross-examination and re-examination); and
- a note of any other logistical, procedural or legal issues to be raised by that party, and not yet resolved, that may affect the progress of the case.

7.7 At the case management hearing, parties shall cooperate so as to allow the sheriff to identify:

- the scope of the dispute between the parties;
- the nature and duration of the evidence to be led, and why such evidence is required;
- the extent to which evidence may be presented in the form of signed witness statements /affidavits or other written evidence;
- any special measures required in respect of a child or other vulnerable witness;
- whether any procedure other than proof is likely to be required, and the reason for that;

- any logistical, procedural or legal issues and the extent to which they may affect the progress of the case.

The sheriff shall issue with the interlocutor a note of any directions given at the case management hearing, including but not limited to directions regarding: the instruction of a single expert; the use of affidavits; restriction of the issues for proof; restriction of witnesses and/or productions; and any special measures to be made in respect of a child or vulnerable witness.

- 7.8 The sheriff will not fix a diet of proof, or a pre-proof hearing, until satisfied that the parties have substantially complied with the above requirements and that it is possible to identify with some confidence the length and timing of proof hearing reasonably required. Where, however, the sheriff considers that any of the parties has failed to comply timeously with the above requirements, the sheriff may nevertheless fix a diet of proof if satisfied that to do so would be in the interests of the child and will lead to the fair and expeditious determination of the application.
- 7.9 When fixing a diet of proof hearing in a complex case, the sheriff will also fix a pre-proof hearing.

Expert Evidence

- 7.10 Expert opinion evidence should be kept to the minimum necessary to assist the court to determine the proof application. Where any question arises regarding reliance on expert evidence, parties are expected to have regard to the guidance set forth by the Supreme Court in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 at paragraphs 38-61.
- 7.11 Where one or more parties wish to lead expert evidence that party must lodge a case summary setting out;
- the issues to be addressed by expert evidence;
 - the area of expertise necessary to address these issues;

- why such expert evidence is considered to be necessary;
- the identity of any expert who has been instructed to prepare a report or who has been cited along with a concise summary of the relevant expert's qualifications and experience;
- the enquiries that would require to be undertaken by the expert, including specifically whether any examination or assessment of the child is proposed;
- the likely impact on the length and conduct of the proof hearing.

7.12 The court expects parties to cooperate in the joint instruction of a single expert witness wherever possible. Parties may lead competing experts only with the express and advance approval of the court to do so, subject to such conditions as the court may require.

7.13 Where such approval is granted and two or more parties intend to lead directly competing expert evidence, these parties must cooperate to comply with the conditions set by the court. At a minimum, that will require firstly; arranging for the competing experts to exchange views in order to identify areas of agreement and to clarify the scope of and basis for any areas of disagreement (for instance by arranging a joint consultation between the experts) and secondly; lodging in court a note setting out the areas of agreement and disagreement thus identified.

7.14 A party who fails to comply with the requirements of the foregoing paragraphs may not be allowed to lead any expert evidence.

Pre-Proof Hearings

7.15 In advance of the pre-proof hearing, each party must lodge:

- an updated case summary, containing a final list of witnesses and a proposed running order and timetable for the proof;
- any productions to be relied upon;
- and any other matters specified by the sheriff at the case management hearing.

- 7.16 Parties should bring to the sheriff's attention any logistical, procedural or legal matters liable to affect the progress of the case and ensure that the sheriff is enabled to determine such matters.
- 7.17 Parties will be expected to have a clear grasp of the issues in the case and to be able to demonstrate their compliance with the requirements of this Practice Note.
- 7.18 The interlocutor arising from the pre-proof hearing will have attached to it a timetable for the progress and completion of the proof as agreed by the parties or, failing such agreement, as determined by the sheriff.

Proof

- 7.19 Referral procedure is summary and intended to be succinct where possible. Accordingly, parties must bear in mind at all times their responsibility to exercise reasonable economy and restraint in their presentation of evidence and submissions to the court. The sheriff has a duty to use either common law powers or the powers contained in rule 3.46A to discourage prolixity or repetition or to restrict the issues for proof in order to prevent the leading of evidence that is unlikely to assist the court in reaching a decision.

8. Applications for extension/variation of ICSOs

- 8.1 An application for an interim compulsory supervision order should set out in concise terms the procedural history of the case, and the basis on which the reporter considers it is necessary for the protection, guidance, treatment or control of the child that the current ICSO be extended or extended and varied. Where relevant, copies of the relevant decision(s) of the children's hearing setting out their reasons will be lodged with the application. In opposed cases, the court's interlocutor will set out brief reasons for the decision made.

9. Appointment of Safeguarders

- 9.1 On lodging an application to establish grounds for referral, the reporter must advise the court of the identity of any safeguarder appointed by the children's hearing in respect of the child.
- 9.2 Any party lodging an appeal against a decision of a children's hearing or an application for review of previously established grounds for referral must advise the court of the identity of any safeguarder currently or recently appointed in respect of the child.
- 9.3 In deciding whether to appoint a safeguarder, the sheriff may take into account: the age or ages of the child(ren); the nature of the grounds for referral; whether the grounds for referral are accepted or not by any relevant person; whether there is a conflict of interest between the child and any other party such that the court cannot otherwise protect the interests of the child; and any other relevant information provided by the reporter or any other party.

10. Appeals against Compulsory Supervision Orders

- 10.1 Where an appeal is lodged against a compulsory supervision order, the court will fix a substantive hearing rather than a procedural hearing unless the appellant indicates, at the time of lodging the appeal, that there is a specified, preliminary legal or procedural matter that requires to be determined in advance of the appeal hearing.
- 10.2 Where the appellant so indicates, the court will fix a procedural hearing for the purpose of determining the legal or procedural matters specified by the appellant. Where possible and when court time permits, the court may proceed to determine the appeal if appropriate to do so.
- 10.3 For the avoidance of doubt, and without prejudice to the sheriff's powers under section 155 of the 2011 Act and Rule 3.56 of the 1997 Act of Sederunt, any motion that the appellant be allowed to lead evidence in support of the appeal must be clearly

specified at the time of lodging the appeal and will be determined at a procedural hearing fixed in terms of the foregoing paragraph.

- 10.4 Where the timescale for determining an appeal exceeds 3 days, parties require to lodge any written submissions and/or list of authorities (with copies of the relevant authorities) which they may wish to refer to during the course of an appeal by 12 noon on the day preceding the appeal hearing.

I APPOINT this Practice Note to be inserted in the Act Book of Edinburgh Sheriff Court and to be posted on the notice board in said sheriff court for publication to the lieges.

MHAIRI M STEPHEN QC
Sheriff Principal of Lothian and Borders

EDINBURGH, 6 September 2018