Practice Direction 23

Court Applications

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SUMMARY

Role of Reporters and General Principles

Reporters are to:

- promote the general principles in relation to the welfare of the child being paramount, views of the child and minimum intervention as they apply to court applications[1],
- be fair, knowledgeable and proficient in relation to relevant statutory provisions and court procedures, and
- in proof applications make all reasonable efforts to bring about a prompt decision in relation to the application.

Process of proof applications

A proof application must be made within 7 days of the grounds hearing. The court rules set out the form of application. A proof application must be heard within 28 days of being lodged.

Jurisdiction of proof applications

An application in relation to offence grounds must be made to the sheriff who would have jurisdiction if the child were being prosecuted for the offence. For non-offence grounds, the application must be made to the sheriff court district where the child is habitually resident. On cause shown, the sheriff may remit any application to another sheriff court.

Service, attendance and representation in proof applications

The sheriff may dispense with (i) service of all or part of the application on the child, and (ii) the attendance of the child. Reporters must include information on dispensing with service and attendance in the application (if applicable).

On receipt of the warrant to cite, the reporter must forthwith serve this and a copy of the application on the child (unless service has been dispensed with), each relevant person and any safeguarder. There are statutory forms to use for service. The reporter must retain proof of service. A relevant person is not required to attend the hearing before the sheriff. A child and a relevant person may be represented by either a lay representative or a solicitor/advocate.

Management of proof applications

Sheriffs are required to hear evidence tendered by the reporter, but can order parties to take steps to ensure a prompt decision. Reporters are to use all available and fair means to assist the court in reaching a prompt decision.

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[1] General principles apply to decisions by courts as follows:- the welfare of the child (s.25/s.26) applies to all decisions; views of the child (s.27) applies to all decisions except whether to make a CPO; better for the child that the order etc. be in force than not (s.29) applies when the sheriff is making a decision to make, vary, continue or extend an order.

At the conclusion of the reporter's evidence, other parties may themselves give evidence but require the sheriff's permission to call witnesses.

The statement of grounds including the section 67 ground may be amended by the sheriff at any time and where a certain offence is alleged, the sheriff may find any other offence established by the facts

Dispensing with evidence

The sheriff may:-

- decide a proof application without hearing evidence if the section 67 grounds are no longer in dispute,
- follow an expedited procedure for applications in relation to grounds not understood.

Withdrawing the application

The reporter must withdraw the application if no section 67 grounds apply in relation to the child. The reporter may withdraw the application in whole or in part in other circumstances. If other grounds were accepted at the grounds hearing, the reporter must arrange a hearing to decide whether to make a CSO (or review an existing CSO).

Determination of application/direction to the reporter

The reporter may only arrange a children's hearing to decide whether to make or review a CSO if the sheriff has directed this[2]. The sheriff must direct the reporter to do so if:-

- the sheriff decides one or more grounds are established; or
- the sheriff decides no grounds are established but one or more other grounds were accepted at the grounds hearing.

The reporter must move the sheriff to direct the reporter to arrange a hearing and remind the sheriff of any accepted grounds.

In any other case, the sheriff must dismiss the application and discharge the referral to the hearing.

ICSOs – During proof applications

During a proof application, the reporter can apply to the sheriff for an extension (with or without variation) to the ICSO. An application for extension can be made only during the currency of the 3rd hearing ICSO. The reporter can apply for further extensions/variations. There are statutory forms for this.

If there is no ICSO in place, the sheriff has power to issue an ICSO. If a child's circumstances require it, reporters are to remind sheriffs of this power

[2] Unless the application has been withdrawn in whole and another ground was accepted at the children's hearing

(by making a motion to that effect). To grant an ICSO when there is no ICSO currently in place, the sheriff must be satisfied that it is necessary as a matter of urgency that an ICSO be made. Reporters may apply for an extension of an ICSO issued by the sheriff.

Interim orders on determination of proof applications

On determination of an application (or on withdrawal of an application in whole where no other grounds were accepted at a hearing), any ICSO/interim variation of CSO (whether issued by a hearing or the sheriff) in force terminates. If the sheriff directs the reporter to arrange a children's hearing, the sheriff can make an ICSO/interim variation. There is no express power for the reporter to apply. The reporter must be prepared to draw the sheriff's attention to this power by making a motion to that effect.

If the sheriff is directing the reporter to arrange a hearing and at the same time issues an ICSO or interim variation specifying that the child is to live at a place of safety but not at a named place, the reporter must arrange the hearing within 3 days of the child moving to the place of safety.

Warrants to secure a child's attendance

If a child's attendance has not been excused, the sheriff may grant a warrant to secure attendance if:-

- the child has failed to attend the proof hearing, or
- the hearing is to be continued to another day and the sheriff is satisfied that there is reason to believe that the child will not attend on a later date.

The warrant will last for a maximum period of 14 days beginning with the day the child is first detained under the warrant but will expire sooner if the proceedings or continued hearing before the sheriff takes place.

The sheriff can issue a warrant to secure the child's attendance at the children's hearing.

Other Relevant Practice Directions:
Practice Direction 7 on Statement of Grounds
Practice Direction 15 on Grounds Hearings
Practice Direction 19 on Orders and Measures

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1. Introduction

1.1. This Direction relates to applications for proof, ICSOs and interim variations to a CSO made by a sheriff and warrants to secure attendance issued by sheriffs.

1.2. The general considerations which apply when children's hearings and the courts exercise their functions under the 2011 Act [remove hyperlink] are set out in Sections 25 to 31. Those most relevant to the role of the Sheriff in proof applications are as follows:

- Section 25, the court is to regard the need to safeguard and promote the welfare of the child throughout his/her childhood as the paramount consideration.

- Section 26, a court may make a decision inconsistent with s.25 if it considers that to do so is necessary to protect members of the public from harm, but if so, the court is to regard the need to safeguard and promote the welfare of the child throughout his/her childhood as the primary rather than the paramount consideration.

- Section 27, so far as practicable and taking account of the age and maturity of the child (a child aged 12 or over is presumed to be of sufficient age and maturity to form a view for these purposes), the sheriff must (i) give the child an opportunity to indicate whether to express a view, (ii) if so, give the child an opportunity to express a view, and (iii) to have regard to any views expressed by the child.

- Section 29, the sheriff may make, vary, continue, or extend an order or interim variation or grant a warrant only if the sheriff considers that it would be better for the child if the order, interim variation or warrant were in force than not.

More specifically, these considerations apply as follows:-

- s.25 and s.26 applies to all decisions;
- s.27 applies to all decisions except where the sheriff is deciding whether to make a CPO in relation to a child.
- s.29 applies when sheriff is considering:-
  1. making a child assessment order;
  2. making or varying a CPO;
  3. making an ICSO/interim variation of CSO, or extending or varying an ICSO under s98/99, or granting a warrant to secure attendance; and
  4. following an appeal, varying or continuing a CSO, making or varying an ICSO/interim variation of CSO, varying a medical examination order, or granting a warrant to secure attendance.

1.3. The role of the reporter in court applications can be summarised as:-

- To promote the overarching principle of the welfare of the child and the other principles set out in 1.2 where applicable;
- To be fair, for example, presenting the whole case to the court, not to win the case at all costs;
- To present the case with vigour, thoroughness and skill;
- To have knowledge of all relevant procedures and rules, to be proficient in using these in practice, and as an officer of the court to bring them to the attention of the court even when they are not favourable to the reporter's case.
- In proof applications to make all fair efforts to bring about a speedy determination of the application.

2. Proof Applications – Process

2.1. A proof application may be made under:

- section 93(2)(a); ground not accepted by the child or a relevant person
- section 94(2)(a); lack of understanding by the child or a relevant person
- both 93(2)(a) and 94(2)(a)

See Practice Direction 15 on Grounds Hearings

2.2. An application for proof is made using Form 60 - Court Forms. Form 60 is a statutory form and the reporter must not amend this other than as noted in paragraph 2.3 below.

The statement of grounds attached to the application is to be unmarked.

Where the reporter uses a single form for more than one section 67 ground, and the hearing is directing a proof application in relation to only one (or some) of the section 67 grounds, the statement of grounds is to be retyped so that only the not accepted section 67 ground(s) and the supporting facts relating to that ground(s) are in the statement attached to the application[3].

For section 67(2)(j) grounds (offences by a child), only not accepted offences are to be included in the application to court.

The reporter is to set out in the application any not accepted facts[4]. This is to assist the sheriff's initial management of the case.

[3] PD 7 states that where the majority of supporting facts for each section 67 ground are unrelated, the reporter is to use a separate form for each section 67 ground and related supporting facts - for example section 67(2)(j) and (o) section 67 grounds.

[4] This is not a statutory requirement, but is based on our view of best practice to assist sheriffs in their management of cases.

The Form 60 proof application requires the reporter to:-

- include the names and roles of witnesses,
- include information about whether an ICSO is in place or not;
- provide reasons for dispensing with service on child or any other person (if applicable), and
- provide a reason for removing the child's obligation to attend (if applicable).

2.3 Reporters are to amend Form 60 (statutory form of application of proof) in line with the following, where appropriate.

- If other section 67 grounds were accepted at the hearing, the reporter is to add a sentence to the statutory application saying "Another/other section 67 ground(s) was/were accepted at the hearing".

- Form 60 does not have space to record the name, address and status of relevant persons who have not attended a grounds hearing.

  Therefore, if relevant persons have not attended a grounds hearing, the reporter is to amend paragraph 5.a. to include information about non-attendance. The reporter is not to state that the non-attendance amounts to a non-acceptance of the section 67 ground(s).

  For example, if no relevant person attended, Para 5.a. should read: The said [*insert name and address and status of the relevant person or persons (within the meaning of Rule 3.1(1))*] did not attend the children's hearing."

- Paragraph 6 of Form 60 does not refer to an application directed under section 94 where the hearing is satisfied that either a child or relevant person would not be capable of understanding or has not understood the explanation in relation to a section 67 ground. Paragraph 6 only refers to an application directed on the basis of non-acceptance.

  Therefore, if the hearing has directed the reporter to make an application under section 94, the reporter is to amend paragraph 6 of the statutory form accordingly.

  For example, where the grounds hearing is satisfied that the child would not be capable of understanding an explanation of the section 67 ground(s), and the parents did not accept the section 67 grounds at the hearing, paragraph 6 is to state:-

  "The Principal Reporter applies to the sheriff to determine whether the section 67 ground(s) not accepted by the said [*insert name of relevant person or persons (within the meaning of Rule 3.1(1))*] and which the said [name of child] is incapable of understanding or has not understood are established."

2.4 The reporter must lodge the proof application with the court within a period of 7 days beginning with the date of the grounds hearing[5]. Rule 3.45. See Appendix 2, "Timescales".

2.5. Where the hearing has appointed a safeguarder, the reporter must intimate that appointment to the clerk and lodge with the application any report made by the safeguarder. Rule 3.45(2) and see Form 60.

2.6. When the application is lodged, the clerk must "forthwith" assign a date for the hearing of the application. The clerk notifies the reporter of this date by returning Form 33, which is the warrant to cite the child, to give notice/intimate to relevant persons and safeguarder, and the warrant to cite witnesses (referred to as "warrant to cite"). This form will also give notice to the reporter of the date and time of any "procedural hearing" arranged under Rules 3.45(4)-(7) see Section 8 - Proof Application – Withdrawal of application. Rule 3.11. See Appendix 2 "Timescales".

2.7. A proof application must be heard not later than 28 days after the application is lodged (s.101(2)).See Appendix 2 "Timescales". The sheriff is not required to make the determination within the 28 day period, and the case may be adjourned to a later date, Rule 3.49[6]. There are provisions for determination of the application within 7 days if the expedited procedure is used – See Section 7 - Expedited Procedure.

3. Proof Applications – Jurisdiction and Transfer

3.1. For non-offence grounds, the application must be lodged with the sheriff clerk of the sheriff court district in which the child is habitually resident[7]. Rule 3.45(1).

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[5] If not lodged within 7 days, the reporter is to contact the Practice Team as we have been able to successfully argue, based on the case of R v Soneji [2006] 1 AC 340 that the sheriff deal with the application despite the late lodging, if no party is prejudiced.

[6] If the proof application is not heard within 28 days, the reporter is to contact the Practice Team. However, in light of H v Mearns 1974 SLT 184, 1974 SC 152, S v McGregor, Court of Session, 8 July 1980, Unreported, and M v Templeton, Court of Session, 29 October 2013, it is very unlikely that there is any discretion to continue with the application where the 28 timescale is breached.

[7] See Norrie's 'Parent and Child' (at pages 361 – 363) where 'habitual residence' is discussed. Habitual residence does not have a special meaning but is understood according to the ordinary and natural meaning of the words. It is a residence that is being enjoyed voluntarily for the time being and with the settled intention that it should continue for some time, although it need not be intended to be permanent or indefinite: it is sufficient if there is an intention to reside for an appreciable period. It is question of fact to be decided by reference to all the circumstances of any particular case. In the case of a child who can form no intention of his or her own, the child's habitual residence is the residence chosen for him or her by his or her parents.

3.2. For offence grounds under section 67(2)(j), the application must be made to the sheriff who would have jurisdiction if the child were being prosecuted for the offence (S102(2)). Territorial jurisdiction is set out in the Criminal Procedure (Scotland) Act 1995 (sections 4, 9, 9A, 10 and 10A).[8]

3.3. On cause shown, the sheriff may remit any application (offence, or non-offence) to another sheriff court. Rule 3.45(1B). Therefore, after lodging the application in a particular sheriff court, the reporter may move the sheriff to remit the application to another sheriff court (even in another sheriffdom), provided the reporter is able to give the sheriff a good reason to do so. Examples of when this might be appropriate are where the family has moved to a different area, or where it might be appropriate to conjoin applications initially lodged in different sheriff courts.

4. Proof Applications – Service, Attendance and Representation

4.1. See Appendix 1 for details of timescales for effecting citation or notice (Rule 3.13), methods of serving such citation or notice (Rule 3.15), and the persons who may effect such service (Rule 3.16). These provisions apply to citation or notice of any court applications except where there are other specific provisions.

4.2. The reporter must "forthwith" serve a copy of the application and the warrant to cite on the following persons:-

- the child (unless service on the child has been dispensed with) together with a citation of the child in Form 31 (or Form 31A if a procedural hearing has been fixed). Rule 3.4
- each relevant person together with a notice in Form 39 (or Form 39A if a procedural hearing has been fixed). Rule 3.12(1)
- any safeguarder (including a safeguarder appointed by a hearing whose appointment has not otherwise terminated[9]) together with a notice in Form 40. Rule 3.12(2)

4.3. The child to whom the application relates has an obligation to attend the hearing unless excused from doing so, s.103(2). The sheriff may excuse the child from attending the hearing in the circumstances set out in s.103(3). Where a sheriff excuses a child from attending all or part of a hearing under s.103(3), any safeguarder or *curator ad litem* for the child, any relevant person and the child's representative must be permitted to remain during the absence of the child. Rule 3.47(5).

The child has an unqualified right to attend the hearing, even if excused, s.103(4). If a child has not been excused from attending, the

[8] (See also Walker v C (No 1) 2003 SLT (Sh Ct) 31, Walker v C (No 2) 2003 SLT 293)
[9] The Children's Hearings (Scotland) Act 2011 (Safeguarders: Further Provision) Regulations 2012

sheriff may grant a warrant to secure attendance. (See Section 13 - Warrants to Secure Attendance).

4.4. The sheriff may dispense with service on the child where the sheriff is satisfied, so far as practicable and taking account of the age and maturity of the child, that it would be inappropriate to order service on the child. Rule 3.3. Dispensing with service means in practice that the child cannot exercise the right of attendance. It is hoped that a sheriff will only dispense with service where the child would be unable to understand and participate in the proceedings.

4.5. If applicable, the reporter must include reasons for dispensing with attendance of or service on the child in the application.

4.6. The sheriff may on application by the reporter, or of his own motion, order that a specified part of the application is not served on the child, Rule 3.4(2). When lodging an application, reporters are to indicate if they think that a particular part of the application should not be served on the child.

4.7. There is no statutory requirement for a relevant person to attend court, though there may be obvious practical difficulties if the relevant person does not attend.

4.8. If a relevant person does attend, the sheriff may exclude any person including a relevant person, while <u>any</u> child is giving evidence. The sheriff may do so if the criteria in rule 3.47(6) are met in relation to that child, namely that it is necessary in the interests of the child and that:

- he must do so in order to obtain the evidence of the child; or
- the presence of the person or persons is causing, or is likely to cause, significant distress to the child.

Where a relevant person is not legally represented at the hearing and has been excluded under Rule 3.47(6), the sheriff must inform that relevant person of the substance of any evidence given by the child and must give that relevant person an opportunity to respond by leading evidence or otherwise. Rule 3.47(7).

4.9. The sheriff may dispense with service on any named person, on cause shown. Rule 3.18

4.10. In order to prove to the sheriff that service has been properly made, the reporter must lodge at the hearing:-

- a certificate of execution of service in Form 43; and
- in the case of postal service, a receipt (which could take the form of a post office book) of the registered or recorded delivery letter,

(Rule 3.17)

4.11. If the hearing before the sheriff is continued to a later date, there is no need for the reporter to give any further notice to any child, or relevant

person who was present or represented before the sheriff, and who will therefore know about the date of the continued hearing.

However, where a child (whose attendance has not been dispensed with) or relevant person was neither present nor represented, the reporter must notify the child and the relevant person of the date for the continued proof. The reporter must use any of the modes of service specified in Appendix 1 (usually first class recorded delivery post), and must allow at least the minimum period of notice set out in Rule 3.13 (usually posting a letter four clear days before the hearing diet see Appendix 1).

As the child is obliged to attend the proof hearing (unless excused) and there are possible consequences if they do not attend, the reporter must use the Form 31 to cite the child to the continued proof. The authority to cite the child comes from the Form 33 (the warrant to cite) and from an interlocutor fixing a date for a continued proof.

Note that there is no specific form for notifying a relevant person of a continued proof. The reporter is simply to send any relevant person a letter informing them of the new date and time, as there is no specific court form for this. However, fair and proper notice, and proof of the same is essential for the reasons set out below (see 4.12).

There is no formal requirement to notify a safeguarder of a continued hearing.

4.12. Unless service has been fairly and properly made, and the reporter is in a position to provide evidence of that, the reporter is not to move the court to make any substantive decision in relation to a proof application, but instead is to seek an adjournment so that service can be effected fairly and properly. There may be exceptions to this where it would not be unfair to a party for the sheriff to make a substantive decision such as if the child/relevant person attends court and waives his/her right to proper service. However, these situations are likely to be rare. There may be serious consequences for a proof if service has not been effected properly or the reporter cannot provide evidence of this; the proof may be delayed or the absence of proof of citation may form the basis of an appeal.

4.13. A child and relevant person may be represented at the proof by another person and that person need not be a solicitor or advocate. (s.104) In effect, the child or relevant person may be represented by a lay person or by a solicitor and/or advocate.

4.14. Rule 3.21 sets out provisions for lay representatives. A lay representative must satisfy the sheriff throughout the proceedings that he is a suitable person to represent the party and that he is authorised to do so.

5. Proof Applications – Management

5.1. In relation to any ground which is in dispute, the sheriff is required to hear evidence tendered by or on behalf of the reporter. Rule 3.47(1)

5.2. Prior to or at a "hearing on evidence", or adjournment or continuation, (see below), the sheriff may order parties to take such steps as the sheriff deems necessary to secure the expeditious determination of the application, including but not limited to:

- Instructing a single expert;
- Using affidavits;
- Restricting the issues for proof
- Restricting witnesses
- Applying for evidence to be taken by live link[10] in accordance with rule 3.22.

(Rule 3.46A)

5.3. These specific provisions build on the growing practice of using procedural or notional callings to expedite the case, and of sheriffs in actively managing cases. This has brought about some sheriffs issuing pre-proof notices to parties setting out expectations of all parties. The Sheriff Principal of Glasgow and Strathkelvin has also issued a Practice Note in relation to children's referrals.

5.4. It is not unusual for a sheriff to raise the issue of evidence being presented by way of affidavit. If so, the reporter is to promote the approach of the use of signed witness statements in line with Appendix 3. Prior to first appearing in court, the reporter ought to have already considered whether a written witness statement would be helpful or appropriate for any of the witnesses, and thus be in a position to respond.

5.5 A reporter's role includes the speedy determination of proof applications. It is therefore incumbent on reporters to use all of the available means to do so. This includes:

- Compliance with Practice Instruction Note 39 on Disclosure of Evidence. Early and proactive disclosure reduces delay.
- Proactively seeking agreement where possible thus reducing the scope of the proof.

[10] This simply introduces a specific rule which allows the reporter to take evidence from a witness who is not a vulnerable witness by live link. This could be used for example where a busy professional witness in another jurisdiction is unwilling or unable to attend court in Scotland. Previously reporters had to argue to "borrow" a similar provision from the Ordinary Cause Rules.

- Calling such witnesses as are necessary to establish the section 67 ground to the applicable standard of proof and using court time for witnesses efficiently.
- Only use independent expert evidence when necessary.
- Proactively consider the use of written witness statements.

5.6. At the close of evidence for the reporter in s.67(2)(j) grounds (alleged offence by child), the sheriff will consider if sufficient evidence has been led to establish that ground. The sheriff will give all parties an opportunity to be heard on the sufficiency of evidence. Where the sheriff is not satisfied that sufficient evidence has been led, s/he will make a finding to that effect (Rule 3.47(2) and (3)). This provision is similar to the "no case to answer" in criminal proceedings. This does not apply in proofs in relation to grounds other than s.67(2)(j) grounds. This can be raised by the parties, or can be considered by the sheriff on his own initiative.

5.7. Where the sheriff has considered sufficient evidence has been led in relation to a s.67(2)(j) ground or any other section 67 ground is in dispute, the child, relevant person and safeguarder may give evidence. They may also call witnesses with regard to the ground in question, but require the approval of the sheriff to do so. Rule 3.47(4A)

5.8. All documents which are lodged are available only to the sheriff, the reporter, the safeguarder, any *curator ad litem*, and the parties. All parties must keep these documents confidential, unless the sheriff directs otherwise. Rule 3.5A. This Rule simply formalises what is already the position, namely that lodged documents are confidential. However, this does not change the way that a reporter is entitled, subject to any relevant statutory provisions (such as Data Protection) and duties of confidentiality, to handle documents in his/her possession.

5.9. The sheriff may at any time, on the application of any party or of his own motion, allow amendment of any statement of grounds[11]. Rule 3.48 The sheriff's power extends to the amendment of the section 67 ground. However, the principles which applied to drafting the statement of grounds apply Practice Direction 7 on Statement of Grounds. A reporter is only to request amendment of the section 67 ground in exceptional circumstances. In particular, a reporter is not to seek to amend the statement of grounds by adding a section 67 ground. It is more appropriate for the reporter to arrange a new grounds hearing in circumstances where an additional section 67 ground is identified. The reporter is to discuss amendment of any section 67 ground with a senior practitioner or LRM.

[11] However, the sheriff must allow the contradictor an opportunity to make submissions about any proposed amendment to the supporting facts. See TC v Authority Reporter, 3 June 2014, unreported, available on Scottish Courts service website.

5.10. If possible, in line with the principle of fair notice and certainty as to what is being alleged, the reporter is to make a motion to amend the statement of grounds prior to evidence being led. However, if that is not possible, the reporter may move to amend the grounds even at the stage of making submissions.

5.11. Where an offence is alleged in a statement of grounds, the sheriff may determine any other offence established by the facts has been committed. Rule 3.50.

6. Proof Applications – Dispensing with Evidence

6.1. The sheriff may determine the application without hearing evidence, if at a hearing on evidence (or any adjournment or continuation), the section 67 grounds (including any amendments) are no longer in dispute[12]. Rule 3.47(A1). This applies to all proof applications, whether under s.93, s.94, or both.

6.2. Reporters are to promote a broad interpretation of the phrase "no longer in dispute" to cover grounds which are not understood whether or not the grounds were also originally disputed[13].

6.3. If an application is made under s.93(2)(a) alone, s.105 also applies and provides that the sheriff must dispense with hearing evidence and determine that the ground is established in the following circumstances:

- the ground and all supporting facts[14] is accepted by the child at the hearing before the sheriff, and
- the ground and all supporting facts is accepted by each relevant person in relation to the child who is present at the hearing before the sheriff.
- Unless the sheriff is satisfied in all the circumstances that evidence in relation to the ground should be heard.

The wording used in section 105(1)(b) is "each relevant person in relation to the child who is present at the hearing before the sheriff". It would therefore be competent for the sheriff to dispense with hearing evidence even where no relevant person, or not all relevant persons, attends the hearing before the sheriff.

[12] It is thought that the sheriff would have to be satisfied that the grounds are no longer actively disputed, suggesting that relevant persons must either attend or be represented or otherwise indicate to the satisfaction of the sheriff that they do not dispute the grounds. This will be a matter for the sheriff.

[13] In practice, if an application was made on the basis that a relevant person could not or did not understand grounds, the sheriff would have to be satisfied that the relevant person can and does understand the grounds (perhaps after explanation by a solicitor) or it is likely that a *curator ad litem* would be appointed.

[14] As originally stated in the application or as amended by virtue of Rule 3.48

6.4. Section 106 can only apply where the sheriff has opted for the expedited procedure outlined below[15].

6.5. The reporter is to be alert to issues of fairness when considering moving the sheriff to find the ground established without hearing evidence.

6.6. In negotiating any amendment to the statement of grounds, the reporter is to apply the same principles as in relation to drafting grounds as set out in Practice Direction 7 on Statement of Grounds.

7. Expedited procedure

7.1. Rules 3.45(4)-(7) give the sheriff the option to follow an expedited procedure in relation to applications submitted under s.94(2)(a). The expedited procedure is as follows:-

- The sheriff may fix a "procedural hearing" to determine whether or not the section 67 grounds in the statement of grounds are accepted by each relevant person. Rule 3.45(4)
- Such a procedural hearing must take place before the expiry of the period of 7 days beginning with the day on which the application is lodged. Rule 3.45(5)
- The sheriff will order service and intimation of the procedural hearing as the sheriff thinks fit. Rule 3.45(6). Therefore, the sheriff may dispense with service on the child for this hearing. The sheriff will also order the manner of and timescale for service.
- Subsequent to the procedural hearing, the sheriff <u>may</u> discharge the hearing on evidence and determine the application, unless any of the following exceptions apply:-
  - At the procedural hearing, a relevant person does not accept the section 67 ground in the statement of grounds.
    or
  - The sheriff considers that it would not be appropriate to determine the application without a hearing.
    or
  - Any of the following persons request that a hearing be held:-
    - The child;
    - A relevant person in relation to the child;
    - A safeguarder (if one has been appointed);
    - The reporter

- A "hearing on evidence"[16] must take place in accordance with rule 3.47(rule 3.45(9)) if:

[15] This is because s.106 results in circularity. S.106(2) gives the sheriff the power to determine the application *without a hearing*. However, for s.106 to apply at all, there has to be a hearing before the sheriff (s.106(1)(b)).

- o no such procedural hearing is held within the 7 day time period or
- o any of the exceptions apply, or
- o having had a procedural hearing the sheriff does not determine the application within the same 7 day period..

7.2. If the reporter decides that a hearing on evidence is appropriate, then to assist with case management, the reporter is to include the request for a hearing on evidence at the time of submitting the application. Examples of when a reporter might want to request a hearing on evidence are:

- Where it is likely that the reporter will be seeking to rely on the interlocutor as evidence for future referrals[17].
- Where the reporter is aware that service has not been properly effected.

7.3. Where the sheriff has determined the application following on from the procedural hearing, the sheriff shall make such orders for intimation as the sheriff thinks fit. Rule 3.47(8). This rule provides power to order intimation of the discharge of the hearing on evidence which will already have been fixed.

7.4. The expedited provisions result in some new terminology. The expedited hearing under rule 3.45 is a "procedural hearing". All other hearings of the application are classified in the rules as a "hearing on evidence". A "hearing on evidence" does not mean evidence needs to be led nor that parties be ready to lead evidence: hearings to deal with procedural matters (whatever local terminology is used eg procedural, notional or pre-proof hearings) can and should still take place. Indeed there may be more of a focus on this (see Section 5 – Proof Applications – Management).

7.6. In practice, the clerk will fix a hearing on evidence (within 28 days) at the start of process even if a procedural hearing (within 7 days) is also being fixed. The procedural hearing (if fixed) will be intimated to the reporter in Form 33, along with the date of the hearing on evidence. The hearing on evidence may later be discharged if the expedited procedure is followed and results in determination of the application. Rule 3.45(7)

8. Proof Application – Withdrawal of Application

8.1. If, before the application is determined, due to a change in circumstances, or information becoming available, the reporter no

[16] Despite the terminology, the sheriff may determine the application without hearing evidence, if the grounds are no longer in dispute.
[17] See M v Constanda 1999 SLT 494 and McGregor v H 1983 SLT 626

longer considers that any ground to which the application relates applies in relation to the child, the reporter must withdraw the application[18]. (S107(1) and (2)). The reporter must withdraw the application only if none of the grounds in the current application (including any amendments to the grounds) applies in relation to the child. The reporter's assessment of whether a ground applies in relation to a child is an assessment of the sufficiency of the evidence to support that ground.

8.2. An application may be withdrawn at the reporter's discretion in circumstances other than in s.107. Rule 3.46 provides that the reporter may at any time withdraw the application in whole or part. The reporter must do so by lodging a minute to that effect or by motion at the hearing. The reporter must intimate withdrawal to the child (unless service dispensed with), any relevant person and any safeguarder. Rule 3.46(2).

8.3. The reporter is to consult with the LRM regarding withdrawal of applications in whole or part unless the LRM has made clear to a reporter that such consultation is not necessary. Reference is made to the Casework Practice Scheme of Delegation.

8.4. If the reporter withdraws an application under section 107 and no other ground was accepted at the grounds hearing, any ICSO, interim variation of a CSO or warrant to secure attendance ceases to have effect., s.107(4) (for interim variation s107(4) with s118).

9. Determination of Application – Direction to the reporter

9.1. The sheriff must direct the reporter to arrange a hearing to decide whether to make (or review[19]) a CSO in relation to the child if:

- the sheriff determines that one or more grounds are established, s.108(4)(a) and s.108(2); or
- the sheriff determines that no grounds are established, but one or more other grounds were accepted at the hearing, s.108(4)(b) and s.108(2).

In any other case, the sheriff must dismiss the application and discharge the referral to the hearing, s.108(3).

9.2. The reporter is to remind the sheriff about any accepted grounds at the conclusion of the proof as the reporter only has power to arrange a

[18] The wording of s.107(1)(b) is ambiguous. However, "any" can mean "every", and therefore it would appear the reporter is only obliged to withdraw the application if no ground applies in relation to the child. It is difficult to see why parliament would have intended otherwise.
[19] s.108 read with s.119

hearing if the sheriff has directed this[20] (unless there is another outstanding purpose such as a deferred review).

9.3. Where the sheriff is directing the reporter to arrange a hearing and makes an ICSO requiring the child to reside in a place of safety (which is not named), the reporter must arrange the hearing to take place no later than 3 days after the day on which the child begins to reside at the place of safety. See ICSO on determination, para 12.3 below.

9.4. The sheriff must give his or her decision in relation to determination of the application orally at the conclusion of the hearing. The sheriff may also issue a note of the reasons for the decision. If so, the sheriff must do this when giving the oral decision or within 7 days thereafter. The sheriff clerk must forthwith send a copy of the note to the child (unless service dispensed with), any relevant person, any safeguarder and curator ad litem, the reporter and any other person whom the sheriff may direct. Rule 3.51

9.5. The reporter may ask the sheriff to consider providing a note of the reasons for the decision. Examples of when the reporter would do so are if grounds are not established, or if a significant legal point was determined by the sheriff.

10. Interim Orders – During Proof Applications

Please see flowcharts in Appendices 3 and 4.

10.1. The reporter has express power in terms of s.98 to apply to the sheriff for an extension (and variation) to an ICSO where:

- a child is subject to a third ICSO issued by a hearing[21] , or
- a child is subject to an ICSO made by the sheriff under section 100 (made by a sheriff where a child is not already subject to an ICSO issued by a hearing – see paragraph 10.6 below).

10.2. It is not competent for the reporter to apply to the sheriff prior to a hearing issuing a third ICSO (s.98(1)(b)(i) and s.96(4)).

10.3. The reporter must use Form 65C to make the application. Rule 3.64A(2)

10.4. The sheriff may hear the application at any time before expiry of the third hearing ICSO. The sheriff must be satisfied that the nature of the child's circumstances is such that it is necessary the current order be

[20] If the sheriff fails to direct the reporter to arrange a hearing, the reporter is to contact the Practice Team.

[21] Section 98 and section 96(4)

extended, or extended and varied, for the protection, guidance, treatment or control of the child. S98(4). An ICSO issued by a sheriff takes effect from the date of the sheriff's decision irrespective of when the third hearing ICSO would otherwise have ceased to have effect.

10.5. Where the sheriff has already granted an extension to an ICSO with or without variation under s98, the reporter can apply for further extension/variation of an ICSO, s99(1-3). The reporter must use Form 65D to make such an application. Rule 3.64A(3) Again, the sheriff must be satisfied that the nature of the child's circumstances is such that it is necessary the current order be extended/ varied for the protection, guidance, treatment or control of the child. S99(4). Note there is no urgency aspect to the test in relation to extending or extending or varying an ICSO.

10.6. In addition, where a child is not already subject to an ICSO or interim variation of CSO, a sheriff has the power to issue an ICSO/interim variation where a proof application has been made and is not determined. s100(1) (for interim variation read s.100 with s.118)

10.7. Neither the Act nor the Rules make express provision for the reporter to apply to the sheriff under s.100(1)[22]. The sheriff's power can be exercised without any application being made. However, if the reporter considers that the test in s.100(2) is met, the reporter is to make a motion to the sheriff to issue an ICSO or make an interim variation under s.100. The reporter is to record a decision to make such a motion to the sheriff on the Case Management System.

10.8. Before granting an ICSO/interim variation under s.100, the sheriff must be satisfied that the nature of the child's circumstances is such that for the protection, guidance, treatment or control of the child it is necessary <u>as a matter of urgency</u> that an ICSO/interim variation is made. S.100(2)

10.9. Where the sheriff has granted an ICSO under s.100, the reporter may apply to the sheriff for an extension of the ICSO. The application for the first subsequent ICSO is under s.98, and the applications for further ICSOs are under s.99. See paragraphs 10.4 – 10.5 in relation to these applications.

10.10. Where the sheriff has granted an interim variation under s.100 there is no power for the sheriff to extend it (section 118 expressly states that sections 98 and 99 do not apply when a child is subject to a CSO and is the subject of a proof application). There is no specific provision for a hearing to consider a further interim variation in these circumstances. However it may be possible to arrange a review children's hearing which could consider making a further interim variation. This is consistent with the general approach of the Act whereby the children's

[22] Therefore there is no form of application nor are there any rules in relation to service

hearing can continue to make interim variations when the statement of grounds is the subject of a proof application.

10.11. The circumstances in which the reporter may arrange a review children's hearing will depend on the purpose of the previous children's hearing:

- Where the previous children's hearing was carrying out a review of the CSO, as well as considering new grounds, and deferred a decision on the review, the reporter is to arrange the deferred hearing.
- Where the previous children's hearing was a grounds hearing only, the reporter can only arrange a review children's hearing if the implementation authority requires the review under section 131(2)(b) (unless the child or relevant person requires one or a review is required for some other purpose). Therefore, the reporter is to ask the implementation authority whether they would wish to require the review.

11. Intimation of ICSO Applications

11.1. The reporter must forthwith intimate an application for an extension of an ICSO during proof on the child and each relevant person and such other persons as the sheriff determines and in such manner as the sheriff determines. Rule 3.64A(4)

11.2. Where the reporter is not applying formally for an ICSO but intends to make a motion to the sheriff to issue an ICSO, there is no provision in relation to intimating this on other parties. The reporter must be alert to issues of fairness to other parties in terms of intimation as well as the overriding duty to promote the welfare of the child.

11.3. If a sheriff makes an ICSO under s.100, or s.109 or following an appeal, the order will be in Form 65A. Rule 3.64A(1)

11.4. Where a sheriff grants an application for the extension or further extension of an ICSO, the interlocutor must state the terms of the extension/variation. Rule 3.64A(5).

11.5. The reporter is required forthwith to intimate the Form 65A or the interlocutor stating the terms of theextension/variation as follows:-

- on the child using Form 65B, unless service on the child has been dispensed with 3.64A(1) and (5);
- to the implementation authority (using Form 65E); and
- on such other persons as the sheriff determines (using Form 65E), 3.64A(6).

The requirement to intimate to the implementation authority always applies regardless of whether the sheriff requires any other person to be intimated.

12. Interim Orders on Determination of Application

12.1. Any ICSO or interim variation of a CSO automatically terminates when the sheriff determines the proof application (S86(1) and s86(3)(b) or s140(1) and s140(4)(b)).

12.2. If the sheriff has directed the reporter to arrange a children's hearing, s/he has power under s109 to make an ICSO or interim variation. References to ICSO in s.109 must be read as interim variation of CSO where a CSO is in place, s.118.

If the sheriff has not directed the reporter to arrange a children's hearing, there is no power to make an ICSO or interim variation[23].

12.3. If the sheriff makes an ICSO/interim variation, specifying that the child reside at a place of safety but not naming the place, the reporter must arrange the children's hearing to take place no later than the 3rd day after the day on which the child begins to reside at the place of safety. S109(7). In practice, a child is likely to move to the place of safety immediately. So, for an ICSO or interim variation issued on a Friday, the hearing must be held no later than the following Monday. However, if the ICSO/interim variation is made on a Friday, and the child does not move to the place of safety until Monday following, the hearing must take place no later than Thursday.

12.4. If the sheriff makes an ICSO/interim variation that names the place where the child is to reside, the reporter must arrange the children's hearing to take place at some time before the expiry of the ICSO/interim variation. This will normally be 22 days but may be less if specified in the order by the sheriff.

12.5. There is no specific power for the reporter to apply for an ICSO/interim variation on conclusion of the proof. The reporter must be prepared to make a motion asking the sheriff to exercise the power under s.109 There is no provision for intimation to other parties. The reporter must be alert to issues of fairness to other parties in terms of intimation of intention as well as the overriding duty to promote the welfare of the child.

12.6. If there is no ICSO/interim variation in place, the test for the sheriff is contained in s109(3) and includes an urgency aspect. The urgency

[23] Contact the Practice Team if the determination of the application, and the termination of an interim variation is likely to cause difficulty for the particular child.

test does not apply where the sheriff is considering a further ICSO/interim variation. s109(5).

13. Warrants to secure child's attendance issued by sheriff

13.1. If a child has not been excused from attending the proof, the sheriff may grant a warrant to secure attendance. If a child has in fact failed to attend the proof hearing, the sheriff may grant a warrant to secure the child's attendance under s103(5). Further, the sheriff may grant an anticipatory warrant to secure attendance, if the hearing is to be continued to another day and the sheriff is satisfied that there is reason to believe that the child will not attend on a later date (S.103(6), (7)).

13.2. The maximum period of time for which a warrant to secure attendance is effective is 14 days beginning with the day the child is first detained in pursuance of the warrant. However, the warrant may expire sooner than that, as follows:-

- for a warrant granted under s103(5), the warrant will expire when the proceedings before the sheriff in respect of which it is granted begin[24]; and
- for a warrant granted under s103(7), the warrant will end at the beginning of the continued hearing[25].

(S.88(1) & (4))

(See also Practice Direction 19 on Orders and Measures)

In either event, it is likely that a child will be brought before the sheriff as soon as possible following being first detained under the warrant. A reporter is to promote this approach as it is the most proportionate response to the situation for the child. See Kearney 32.02, setting out the expected approach in relation to warrants to secure attendance issued under the 1995 Act.

The reporter is to attend any hearing before the sheriff and be in a position to give a view and reasons as to whether the child should continue to be detained under a warrant, or whether the child should be released. The reporter is to make efforts to inform relevant persons and any solicitors acting for parties of any hearing before the sheriff.

13.3. If the sheriff is satisfied that there is reason to believe the child will not attend the children's hearing which the reporter is required to arrange,

[24] i.e. if a s103(5) warrant is granted, and the child is found some days later, the child will be brought before the sheriff immediately, and the warrant will expire as soon as the child is brought before the sheriff – the sheriff may continue the hearing until a later date and grant a warrant under s103(7) or the sheriff may simply ordain the child to appear at a later date

[25] i.e. if a warrant is granted under s103(7), and a child found some days later, the child will be brought before the sheriff, but the warrant will not immediately expire, unless the sheriff effectively recalls the warrant at that point. If the sheriff does not recall the warrant, then the child will be detained until the date of the continued hearing, as long as this is within 14 days of the day when the child was first detained

the sheriff may grant a warrant to secure the child's attendance. s109(6)

13.4. The maximum period of time for which a warrant to secure attendance under s109(6) is effective is 7 days beginning with the day the child is first detained in pursuance of the warrant, but it will expire at the beginning of the children's hearing if held sooner than that. S88(1), (4).

13.5. The expectation would be that the reporter, wherever practicable, arrange the children's hearing to take place on the first working day after the child was first detained in pursuance of the warrant, in line with what is set out in Rule 17 of the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013.

13.6. A warrant to secure attendance ceases to have effect on withdrawal of the application. S107(4)

Appendix 1 – Service, Citation and Notice

In relation to notification of court applications[26], the calculation of time runs back from the date of the diet. So, for a diet on a Friday, notified by post, 72 hours counted backwards takes the last possible time for notification to be the end of Monday (more realistically, close of business on Monday)[27].

Specific provisions in relation to service/intimation/citation

Service/intimation of:

- a procedural hearing under rules 3.45(4)-(7) – the sheriff shall appoint service and intimation as the sheriff thinks fit, Rule 3.45(6);
- discharge of a hearing on evidence – the sheriff shall make such orders for intimation as the sheriff thinks fit, Rule 3.47(8);

Timescale

- Rule 3.13 sets out the minimum period of notice
- Rule 3.15 and Rule 3.16 have to be read together. Rule 3.15 sets out the modes of service. Only some of the modes of service are available to reporters or persons delegated by reporters. All modes of service are available to sheriff officers.

  So, the following provisions apply to citation/intimation of proof applications, continued proof applications, applications for ICSO during proof applications and citation of witnesses.

Methods of service

It is legal service if service is made as follows:

1. delivered to him personally;
2. left at his dwelling-house or place of business with some person resident or employed there;
3. left for him at any other place at which he may at the time be resident, where options 1. or 2. can't be used;
4. where he is the master of, or a seaman or other person employed in, a vessel, left with a person on board or connected with the vessel;
5. sent by first class recorded delivery post, or the nearest equivalent postal service, to his dwelling-house or place of business, or if he has no known dwelling-house/place of business to any other place in which he may at the time be resident;
6. where the person has the facility to receive fax or other electronic transmission, by being faxed or other electronic transmission; or

[26]Rule 3.13 sets out that any citation or notice required must be made not later than 48 hours or in the case of postal citation 72 hours before the **date** of the diet to which the citation/notice relates..

[27] See Kearney para 30.21 A reporter should be alert to a possible argument that the citation/notification has only been "made" when it can be presumed to have been received. In other words, for a diet on a Friday, a postal citation would need to be mailed no later than 11.59pm on the Saturday before.

7. where the person has a numbered box at a document exchange, given by leaving at the document exchange.
8. where there is not sufficient time to use any of the above methods, the sheriff may direct that service is to be made orally or in such other manner as the sheriff directs.

Only methods 5, 6, 7 and method 8 (if specified and directed by the sheriff) can possibly be used by reporters. In practice, as reporters are not to use fax unless in exceptional circumstances and SCRA is not part of any document exchange, reporters are limited to serving by first class recorded delivery or e-mail (where there is a secure e-mail address – see SCRA's Information Security Policy).
A sheriff officer may use any of the above methods.

Timescales for service, intimation or citation

Postal citation or notice must be given no later than 72 hours before the date of the diet. Other methods of service must be made no later than 48 hours before the date of the diet. Rule 3.13.

So, in practice, for a diet on a Friday, the notice must be posted no later than Monday. If e-mail can be used, the e-mail must be sent no later than Tuesday.

In practice, for a proof on a Friday, a sheriff officer would have to complete service no later than Tuesday.

If there is insufficient time for the reporter to serve/intimate/cite by post, the reporter may request that the sheriff direct that notification or citation be made orally, or in such other manner as the sheriff directs. Rule 3.15(3).

Citation of Witnesses

Witnesses should be cited using Form 41, and proof of execution of citation is given in Form 42. Rule 3.14(2),(3).

The purpose of citation is to compel attendance at court. Citation is not a precondition of that person being called as a witness.

Where the reporter is in no doubt that a witness will attend court at the reporter's request, it is not necessary for the reporter to send a citation by recorded delivery post. For example, a professional witness, such as a social worker, may be informed of the need to attend court orally, by secure e-mail, or by letter sent by ordinary post.

However, where there is any doubt about the witness's attendance at court or the witness is non-professional, citation must be sent by first class recorded delivery post. In the unlikely event that a reporter is seeking a warrant of apprehension of a witness, a sheriff is not likely to grant this unless there is absolutely no doubt that the witness has received the citation. It may be

necessary for the reporter to arrange for the witness to be cited personally by a sheriff officer, to remove any doubt about the witness having received the citation.

Witness List

In a standard prosecution report submitted by the police the report may indicate that a witness's address is not to be disclosed. They will normally do this by stating the witness's "disclosable address" as being care of some other address, such as a police station.

In addition, the reporter may decide that a witness's address should not be disclosed in order to protect their privacy (see Practice Direction 4 on Non-Disclosure).

In compiling a list of witness, the reporter is not to include an address that is not disclosable. The reporter should state the witness's address as being care of the police or SCRA.

Appendix 2 – Timescales

SITUATION	WHAT MUST/WILL HAPPEN?	TIMESCALE?	EXAMPLES
If a hearing directs the reporter to make a proof application	the reporter must lodge the proof application with the court within a period of	7 days beginning with the date of the grounds hearing	Grounds hearing on Wednesday. Proof application must be lodged no later than following Tuesday. Grounds hearing on Monday, proof application must be lodged no later than Friday of that week.
Where a proof application is made to the sheriff, the application	must be heard	no later than 28 days after the day on which application lodged (but can be continued)	Application lodged Tuesday 13th August 2013, must be heard no later than Tuesday 10th September 2013
Where a proof application is made to the sheriff under s.94(2)(a) and the sheriff wishes to fix a procedural hearing under rule 3.45	The procedural hearing must take place before the expiry of the period of	7 days beginning with the day on which the application is made	Application made on Friday. Procedural hearing must be held no later than following Thursday

Where a sheriff directs the reporter to arrange a children's hearing following a determination of a proof application and the sheriff makes an ICSO specifying that the child is to reside at a place of safety	the reporter must arrange the hearing to take place	no later than the 3rd day after the day on which the child begins to reside at the place of safety	Application determined on Friday and sheriff directs reporter to arrange a hearing. Same day sheriff issues ICSO specifying place of safety. Child already in a place of safety. Hearing must take place no later than Monday. If child taken to a place of safety on Saturday, hearing must take place no later than Tuesday.
Where a warrant is granted by the sheriff under s103(7) (a child not excused from attending hearing of a proof application, hearing continued and sheriff is satisfied reason to believe child will not attend continued hearing), the warrant to secure attendance	is effective for the period	beginning with the granting of the warrant and ending with the earlier of (i) the beginning of the continued hearing (ii) the expiry of the period of 14 days beginning with the day on which the child is first detained	Maximum period during which the warrant to secure attendance has effect is as follows. Where warrant granted on Monday , child detained on Sunday 27th October 2013. Warrant ceases to have effect at the end of Saturday 9th November 2013.

Where a warrant is granted by the sheriff in relation to child's attendance at any other proceedings under Part 10 (e.g. ICSO, IVCSO, review of grounds determination), the warrant to secure attendance	is effective for the period	beginning with the granting of the warrant and ending with the earlier of (i) the beginning of the Sh Ct proceedings in respect of which it was granted (ii) the expiry of the period of 14 days beginning with the day on which the child is first detained	Maximum period as above
Where a warrant is granted by the sheriff in relation to child's attendance at a hearing arranged under s108, 115, 1172)(b) or 156(3)(a), the warrant to secure attendance	is effective for the period	beginning with the granting of the warrant and ending with the earlier of (i) the beginning of the CH in respect of which it is granted or (ii) the expiry of the period of 7 days beginning with the day on which the child is first detained	Maximum period during which the warrant to secure attendance has effect is as follows. Where warrant granted on Monday , child detained on Saturday. Warrant ceases to have effect at the end of following Friday.

Appendix 3 – Signed Witness Statements or Affidavits

1. Introduction

- Affidavit evidence is a form of hearsay evidence which is admissible by virtue of section 2(1) of the Civil Evidence (Scotland) Act 1988.
- A written witness statement which includes a declaration that the evidence is true to the best of the witness's knowledge and belief and signed by the witness can be used in place of an affidavit. It would be competent for a reporter to prepare this provided the reporter adhered to good practice in preparing such statements. In particular, the statement must be the actual evidence of the witness in written form, and not influenced by the precognoscer. The witness must be given the opportunity to consider the draft statement and make any amendments or confirm its terms before signing it.
- Other forms of written evidence prepared by that witness may be attached to the written statement, for example a report of an assessment carried out by the witness.
- The reporter may still call and ask supplementary questions of a witness who has provided a written statement. In that case, the court would be required to assess the totality of the oral evidence and the witness statement.
- There are well-recognised advantages to providing evidence by way of written statement, namely allowing court to deal with case expeditiously, allowing earlier and shorter timescales for proof, and facilitating settlement of cases. There may be other advantages – the evidence may be better quality than oral evidence as the witness is not in a formal court setting when providing the statement, it may assist the court in managing the case and restricting the issues for proof. The use of written statement evidence will show the willingness of reporters to adopt new practices to assist courts' expeditious management of cases.
- The weight to be given to any evidence including hearsay is a matter for the court. The reporter requires to exercise his/her judgement regarding the sufficiency of evidence provided only in hearsay form, whilst weighing up the benefits such as possibly obtaining a speedier outcome for the child.
- A written witness statement may be admitted by (1) calling the witness and having the witness adopt the statement (2) a joint minute of agreement which agrees to the admission of the witness statement as the evidence of the witness (3) the reporter making an application by motion for the evidence to be admitted and the court assenting to that motion and possibly borrowing from rule 29.3 of the ordinary cause rules which allows a party to docquet a written statement, lodge it and provide the other parties with a copy.

2. Admissibility of written statement or affidavit

- Section 2(1) of the Civil Evidence (Scotland) Act 1988 provides that hearsay is admissible in civil proceedings as follows: "(1) In any civil proceedings … a statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible". This allows a person's statement, including a written statement, to be admitted as evidence of any matter of which direct oral evidence by that person would be admissible.
- An affidavit is a form of written witness statement on behalf of one party made on oath or affirmation before a notary public, justice of the peace, sheriff or magistrate.
- Both a written witness statement (unsworn) and an affidavit are forms of hearsay evidence and admissible by virtue of section 2(1).
- This form of evidence is subject to the same rules of competency and relevancy as direct oral evidence.
- A style of written witness statement and affidavit are in Appendix 3 [styles to be added]

3. Weight of written statement or affidavit

- The weight which is given to any piece of evidence is a matter for the court's judgement. [references]
- There does not appear to be any difference in the weight given to a statement by virtue of the fact that it is in the form of an affidavit as compared to a signed witness statement. In MacPhail at 15.43, in case law, and in the Note below re commercial actions, **a written witness statement is equated to an affidavit**. Indeed both are simply examples of the type of evidence which may be introduced under section 2(1) of the Civil Evidence (Scotland) Act 1988. See:
    - MacPhail 15.43, and
    - Note by Lord Hodge, Lord Menzies and Lord Malcolm on the Scottish Courts Service Website in relation to the use of affidavits/written statements in commercial actions (referred to here as "Note re Commercial Actions"). It helpfully provides guidance on the preparation of such statements, and
    - *Luminar Lava Ignite Ltd* v *Mama Group plc* 2010 SC 310, paragraphs 70-75.
- We routinely use hearsay evidence in our proceedings in place of oral evidence, for example a child's joint interview. Often, direct oral evidence is the best evidence, but it is not always the case. For example, a visually recorded joint investigative

interview, completed shortly after an incident, may be the best evidence – it may be a more accurate account of events than evidence given in court months later.

- The use of affidavit evidence does not rule out additional questioning by the reporter or the defence. See the Adoption Practice note, paras 18 and 19 and the case of Petition Of Aberdeenshire Council For An Order Freeing The Children A, B And C For Adoption, Court of Session 22 June 2004. See Lady Smith's comments in para 3. See also the comments in the Note re Commercial Actions about supplementing evidence. The court would assess the totality of the evidence and the weight to give it.
- The use of affidavit evidence in adoption cases seems to be commonplace and very much appreciated by the court. It seems to be used for important evidence. There is an example of the use of affidavits in the case of JDM and FBM Petitioner for an Adoption Order under section 29 of the Adoption and Children (Scotland) Act 2007 in respect of the children L and B [2012] CSOH 186, in an Opinion by Lord Glennie.

4. How to admit affidavits or written statements in to evidence

The witness may either be cited and called as a witness for the reporter. For a written witness statement, the witness should confirm in witness box (i) that the statement is his, (ii) that after giving a statement, he has considered the terms of the written statement and signed it, and (iii) that he adopts it as his evidence. Thus the statement will become part of his sworn testimony.

When an affidavit is used, the witness should simply confirm the affidavit is his, at the start of giving evidence. As it is an affidavit, steps (ii) and (iii) are not required.

This method would be appropriate if the reporter wished to ask supplementary questions. If the reporter does not wish to ask supplementary questions but the other parties wish to cross-examine the witness, then the other parties may cite and call that witness, but the reporter cannot rely on other parties to call the witness to introduce the affidavit or written statement.

Therefore, if the reporter does not wish to ask supplementary questions, the evidence can be admitted by (1) a joint minute of agreement which agrees to its admission as the evidence of the witness, or (2) the reporter makes an application by motion for the evidence to be admitted and the court assents to that motion and perhaps borrow from rule 29.3 of the ordinary cause rules which allows a party to docquet the statement, lodge it and provide the other parties with a copy.

Method (2) is untested in our proceedings. For (2) reporters would need to be equipped to make submissions regarding borrowing from ordinary cause rules.

5. Style Affidavit

Taken from Butterworths Scottish Family Law Service/Division F Styles/Style 1 Divorce - adultery/Style 1(iii) - Affidavit of pursuer

STYLE 1(III) - AFFIDAVIT OF PURSUER

Sheriffdom of Lothian & Borders at Edinburgh

Affidavit of pursuer

in the cause

MRS FAITH BROWN or CAMERON, residing at 1 Sycamore Road, Edinburgh

PURSUER

Against

ROBERT HAMISH CAMERON, residing at 10/2 Hornbeam Road, Edinburgh

DEFENDER

At Edinburgh the First day of September Nineteen Hundred and Ninety Seven in the presence of James Smith, Solicitor and Notary Public, 10 Walker Street, Edinburgh, COMPEARED Mrs Faith Brown or Cameron, residing at 1 Sycamore Road, Edinburgh, who being solemnly sworn DEPONES as follows:

1. My full name is Faith Cameron. My maiden name is Brown. I am 38 years of age and am employed as a teacher at Roseburn Primary School. I reside at 1 Sycamore Road, Edinburgh.
2. I married my husband Robert Hamish Cameron presently residing at 10/2 Hornbeam Road, Edinburgh, at Edinburgh on 9th February 1980. We have no children. I produce an extract of the entry in the Register of Marriages No. 5/1 of process which I have signed as relative hereto.
3. I have been habitually resident in Scotland for more than one year immediately prior to raising this action. I have been resident within the Sheriffdom of Lothian & Borders for a period in excess of forty days immediately preceding the raising of this action. I do not know of any proceedings continuing in Scotland or elsewhere concerning my marriage or capable of affecting its validity or subsistence.
4. After the marriage my husband and I lived together latterly at 1 Sycamore Road, Edinburgh until on or about 1st December 1996 when my husband left the family home. We have not lived together nor had marital relations since that date. Immediately prior to his departure my husband told me that he had been involved in a sexual relationship with his secretary, Miss Ellen Hay, for the preceding six months. He has shown no intention of ending that relationship and indeed immediately after leaving our home moved in with Ellen Hay at 10/2 Hornbeam Road, Edinburgh, where he has resided ever since. He has conducted this adulterous relationship quite openly since that date. I have attended a number of family functions to which he has brought his girlfriend. I produce photographs Nos 5/2 and 5/3 of process

which were taken during a party held for my mother-in-law's birthday on 4th April 1997 in which my husband is sitting with his arm round his girlfriend. I have signed these photographs as relative hereto. My husband's relationship with Ellen Hay has been and continues to be adulterous. There is no prospect of a reconciliation between us. My marriage has broken down irretrievably and I seek decree of divorce.

All of which is truth as the Deponent shall answer to God.

..... Deponent

..... Notary Public

6. Style Signed Witness Statement

Sheriffdom of [ ] at [ ]

Witness statement of [name of witness]

in the application under
section 93/94 of the
Children's Hearings
(Scotland) Act 2011

by

[NAME OF LRM], [address of locality team], LOCALITY REPORTER MANAGER

In respect of

[NAME OF CHILD]

I, [name of witness], of [professional address or c/o SCRA Locality Team] make the following statement:

1. My full name is [ ]. I am [ ] years of age and am employed as a [e.g.teacher] at [name of establishment]. My work experience is as follows: [ ] . My qualifications are…
2. Then in numbered paragraphs details of the evidence.

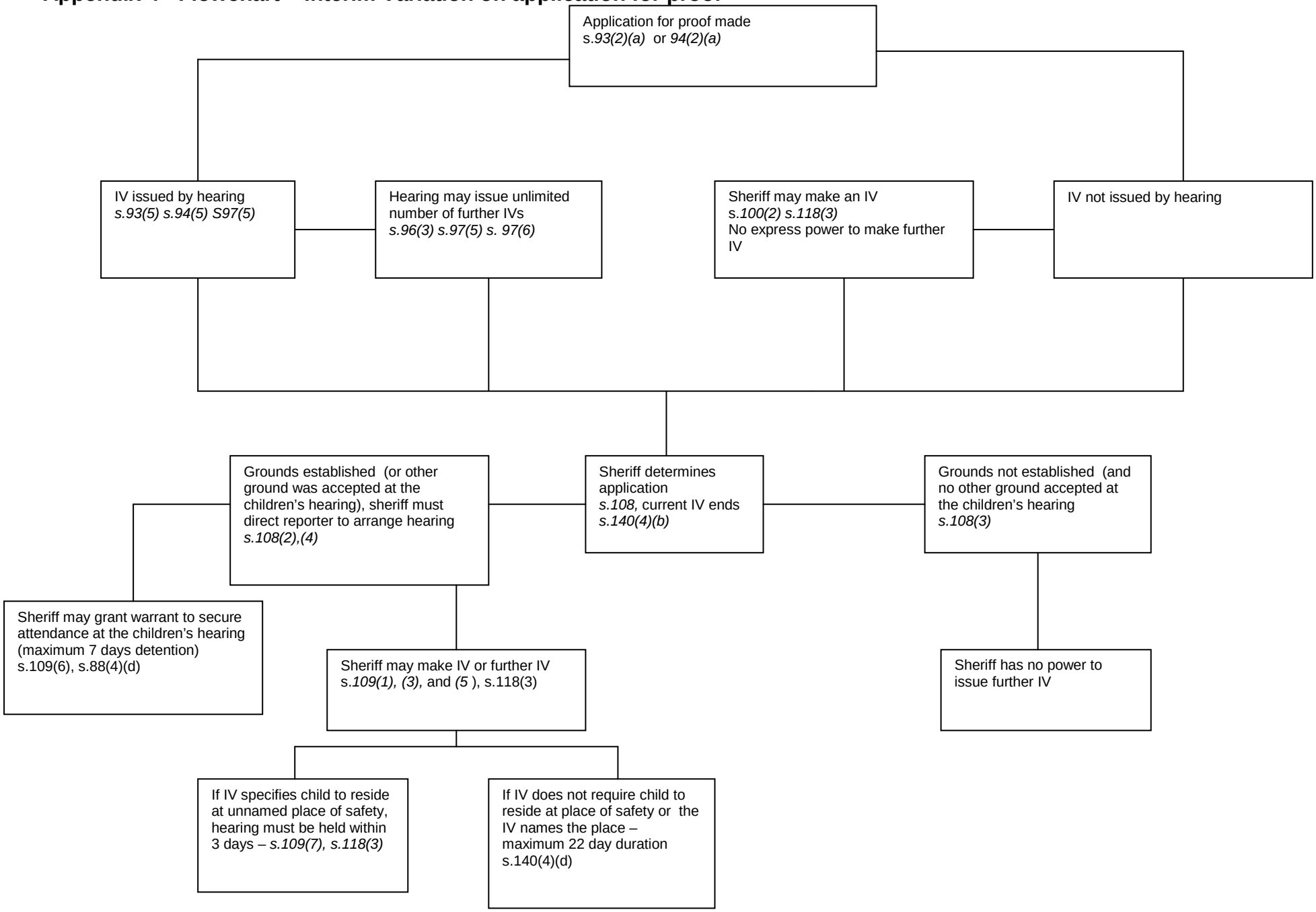
The evidence in this and the previous [x] pages which I have read before signing is true to the best of my knowledge and belief

..... Witness

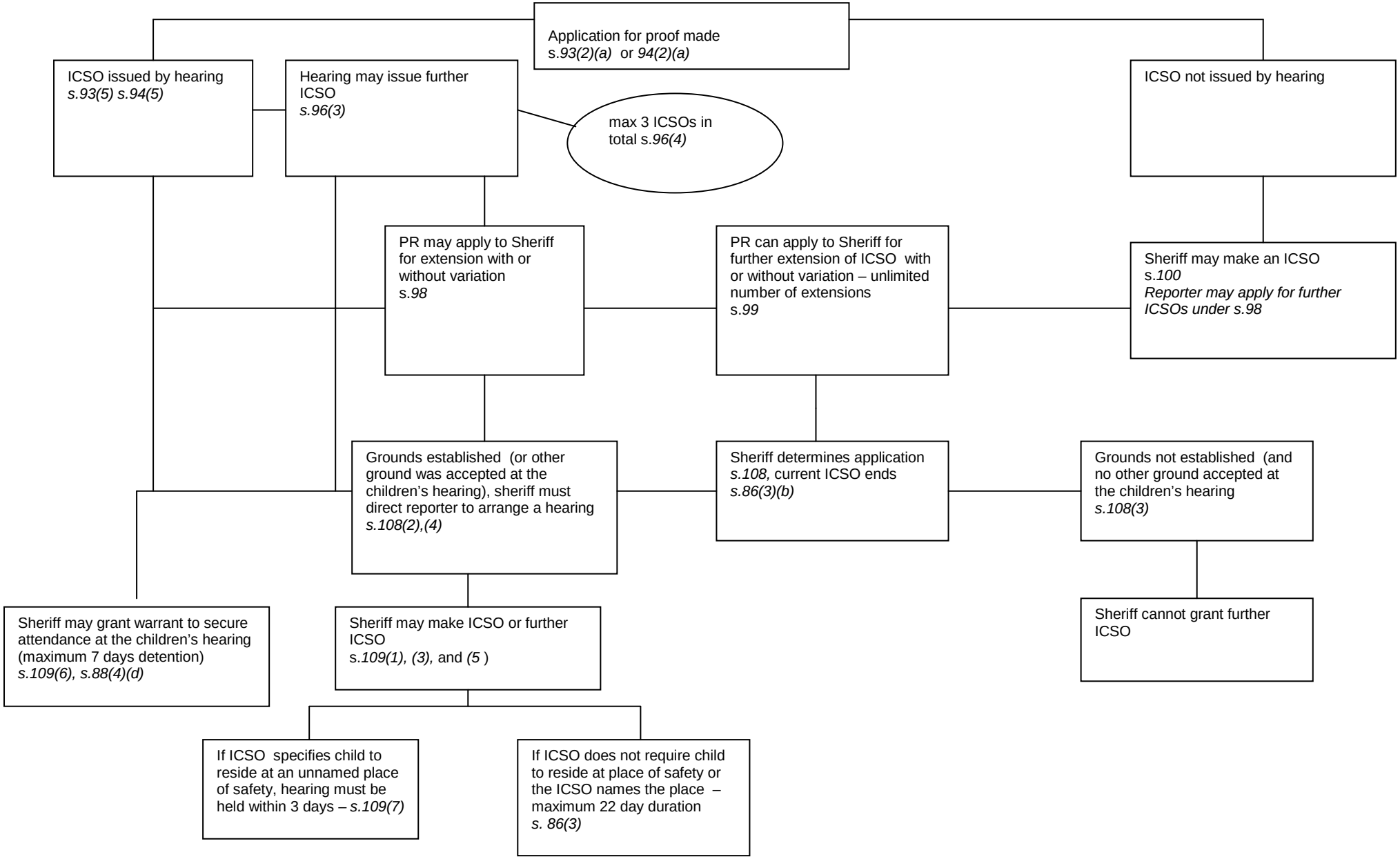
…….. (date of signing)

……..(place of signing)

Appendix 4 - Flowchart – Interim Variation on application for proof



Appendix 5 - Flowchart – ICSO on application for proof - For children not on CSO



Appendix 6 - Aide Memoire

Efficient and Expeditious Case Management

Set out below is an aide memoire of options to support efficient and expeditious progress of cases.

Generally speaking, the more complex the case, the more likely the reporter should employ one or more of the options. In considering any particular option, the balance should be in favour of using the option, unless there is good reason not to do so. It is always a matter of judgement as to what options are appropriate and proportionate in any particular case and this should form part of early assessment about managing the case.

It is recognised that other parties may not always be co-operative but the options in the aide memoire should always be considered by the reporter. They are likely to be of assistance in managing difficult behaviour by other parties and in supporting case management by the sheriff.

The options are in addition to the reporter's duty of disclosure as set out in PIN 39 Disclosure of Evidence – this includes the duty to disclose evidence which the reporter intends to lead, and evidence which undermines or weakens the reporter's case or strengthens another party's case (whether or not this evidence will be led by the reporter).

Aide Memoire

1. Send an initial letter to all parties together with the reporter's witness list and proposed inventory of productions.

2. The initial letter should, as a minimum:
    a. Request parties' lists of witnesses and (if appropriate) whether they intend to instruct any independent expert witness;
    b. Request a note of what parties intend to lodge as productions and suggest a joint bundle of productions (which is a bundle of productions containing both reporter and other parties productions);
    c. Include a proposed joint minute of agreement[28];
    d. Request that the other parties highlight any other areas capable of agreement;

    The letter may also:
    e. Suggest a meeting between all parties take place outwith court time to discuss matters which may be capable of agreement.
    f. Suggest that all parties produce for the sheriff and each other a case summary (see number 8 below)

[28] What to include in the draft joint minute is a matter of judgement. It ought to go beyond what is incontrovertible. It may be used as a way to initiate discussion on other parties' positions and in some cases, it may be appropriate to provide the sheriff with a copy of the draft joint minute to assist the sheriff to focus the proof.

g. if the reporter or two parties require an independent expert on the same subject matter, suggest that the expert is instructed jointly.

The letter should give a date by which the reporter expects a response and highlight that Rule 3.46A of the Child Care and Maintenance Rules allows the sheriff to order parties to take such steps as the sheriff deems necessary to secure the expeditious determination of the application.

3. Lodge productions (including any signed witness statements) with inventory of same before first court hearing or as soon as possible thereafter.

4. Share precognitions of reporter witnesses except child witness (having advised witnesses at precognition stage of intention to do so, and considering whether there needs to be redaction of third party, sensitive or irrelevant information).

5. Allow parties to view child witness precognition (having advised child witness at precognition stage of intention to do so and subject to redaction as above).

6. Convert precognitions into signed witness statements (or affidavits) and share these with other parties.

7. If competing expert reports are produced (which should only be the case where the sheriff has declined to order joint instruction), the reporter should write to parties to suggest that the experts consult to identify areas of agreement and scope of disagreement in their opinions.

8. Provide the sheriff and parties with a case summary including:
    a. a witness summary containing for each witness one paragraph with a succinct and informative note of the nature and scope of evidence of that witness.
    b. a list of productions lodged or to be lodged (including any signed witness statements).
    c. a list of what has been disclosed or what is still to be disclosed.
    d. a note of any independent witness on whom the reporter intends to rely, the qualifications of that witness and their suitability to give opinion evidence on the particular topic.
    e. An estimate of the number of days for the reporter's evidence to be concluded.

9. Ask the sheriff to issue a pre-proof order setting out expectations on parties and dates by which expectations are to be met.

10. Pre-proof order could:

    a. **require** each party to prepare and lodge a case summary setting out:-
    - a witness summary containing for each witness one paragraph with a succinct and informative note of the nature and scope of evidence of that witness.

- for parties other than the reporter, the extent to which the grounds for referral and supporting facts are disputed.
- a note of any independent expert witness, and the qualifications of that witness, and why they are suitable to provide opinion evidence on the particular topic.
- a note of productions lodged or to be lodged.
- the identity of who will represent them at the proof.
- A proposed running order and timetable of witnesses.
- an estimate of the number of days required to conduct that party's evidence including cross-examination and re-examination.

b. **Set out** expectations for conduct of parties at pre-proof hearing e.g.:

- full and frank disclosure of their respective positions – and set out that a failure to do so may mean sheriff refuses to hear evidence regarding undisclosed matter;
- be able to explain why particular evidence is required;
- be able to explain the nature and extent of expert evidence, the relevance of it, and the suitability of the expert;
- be able to explain any issue which may delay the proof, e.g. legal aid, recovery of evidence, instruction of experts, availability of witnesses;
- be able to explain any legal issues arising;
- identify areas where evidence can be agreed;
- identify evidence which can be presented in the form of written witness statement;
- identify whether sharing of submissions would be helpful
- identify whether a joint expert can be instructed and if not confirm that competing experts have shared views to identify common or disputed ground.

11. Following on from production of case summaries or information gathered by the reporter from parties at or outwith court, the reporter may consider asking the sheriff to order:

    a. Restriction on a party leading evidence of a certain line or from a certain witness if the evidence appears to be unlikely to assist the court in reaching a decision, or if the substantive line of evidence has not been disclosed during pre-proof.
    b. Joint instruction of expert.
    c. If the sheriff has declined to order joint instruction of expert, and parties do not agree to experts exchanging views, that the sheriff order experts to exchange views so as to identify areas of dispute or clarify the scope of disagreement.
    d. Evidence of a witness **for any party** to be presented by way of written witness statement or affidavit.
    e. Submissions to be shared in advance.

Appendix 7 - Aide Memoire for Supporting Court Work

Nature of support	Discuss with	Possible provider
Administrative support e.g. photocopying, numbering productions/case law, producing inventories, binding.	LRM, LSM	In team support - Assistant Reporter or Support Administrator
Locating/printing off non-standard case law, checking judicial status, checking up to date legislation	LRM, Senior Practitioner	Senior Practitioner, Practice Team
Checking for relevant SCRA experience	LRM, Senior Practitioner, Practice Network	Senior Practitioners, Practice Network, other reporter having conducted similar case
Assistance with precognitions – taking same, typing up (possible conversion to signed witness statement – meeting with witness to check/amend and finally sign statement).	LRM, Senior Practitioner	In team support - Assistant Reporter or Support Administrator
Assistance with case analysis	LRM, Senior Practitioner	Senior Practitioner, LRM, other reporter within or outwith Locality, Practice Reporter,
Review of/2nd opinion on evidence, witnesses, productions, disclosure, recovery of evidence, expert witnesss	LRM, Senior Practitioner	Senior Practitioner, LRM, other reporter within or outwith Locality, exceptionally Practice Reporter

Review of/2nd opinion on options for expeditious progress of case.	LRM, Senior Practitioner	Senior Practitioner, LRM, other reporter within or outwith Locality, exceptionally Practice Reporter
Consultation with Practice Reporter on specific issues and related ongoing support from Practice Reporter	LRM, Senior Practitioner, Practice Reporter	Practice Reporter
Consultation with SCRA external solicitor or solicitor advocate, or counsel on specific issues	LRM, Senior Practitioner, Practice Reporter, Practice Manager	SCRA external solicitor or solicitor advocate, or Counsel (Practice Team will instruct)
Scribe	LRM, Senior Practitioner	In team support – Assistant Reporter, Support Administrator
Co-work the case or parts of the case with another reporter e.g. dividing up witnesses for examination-in-chief	LRM, Senior Practitioner	Other reporter within or outwith locality
Another reporter with relevant experience take on the case either within locality or from another locality	LRM, Senior Practitioner	Other reporter within or outwith locality
Practice Reporter takes on part of case (eg one-off debate on unusual and complex point)	LRM, Senior Practitioner, Practice Reporter, Practice Manager	Practice Reporter
Outsource (could be for operational reasons or eg one-off debate re complex point)	LRM, Senior Practitioner, Senior Operational Manager (also Practice Reporter and Practice Manager if because of complex point)	External solicitor, solicitor-advocate, or counsel (Practice Team will instruct if because of complex point.)