

Scottish Civil Justice Council submission of 3 April 2023

PE1984/F: Introduce the C100 form for child arrangement orders in Scotland

Thank you for your e-mail of 08 March 2023 inviting the Family Law Committee of the Scottish Civil Justice Council to provide views on 'Petition PE1984: Introduce the C100 form for child arrangement orders in Scotland'. This Petition calls on the reduction of financial barriers that prevent parents from having contact with their children by introducing a Scottish equivalent to the C100 form, with a fixed fee, for making applications for child residence or child contact orders.

The Family Law Committee has considered the Petition and provides the following views:

Procedure in England and Wales

- The C100 procedure is only available in England and Wales where parties have first attended a Mediation Information Assessment Meeting ("MIAM") and have either been deemed unsuitable for mediation or the mediation process is unsuccessful. There are associated costs with this process. Only once that process has concluded can applicants lodge a C100 form. However, as highlighted at the Citizen Participation and Public Petitions Committee ("CPPP"), the form used in England and Wales is not without difficulty with many people who have no prior legal experience requiring assistance to fill in the form.
- Whilst the lodging of a C100 carries a fixed fee, applications within proceedings are also chargeable so the overall costs for the whole process can be higher, significantly so if there is legal representation.

Costs and Legal Aid

- Legal aid remains available to those eligible in Scotland for family cases. The situation is not the same as in England following the introduction of the 'Legal Aid, Sentencing and Punishment of Offenders Act 2012'. Therefore, any perceived financial barriers to obtaining a judicial determination are not the same between the

two jurisdictions.

- The proposal of a fixed fee system seems to be unworkable within the present system of court fees. Given the nature of an action (relating to the welfare of children) where the procedure required can be impossible to predict, it would be difficult to arrive at an appropriate fixed fee suitable in all cases. Presumably the introduction of a fixed fee system would have to apply to all actions concerning parental responsibility. Therefore, any fixed fee would require to be at a level sufficient to cover child welfare hearings and any proof.
- It is often of assistance to parents to have impartial advice before they embark on a court action to resolve arrangements for the care of children. Many solicitors in Scotland operate fixed fee systems to enable advice to be given in advance of court actions being initiated.

Court Procedure

- As highlighted previously by the CPPP, even if the court action was initiated by a form, the procedures thereafter would need to furnish the court with sufficient information to form a view on orders conducive to the welfare of the child. We operate in an adversarial system where that information is ultimately provided through evidence before the court. Any form based system would need to give sufficient notice of the arguments of both parties.
- The use of a form to initiate a court action would not relieve the court of the obligation to give the child an opportunity to express their view in relation to the application. The F9 procedure (in the sheriff court) would continue to apply. The Family Law Committee spent a considerable period of time developing rules to ensure that forms were prepared in advance so the sheriff has the ability to approve or amend forms before they are sent to children. Compliance with those rules would be required even where a form initiated the court process.

General Observations

- It is always be better for parties if they are able to reach agreement on reasonable arrangements for the care of children without resorting to judicial determination. A form based system may encourage people to attempt to go straight to court without

considering alternative routes first and without having advice on their position.

- The Children (Scotland) Act 1995 effectively creates a presumption that children will have the benefit of direct contact and personal relations with both of their parents where those parents are separated. The Scottish Government has not adopted the policy of creating a presumptive regime for separated parents (as has been adopted in other jurisdictions beyond the United Kingdom). Where parents cannot agree, the Scottish system is for judicial determination. Any other approach would require a change in primary legislation.

Overall, it is the Family Law Committee's view that the introduction of a form similar to the C100 would be a significant innovation in relation to the Scottish system for initiating a court action in relation to children, which may be beyond the scope of its remit. It is tentatively suggested, however, that should such an innovation be considered desirable, it would require a significant policy shift to create a system similar to that used in civil simple procedure cases in relation to the care of children. However, before even considering such a course, a review of the present system (including legislation) would be required. Proper funding would also be necessary to facilitate this. Unless such a review takes place, together with the resolution of the issues mentioned, the Committee has considerable reservations about the introduction of a form based initiating document or for the introduction of a fixed fee system.

Whilst currently the Family Law Committee does not see the benefit in the introduction of such a form, information on work done by the Committee which may reduce any financial barriers experienced by parties can be provided.

The Family Law Committee spent a significant period developing new rules in respect of family and civil partnership actions in the sheriff court. The overall policy aim of these rule changes is to improve the progress of family actions, with particular regard to preventing undue delay in proceedings relating to the welfare of children. These rules are designed to ensure consistent and effective case management of actions while also providing a clear, streamlined structure to the Court process. It is hoped that this new process will also reduce overall costs and the time

taken to reach a final decision. These rules commence in September 2023.

Finally, the Family Law Committee has developed draft rules to support the Scottish Government's proposal on extending the use of Simplified Divorce and Dissolution. This would result in parents of children under the age of 16 who have reached agreement about the arrangements for the child(ren) being eligible to use that process. Once commenced by the Scottish Government, it is expected that this would result in considerable savings for relevant parties.