SHERIFFDOM OF GLASGOW & STRATHKELVIN

Practice Note number 1, 2014

CHILDREN'S REFERRALS UNDER THE CHILDREN'S HEARINGS (SCOTLAND) ACT 2011

Part 1. Introduction

1.1 The overriding purpose of this Practice Note is to ensure that children's referral proceedings are conducted as fairly, expeditiously and efficiently as possible. By definition, such proceedings concern children who appear to be vulnerable and may be in need of compulsory supervision.

1.2 It is vital in the interests of the child that such referral proceedings are conducted and concluded as fairly, expeditiously and efficiently as possible. This requires the accurate estimation and allocation of hearings, the reduction of repeated appearances, and the elimination of unnecessary or repetitive evidence at hearings. This will be achieved by active judicial management, together with a requirement on all parties to work to achieve the foregoing aim.

1.3 The Practice Note applies to the following, all of which are collectively referred to as children's referral proceedings:

- proof applications by the children's reporter;
- applications for interim compulsory supervision orders (ICSOs) by the children's reporter;
- applications to recall child protection orders;
- appeals against decisions by children's hearings; and
- applications for review of previously established grounds for referral.

The requirements applicable to proof applications (Parts 3 and 4) will also apply, subject to any necessary adjustment, to any other children's referral matter in which it is anticipated that evidence will be led.

1.4 Under exception of paragraph 2.1, this Practice Note has immediate effect in relation to proceedings to which the Children's Hearings (Scotland) Act 2011 apply. The existing Practice Note no. 1 of 2013 remains in force in relation to all referral matters still proceeding under the Children (Scotland) Act 1995.

1.5 All statutory references are to the Children's Hearings (Scotland) Act 2011 and to the Act of Sederunt (Child Care and Maintenance) Rules 1997 as now amended, and in particular Rules 3.46A and 3.47.

Part 2. Organisation of Referral Proceedings

2.1 With effect from 25 August 2014, children's referral proceedings will be organised into substantive hearings on Wednesdays, Thursdays and Fridays and procedural callings on Mondays and Tuesdays.

2.2 The only matters to be allocated to the 3 substantive days will be: proofs where it is anticipated that evidence will then be led; appeal hearings where it is anticipated that the substance of the appeal will be argued (or, if agreed by the court, that evidence will be led); and other matters requiring to be heard as a result of statutory timescales, such as an application to recall a child protection order.

2.3 All other matters will call on Mondays or Tuesdays. For the avoidance of doubt, that includes: first callings of proof applications and (if required in terms of paragraph 7.2) procedural hearings in respect of appeals; subsequent hearings where evidence is not to be led, including case management hearings and pre-proof hearings; and ICSO applications except where the court determines it would be more

appropriate to consider the application alongside a proof diet allocated to another day. Unless specified otherwise, it is thus not expected that witnesses will be cited for any calling on a Monday or Tuesday.

2.4 Business on Mondays and Tuesdays will be allocated into 3 half-day slots on Monday afternoon, Tuesday morning and Tuesday afternoon. All papers required for such business should be lodged by the preceding Friday at the latest.

2.5 All sheriffs will continue to be allocated for substantive matters on Wednesdays, Thursdays and Fridays. Sheriffs allocated to sit on Mondays and Tuesdays will be drawn from a pool of sheriffs who will undertake judicial case management functions as set out in this Practice Note.

Part 3. Proof Applications: General

Lodging of Application

3.1 When lodging an application to establish grounds for referral under section 93 or 94, 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.

3.2 At the time of lodging the application, the children's reporter should draw to the sheriff clerk's attention any factors indicating that a long proof, or complex procedure, may be required.

Cooperation of Parties

3.3 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

3.4 A first hearing in respect of the application will be fixed for a Monday or Tuesday court. 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 has 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);
- in the case of an application falling within section 94(2)(a), 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 4 below.

3.5 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 fixed as a pre-proof hearing.

3.6 At this or any subsequent hearing, the sheriff will fix a proof hearing when satisfied that the parties are or ought to be ready to proceed to proof at the proof hearing, and that the hearing of evidence is likely to be required.

Subsequent Hearings

3.7 Where a second procedural hearing is fixed, the sheriff will consider the matters listed at paragraph 3.4 insofar as not already determined. The sheriff will consider whether a hearing of evidence is likely to be 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.

3.8 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 unless satisfied, on exceptional cause shown, that a further procedural hearing should be fixed.

Proof Hearing

3.9 Where 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.

Part 4. Proof Applications:- Complex Cases

4.1 A complex case is any matter where the court reasonably anticipates either that a hearing of more than 3 days may be required, or where in terms of paragraph 4.11 the court has approved the leading of competing expert evidence by two or more parties.

4.2 Throughout the progress of a 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 and do so in an efficient manner.

Case Management Hearings

4.3 At the first procedural hearing, or as soon thereafter as an application is identified as likely to be a complex case, after considering the matters listed at paragraph 3.4 above the sheriff will fix a case management hearing.

4.4 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.

4.5 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.

4.6 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:

- a note of 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, if full disclosure has not been made, why not
- a list of witnesses
- the nature and scope of the evidence to be led (1 succinct but informative paragraph per witness);
- the manner of the party's compliance with the requirements regarding expert evidence at paragraphs 4.10 to 4.12 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.

4.7 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 affidavits or other written evidence;
- whether any procedure other than proof is likely to be required, and the reason for that;
- and 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: instruction of a single expert; the use of affidavits; restriction of the issues for proof; restriction of witnesses; and any special measures to be made available for a child witness or vulnerable witness.

4.8 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. Exceptionally, however, the sheriff may nevertheless fix a diet of proof where satisfied that to do so would be in the interests of the child and of the fair and expeditious determination of the application.

4.9 When fixing a diet of proof in a complex case, the sheriff will also fix a pre-proof hearing.

Expert Evidence

4.10 Expert opinion evidence should be kept to the minimum necessary. It is the parties' responsibility to instruct experts who are able to meet the ordinary demands of court appearance, including holiday arrangements. It is the responsibility of each party to ascertain that every appointed expert:-

- represents an established and respectable body of relevant professional opinion;
- is appropriately informed as to the facts;
- is appropriately qualified and competent to address the relevant issues;
- and does address the issues.

4.11 The court expects parties to cooperate in joint instruction of a single expert witness. 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: for instance, that the evidence of the experts be given simultaneously using the procedure set out in the Appendix to this Practice Note.

4.12 Where such approval is granted and 2 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.

4.13 A party who fails to comply with the requirements of the foregoing paragraphs will be allowed to lead expert evidence only on special

cause shown and subject to such conditions as the sheriff may require in the interests of fair and expeditious determination of the proceedings.

Pre-Proof Hearing

4.14 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.

4.15 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.

4.16 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.

4.17 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

4.18 During the proof hearing, the court is likely to sit continuously between 10 am and 1 pm, and again between 2pm and 4pm. At the court's discretion, parties may be asked to lead evidence beyond 4pm each day, in order to assist the early resolution of the referral. .

4.19 The referral procedure is summary and intended to be succinct where possible. Accordingly, it will be necessary to justify any request for (i) a shorthand writer; (ii) any further procedure; (iii) any adjournments once the proof has commenced.

4.20 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 will not hesitate to use either common law powers or the powers contained in the Act of Sederunt 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.

4.21 No party will be allowed to lead evidence or to follow a substantive line of examination not previously disclosed to other parties and the court, except with the leave of the court on cause shown.

4.22 Where Rule 3.47(4A) of the Act of Sederunt applies, at the close of the evidence led by the reporter the child, the relevant person and any safeguarder may give evidence and may, with the approval of the sheriff, call witnesses with regard to the ground in question. In determining whether to grant such approval, the sheriff shall take into account: the overriding purpose of this Practice Note; the nature and quality of the evidence led by the reporter; the nature and scope of the evidence that any other party proposes to call; and the extent to which parties have complied with their responsibilities under this Practice Note.

Additional Evidence and/or Court Time

4.23 Once a diet of proof is allocated, parties should have no expectation that additional evidence will be allowed or that additional days will be allocated.

4.24 Any motion to allow additional evidence or to allocate additional days to the hearing of the proof will be granted only on cause shown, taking account of the responsibilities of parties under this Practice Note and the extent to which parties have fulfilled them.

Part 5. Applications for ICSOs

5.1 An application for an interim compulsory supervision order should be accompanied by a written statement setting 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.

Part 6. Appointment of Safeguarders

6.1 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.

6.2 Any party lodging an application to recall a child protection order, 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.

6.3 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.

Part 7: Appeals against Compulsory Supervision Orders

7.1 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 logistical, legal or procedural matter that requires to

be determined in advance of the appeal hearing. Such indication should be given in writing, with reasons.

7.2 Where the appellant so indicates, the court will fix a procedural hearing for the purpose of determining the logistical, legal or procedural matters specified by the appellant.

7.3 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.

C.A.L Scott QC
Sheriff Principal of Glasgow and Strathkelvin
Glasgow, 24 April 2014

APPENDIX

Simultaneous Expert Evidence:

Guidance for Parties in Referral Proceedings

Simultaneous expert evidence (sometimes known as 'hot-tubbing') is a process for taking expert evidence in a manner that enables the court and parties to focus on the areas of disagreement between experts on crucial issues. It is particularly useful where the court has allowed parties to call experts to give competing evidence which is intended to comment on the same matters.

Experience in this and other jurisdictions indicates that three clear benefits arise from the use of this process: firstly, the evidence is concentrated on the key matters in dispute; secondly, the process of dialogue between the themselves and with the court supports clearer assessment of evidence; and thirdly, there is likely to be a significant saving in court time required. See, for example, the comments of Mr Justice Ryder in *A Local Authority* v *Ms A, Mr B and Baby X* [2011] EWHC 590 (Fam) at paragraphs 22 and 23 where he says "The resulting coherence of evidence and attention to the key issues rather than adversarial point scoring is marked".

In practical terms, the process in court is that:

- The expert witnesses are cited to attend court on the same day;
- They are brought into court at the same time and take the oath at the same time;
- The court then takes the lead in questioning, focusing on the matters on which there is dispute between the experts and the reasons for that dispute. The same question will be put to each witness, topic by topic;
- During questioning the experts will be encouraged to comment on each other's opinion and to engage in three-way dialogue between each other and the court;

- All parties will be given the opportunity to ask relevant supplementary questions, either on a topic-by-topic basis or after the court has concluded its examination of the witnesses.

To enable the simultaneous expert evidence process to work effectively, it is essential that parties undertake the following preparatory steps. Parties must:

- Coordinate between themselves and the court to ensure availability of the witnesses on the same date and at the same time;
- Ensure that each expert has available a copy of all reports lodged by the other experts;
- Ensure that each expert's report or reports, together with a full CV if not included in a report, are lodged with the court by the pre-proof hearing at the latest;
- Ensure that communication takes place between the experts so that they can identify the matters on which they agree, the matters on which they do not agree and the reasons for such disagreement;
- Prepare a joint note setting out the matters of agreement between the experts, the matters on which the experts disagree and the reasons for their disagreement. Parties should note this should be separate from any joint minute of admissions or agreement amongst the parties themselves regarding non-expert evidence. It may well be that the joint note should be prepared by the experts themselves, although it of course remains the parties' responsibility to ensure it is prepared;
- And lodge the joint note at least 1 week in advance of the date when the experts will give evidence.