

# *Representing Yourself in a Scottish Family Court*

A guide for Party Litigants in  
child contact and residence cases



**FAMILIES NEED FATHERS**  
**SCOTLAND**

**March 2014**

**Revised edition**

Published by

**FAMILIES NEED FATHERS SCOTLAND,  
10 PALMERSTON PLACE,  
EDINBURGH EH12 5AA**

0131 557 2440

scotland@fnf.org.uk

[www.fnfscotland.org.uk](http://www.fnfscotland.org.uk)

March 2014

# INTRODUCTION

This is an updated and revised edition of the Guide published in June 2011. There have been a number of changes in law and in procedures in the last two and a half years with several more on the horizon as the civil courts overall are reformed.

There is considerable research that demonstrates that most children do better in all areas of their life when they can draw on the confidence that comes from knowing they are loved and supported by both parents even after separation.

FNF Scotland's principal aim is to provide support and advice for parents seeking to maintain full and constructive relationships with their children after separation. We offer support and guidance at local group meetings and to the many telephone callers to our Edinburgh office.

We also work with the legal profession, other professionals in the statutory and voluntary sectors and with legislators in the Scottish Parliament to address some of the obstacles our members tell us they have encountered while trying to maintain a loving and supportive relationship with their children.

It is our experience that sometimes the non-resident parent - usually but not always the father - as well as the wider family of grandparents, aunts and uncles - can become dispirited and have their own confidence drained away when their wish to do their best by their children turns into a conflict.

Much of the important work at FNF Scotland group meetings comprises members listening and sharing their own experiences with the aim of rebuilding self-confidence and helping find a path through frustrations and disappointments.

FNF Scotland as a rule encourages those who contact us to avoid going to court if possible. The adversarial system tends to polarise attitudes and can even generate entirely new grievances. It can also be crushingly expensive. It is a common refrain at group meetings that “the thousands we are both spending on legal costs is money that ought to be there for our kids.”

Sometimes, however, the courts can't be avoided where negotiation is not possible. This guide is intended to help anyone who has to go to court get a grasp of the procedures and relevant laws in Scotland. It will be of assistance to anyone contemplating representing themselves as a 'Party Litigant' – conducting a court case without a lawyer.

We are aware that for a variety of reasons the number of people opting to conduct their own case as Party Litigant is increasing. The civil justice system acknowledges that it is anyone's right to be a Party Litigant and rules of court accommodate such self-representation. It is not an easy role to fulfil and anyone considering being a Party Litigant has to be ruthlessly honest about their capacity to conduct their case successfully – especially when they may be locking horns with an experienced qualified solicitor or advocate.

The disciplinary codes of both the Faculty of Advocates and the Law Society of Scotland spell out that their members should not take unfair advantage of a Party Litigant.

One of the significant changes of the last two and a half years has been the establishment of the role of the Lay Representative, similar to the long established McKenzie Friend in England and Wales, in being allowed to speak to the Sheriff or judge in court on behalf of a Party Litigant. Experience of the Lay Representative role is developing both among our members and among the judiciary. We will keep members informed of developments.

Even if you are not intending to represent yourself as a Party Litigant, knowing more about the legal machinery set out in this report is confidence-building in itself. Making yourself better informed about the legal nuts and bolts and peculiar language will help in the conversations you may have with a solicitor if you are eligible for legal aid or can afford representation. It can improve the quality and focus of the discussions you should have with your solicitor in agreeing an active and effective strategy in pursuing your case.

Ideally it can also help separated parents find mutual benefit in working out arrangements based on putting the interests of their children first.

Most child contact and residence actions will be heard in a Sheriff Court and don't really involve complex points of law. This Guide is primarily aimed at assisting anyone involved in such cases. It is possible to raise some actions in the Court of Session, especially if the case is going to turn on points of law and complex evidence. It is possible to represent yourself in the Court of Session and some of our members have done so but it is essential to take formal legal advice before embarking on the case.

We have to conclude this introduction with a disclaimer in case it isn't already clear. Nothing in this guide should be taken as forming legal advice. Families Need Fathers Scotland recommends seeking the help of a qualified solicitor where explicit legal advice is required. The names of solicitors may be obtained from the Law Society of Scotland by phoning 0131 226 7411 or at [www.lawscot.org.uk](http://www.lawscot.org.uk) or from the Family Law Association at [www.familylawassociation.org.uk](http://www.familylawassociation.org.uk).

Many thanks are due to FNF Scotland members, lawyers and others who have contributed ideas, feedback and information for this publication. Particular thanks are due to Kathryn McElroy who did a large proportion of the groundwork in preparing the first edition of this Guide. Mistakes and omissions are the responsibility of the FNF Scotland staff, and they will be rectified in future editions - see [www.fnfscotland.org.uk](http://www.fnfscotland.org.uk) for the most recent edition.

**FNF Scotland, March 2014**



## TABLE OF CONTENTS

WHO CAN RAISE AN ACTION? .....	8
RAISING AN ACTION IN THE SHERIFF COURT .....	9
PRINCIPLES OF THE COURT .....	11
DRAFTING DOCUMENTS FOR COURT .....	12
THE INITIAL WRIT .....	15
PREPARING FOR COURT .....	18
CHILD WELFARE HEARINGS.....	22
OTHER COURT PROCEDURE INFORMATION.....	25
PROOF .....	27
DEFENDING A CASE .....	30
SAMPLE INITIAL WRIT.....	32
SAMPLE DEFENCES.....	35
SAMPLE INVENTORY .....	39
SAMPLE ADJUSTMENTS FOR THE DEFENDER.....	40
SAMPLE ADJUSTMENTS FOR THE PURSUER .....	41
SAMPLE MOTION.....	42
FNF Scotland Jargon Buster .....	43
Ordinary Cause Rules relating to Child Welfare Hearing .....	48
Lay Representative Statement .....	49
Sources of further information .....	50

# FLOW CHART

Stages of a court action

See a solicitor. Investigate whether you might be eligible for legal aid

Draft an application to the court – usually by way of an Initial Writ

Send your signed Initial Writ to the Sheriff Clerk for Warranting. Ensure you have included the necessary birth certificates.

Option 1: Service by Recorded Delivery. This is cheaper but if not signed for and/or returned to Pursuer it remains unserved

When the Warranted writ is returned, serve the Service Copy on each defender.

Include NID (Notice of Intention to Defend) and F9

Option 2: Service by Sheriff Officer. This is significantly more expensive but is a more reliable form of service.

Defender has 21 days notice period from date of service to respond. Pursuer can do nothing in this time except check it has been served

If a NID is not lodged by the Defender within 21 days the court will grant Decree by Default. See OCR 33.37 for an explanation of Decree by Default

If a NID is lodged by the Defender, the Court will send a G6 form with all of the important dates on it. Use this to form your timetable and make sure to put all the dates in your diary!

Adjustment Period – both parties adjust their pleadings. The pleadings are sent back and forth between themselves, not to court.

A Child Welfare Hearing will almost always be fixed. This will be more than 21 days after the Defences are lodged unless the Sheriff thinks it should be earlier. See the section on CW Hearings.

Pursuer must lodge 2 clear copies of the Pleadings no later than two days before the Options Hearing

## OPTIONS HEARING

**Continuation**  
OH can be continued for a maximum of 28 days

Either party can ask for a continuation and/or can oppose a continuation request with good reason

Why Continue?

Examples:

Parties believe they can reach agreement in this time

Last-minute adjustments have been received from the other side

**Proof**

The case may be assigned to the evidential hearing called the Proof

The Pursuer should suggest a number of days for the Proof to be "set down" for – this depends on the complexity of the evidence to be led and the number of witnesses. Parties often try to agree an appropriate number of days.

Have your diary to hand so you can discuss free dates with the other side and suggest dates to the Sheriff and his/her Clerk

**Debate**

The case may be assigned to Debate – this is a hearing on a specific point of law. It is very unusual in family cases

**Proof Before Answer**

The case may be assigned to a Proof Before Answer – this is a hearing on a specific point of fact. It is very unusual in family law cases.

## WHO CAN RAISE AN ACTION?

If you are the father of a child you are likely to have legal rights and responsibilities or can acquire them even if you were never married.

If you were married you will automatically have what is termed "parental responsibilities and rights" (PRR). These are the fundamental obligations of parenting, such as the responsibilities to safeguard and promote your children's health, development and welfare and to provide direction and guidance to the children in accordance with their stage of development.

Rights include the ability to control, direct or guide the children in a manner appropriate to their stage of development, and importantly, to have your children living with you or to maintain personal relations and direct contact with your children on a regular basis unless there are specific reasons why it is not in the interests of the children that you should have contact.

A mother automatically has parental rights and responsibilities.

If you are divorcing you ought to be guided by your respective solicitors to draw up a 'Parenting Plan' as part of the proceedings in which you can establish the expectations of your role as parents as well as the specific details of residence and contact. If there is sufficient flexibility and mutual good faith built into the parenting plan it may see you all through until the children become adults. Unfortunately we frequently hear from members that little importance or even mention was given to the Parenting Plan. It is our view that effort put into the Parenting Plan could help avoid many problems that end up in court later.

The Family Law (Scotland) Act of 2006 extended parental responsibilities and rights to unmarried fathers where the birth was jointly registered after May 6<sup>th</sup> 2006. Even where the birth was not jointly registered or where the birth was before May 6<sup>th</sup> 2006 it is possible to acquire parental responsibilities and rights either with the agreement of the mother or, if no agreement is possible, by applying to court for them.

It is common for a non-resident unmarried father who doesn't automatically have PRRs to apply for them and for contact in the same action. You can still take court action to have contact with your children without PRRs, but a father without PRRs is limited to some actions such as agreeing to medical treatment or giving permission for school outings.

Throughout this Guide, the assumption has been made that your case is one in which a "Section 11 Order" for contact or residence is being asked for. This refers to Section 11 of the Children (Scotland) Act 1995. You should read this as it is very likely to be relevant to your case. See <http://www.legislation.gov.uk/ukpga/1995/36/contents>.

If you are a non-resident father raising an action for PRR or for contact or residence you will be the Pursuer. The other side – usually the mother although in certain circumstances it may be another family member or a local authority that has care of the child – will be the Defender.

Of course, the non-resident father may be the Defender when an action is raised by another party to reduce or stop contact or to remove parental rights and responsibilities. You should read the Guide accordingly.

The Act sets out the terms of rights and responsibilities for parents and also for public authorities that may have taken over the role of parent.



The Act spells out clearly that when a judge is considering an application for contact or residence it is the welfare of the child that is “paramount” (see section on Principles of the Court below). It is important to keep this principle at the forefront of your mind at all times in your application. It should not be a competition between the parents. Judges are increasingly impatient when they perceive that a contact/residence action is being used to continue conflict between the parents at the expense of the children involved. It is essential that the non- resident parent should demonstrate both in the written documents and the way he conducts himself that he is positively focussed on the relationship with the children even when unfounded and personal criticisms are made about him.

The European Convention of Human Rights does contain an article, Article 8 <http://www.hri.org/docs/ECHR50.html#C.Art6> on the right of all individuals, including children, to family life.

## RAISING AN ACTION IN THE SHERIFF COURT

The great majority of child contact cases will be conducted in the local Sheriff Court. There are 6 Sheriffdoms and 49 Sheriff Courts in Scotland though there are court closures in the pipeline.

You must make sure you raise your action in the correct place. For most cases, it will be the Sheriff Court in the town nearest to where the child is “habitually resident.” This usually means the child has lived there for the last 40 days.

Check the Scottish Courts website: <http://www.scotcourts.gov.uk/Sheriff/index.asp> and click on “locate your court.” It will ask you to put in the name of a town, and will tell you the most appropriate Sheriff Court, and the Sheriffdom. You need both of these pieces of information to proceed.

It is possible though unusual to raise a case in the Court of Session. It will be much more expensive there if you are funding the case yourself. Legal Aid is unlikely to sanction raising an action in the Court of Session unless there are unusual circumstances or complex points of law in your case.

There is an excellent downloadable guide to representing yourself in the Court of Session at <http://www.scotcourts.gov.uk/docs/scs---taking-action/raising-and-defending-ordinary-action-in-the-cos100810.pdf?sfvrsn=2>

There are likely to be changes in civil court structures throughout Scotland over the next few years with the establishment of special family courts where possible. They are already in place in Edinburgh and Glasgow and Aberdeen. Some Sheriffdoms are appointing specialist family law Sheriffs. Not all Sheriff Courts are big enough to allow that degree of specialism or even guarantee that you will see the same Sheriff each time your case calls, but it is worth requesting that your case remains with the same Sheriff.

Family law procedures in the Sheriff Courts are governed by the Ordinary Cause Rules (OCR). They can be found at: <http://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/Sheriff-court---civil-procedure-rules/ordinary-cause-rules> You need to read them.

The relevant section is Chapter 33 which relates to Family Law Actions. If you are representing yourself, you should identify and familiarise yourself with this section. Note that there are different versions of the rules applicable depending on what date your case was originally raised in court. This guide is based on the rules applicable after 1 January 2011.

There are frequent references to specific sections of the OCR mentioned in this Guide. These are only designed as signposts. There may be other relevant sections of the OCR, or indeed other legislation which is relevant to your situation.

## **SPEAK TO THE SHERIFF CLERK**

The Sheriff Courts have a Civil Department with trained staff and Sheriff Clerks. They are usually very helpful and can answer many questions about procedure, fees and technical matters. They cannot give legal advice.

## **FEES**

There are court fees to be paid when lodging documents. Information about fees, and Fee Exemption application forms for those on certain benefits can be found at:

<http://www.scotcourts.gov.uk/rules-and-practice/fees/Sheriff-court-fees>

If you are still unsure, the Sheriff Clerk's staff should be able to help. Cheques should be made out to the Scottish Court Service.

## **PROCEDURE**

Sheriff Court procedure can be quite difficult to navigate, especially in a complex family law case. On page 6 (above) there is a flowchart showing the basic procedure in a case involving children. You should refer to this to keep you on the right track but be aware that it is not set in stone - there may be a number of Child Welfare Hearings, motions or other things that will affect the progress of your case.

The final stage in the procedure flowchart is the 'Proof'. A Proof is relatively rare in family law cases. The court usually prefers the parties to sort out as much as possible as early as possible between themselves. It is usually better for the children if they can. However if your case is good and you feel the other parent is being destructive and intransigent as a method of controlling or withholding contact you can press for an early proof. If you do, be careful that it doesn't appear to be you that is being intransigent.

It is apparent that a number of Sheriffs are aware that there may be specific issues that are holding up progress to agreement between the parties and a practice has evolved in calling for an "evidential hearing" on those issues in which witnesses may give evidence under oath but short of a full on proof.

## **TIMESCALES**

You can see from the Flowchart that there are a number of steps to be taken in any case. These steps can take a long time from start to finish, with many frustrating weeks between. You should bear this in mind. Negotiation with your former partner is worth considering at any time in the process as a speedy resolution to the case may be beneficial for everyone involved especially the children.

When a NID (Notice of Intention to Defend) is lodged by the Defender in a case, the court will prepare a timetable and send it to you. Be sure to put each date in your diary. Be aware that dates will change as hearings are continued or additional motions (new information or requests made to court by either party) are enrolled.

It is important not to let your case drift. The passing of time in itself can undermine the relationship you have with your children and deliberate delaying tactics by the other side are not unknown.

There have been cases where Sheriffs have indicated that the length of time taken to reach a resolution in court and the distance that has grown between the children and the pursuer has influenced their final decision to minimise or refuse contact. If you are represented ask for a meeting with your solicitor to agree your strategy to the case and decide when to press on. If you are representing yourself you must make your own judgment on the balance between being seen to be difficult and standing your ground.

## **TERMINOLOGY**

There are certain words used all the time in court proceedings. It is a good idea to be familiar with these terms so that you can follow what is going on more easily. There is an FNF Scotland Jargon Buster in Appendix Two.

In particular, note the pronunciation of Record (Re-CORD) and Decree (DEEcree) which are different from their usual pronunciation in conversational English.

## **PRINCIPLES OF THE COURT**

In order to give yourself the best possible chance of success, it is important to understand what the court will consider when making a decision. The Court must abide by something called the “Welfare Principle” when dealing with cases involving children. In applying the Welfare Principle the court tries to establish what is in the child’s best interests using a “non-interventionist” approach where possible. The court has a duty to ascertain and take account of the child’s views where appropriate, depending on the child’s age, maturity and understanding of their circumstances. The Principle can be broken down into three parts:

### **BEST INTERESTS OF THE CHILD**

The main principle in family law is sometimes summarised as “the welfare of the child is paramount.”

Every step taken by the court should be in the best interests of the child. It can be difficult to separate what you want, what your former partner wants and what is objectively in the best interests of the child.

You have to be honest with yourself. DO NOT think about your interests and what YOU want. That won't work in court. Think always what is best for the child. At the same time remember that it is normal for a child to have a close and supportive relationship with both parents. The adversarial nature of court procedures often makes it feel that the non-resident parent is having to prove his worth as a person never mind as a parent. It can be very frustrating to discover that the things that you considered normal parenting prior to separation may now be challenged and argued as unnecessary or somehow suspect and have to be explicitly justified.

### **THE CHILD’S POINT OF VIEW**

Unless a child is extremely young, the court will be keen to hear the child’s opinion and take it into consideration. The court will look at and consider the views of any children able to express them. In general the views of children over the age of 12 are usually given more weight as they are thought to be old enough to have sufficient understanding. However, the court will consider each child’s level of maturity and understanding when deciding how much weight to place upon their views.

One way they may be expressed is by way of a form F9. Unless the child is too young to be aware of the separation and legal proceedings s/he ought to have the Initial Writ (see below) intimated to him or her, accompanied by a Form F9. This is a form designed for children who are old enough to write down their opinion. When completed it is sealed in a confidential envelope and given only to the Sheriff.

The F9 is rather stark, especially for younger children. The Scottish Child Law Centre [[www.sclc.org.uk](http://www.sclc.org.uk)] has devised a more child friendly "Helping Hands" template that the child can fill in with the help, for example, of a teacher or other neutral adult s/he can trust.

There are other ways a child's view may be taken into account - often by way of a "Bar Report" or "Child Welfare Report". These are intended to be independent reports for the assistance of the court. (See section on Reports below.)

Take a look at the rules relating to taking a child's point of view into account which are at OCR 33.19 and how those views are recorded at OCR 33.20.

## **'NO ORDER' PRINCIPLE**

The court will only make an order where it believes that making an order would be better than making no order at all. This is called the "No order" or "non-interventionist" principle. In practice it means that if the court is satisfied that the current arrangements are in the best interests of the child, and that to make an order varying the current arrangements would not be in the best interests of the child, the court will not make an order.

An Initial Writ should address this in the "condescendence". There should be a sentence or two explaining why it would be better that an order is made than that none is made.

## **PROTECTION OF CHILDREN FROM ABUSE**

The 2006 Family Law (Scotland) Act introduced the need to protect the child from the risk of abuse in granting an order for contact or residence. It refers to the effect such abuse, or the risk of such abuse, might have on the child, or on the ability of a person who has carried out abuse or suffered from abuse to co-operate safely with one another in making arrangements for parenting time with the child.

This amendment was introduced at the same time as Parental Rights and Responsibilities were extended to unmarried fathers. The court has to balance the benefit to the child of maintaining contact with the detriment of exposing the child to conflict between the parents if it can be shown that violence has taken place or there is a justified fear of violence.

If either party already has a conviction for domestic violence this should to be addressed in the initial writ. Allegations of domestic violence may be made in response to the Initial Writ and if unfounded must be explicitly denied or else they will be accepted as fact.

## **DRAFTING DOCUMENTS FOR COURT**

The keys to the success of any court case are the document(s) it is founded upon. It is impossible to stress enough how important it is to get the documents right from the outset. If important elements are left out it is possible but difficult to add them later.

If you are representing yourself a correctly drafted Initial Writ is worth any amount of information you may want to give the court on your feet. Set aside enough time to draft the documents well.

If you have representation make sure you prepare properly for the relevant meeting with your solicitor. S/he may give you a pro forma template to fill out in advance but you should make your own list of important facts and insights into your relationship with your child or children. Make sure

you check your solicitor's draft carefully for errors or omissions. It happens. You are the expert on your own situation.

The documents should be in the proper format and sent to the other side and to the court within the prescribed time limits. You must give **fair notice** to the other side.

If you send the documents late, or turn up with them on the day, there is a strong chance they may not be accepted by the court no matter how important they are to your case.

## **SERVING COURT PAPERS**

As well as lodging your Initial Writ with the court you must 'serve' it on the other side so that there can be no dispute about whether it has been received. The recognised system for serving court papers is by using the services of a Sheriff Officer. There is a substantial fee for this. The Sheriff Clerk will be able to give you a list of local Sheriff officers.

Your initial writ can include a crave that the writ is not served on the children, stating in the averments why this is not appropriate (because of their age or other reasons). You may also have to serve your writ on other people connected with the case, such as the former partner of the other parent.

## **ADJUSTING AND AMENDING**

The process of adjusting and amending (below) is increasingly carried out by e mail between solicitors. It is quicker, cheaper and accepted by the courts. It would be sensible to ask the solicitor for the other side if s/he will accept similar e mail exchange with you as party litigant.

If they agree – and it would be unusual to refuse – remember this is for formal exchange of documents. Take care not 'think out loud' in an email or respond to what you think are untrue, unfounded or unhelpful contents in what they send you. Keep your arguments about the other side's evidence - and your own evidence rebutting it - for the court.

## **GET ORGANISED**

The key to minimising stress and to running your case efficiently is good organisation.

From the very start you will have a timetable with dates when the case is calling in court. Use this to keep a diary of when various items need to be lodged with the court and the other party in advance of hearing dates. You will need to keep this timetable constantly updated to take account of court dates being set, as well as changes, continuations and other factors. By keeping on top of the dates, you will be less likely to lodge things late and will minimise delay.

You will need a folder or ring binder to keep all of your documents together. Make divisions in it to keep everything separate but easy to find when you are on your feet.

You should think about having two folders: one for the court papers (the "Pleadings" and the "Productions" lodged by you and by the other side). Keep only the most up to date court papers in this file.

The other should be a correspondence file and should hold everything else: letters, emails, rough drafts, notes of telephone calls, print outs, photocopies from textbooks etc. Keep everything in chronological order to make it easier to find.

## **PRODUCTIONS**

Productions are items of paper-based evidence that are lodged with the court. In contact cases they are usually Birth Certificates, affidavits, letters, bank statements etc. They should be there to back up everything you have written in your “averments” (the statements of fact you are relying upon in your written pleadings).

Productions must be listed in an inventory (see sample “Inventory of Productions for the Pursuer” in Appendix One). The Ordinary Cause Rules (OCR 9a) state that the inventory should be sent to the other side no later than 14 days after the date of the interlocutor setting a date for the proof.

In practice, you may have to assemble more than one inventory at different stages of the case. For example you may wish to have productions lodged before a Child Welfare Hearing. It may be that there will never be a proof so make sure anything you think is relevant is lodged for the Child Welfare Hearing. You don't have to use everything in your inventory but may be refused permission to refer in court to anything that isn't in the inventory.

You should send your Inventory of Productions to the other side as soon as possible, and lodge a separate copy with the court for the Sheriff.

A useful production might be a chronology of events, particularly if there is a long and complex history of the case or the relationship.

You must provide a copy Birth Certificate for any child about whom you are seeking a s11 order. These should be lodged with the Initial Writ as productions. You can get copies of birth certificates from your local Registrar's office for a fee. There should be averments referring to the Birth Certificate (see below and style Initial Writ in Appendix One).

It is important that your averments refer to the productions you wish to rely upon. There is particular wording you can use rather than repeat word-for-word what the productions says.

**The wording is:**

*“X Production is produced herewith and referred to for its terms which are held as repeated herein for the sake of brevity”*

You can use this same wording for any documentary evidence you are relying upon in your averments. Example:

*“A copy of the Defender's Bank of Scotland statements dated 4<sup>th</sup> December 2008 to 14<sup>th</sup> May 2009 relating to Current Account Number 001234567 are produced herewith and referred to for their terms which are held as repeated herein for the sake of brevity”*

**THE RECORD**

All court cases rely on the documents that are drafted beforehand. When the case is ready for court the document relied upon is called the Record (pronounced re-CORD).

The Record is made up of the Initial Writ; the answers to the writ by the other side (also called defences); and your responses to their defences.

The Initial Writ (see below) is the founding document of the case. It is drafted by the Pursuer in the case, the person who is asking for something to happen. The answers are drafted by the other side.

**ADJUSTING AND AMENDING**

The Record is sent back and forth between the parties and adjusted until both sides feel they have stated all of the facts they plan to rely on at the proof or evidential child welfare hearing, and have

answered the points raised by the other side. This is what is called the adjustment period. The document that is sent back and forth is called the “Open Record”. The document is sent directly between the parties, not to the court. Read OCR 9.8 for the rules about adjustments.

The Record cannot be adjusted later than 14 days before the “Options Hearing”. After that, the adjustment period is finished and no more changes can be made. It is now the “closed record”.

In exceptional circumstances if some significant new evidence has just become available, not just because you missed the deadline, you can ask the court for permission to “amend” the Record. The other side may oppose your request. If the Sheriff does not think you have a good reason, s/he may refuse.

## THE INITIAL WRIT

It is very important that the Initial Writ is drafted very carefully and precisely so that all of the appropriate facts have been put to the other side from the start. This makes the adjustment period easier. Take a look at the style Initial Writ (Appendix One). We will go through each part of it and discuss what it is for and how to draft it.

The Initial Writ is Form G1. This is the format that must be used. It must be on A4 sized paper. The specimen at Appendix One shows what an Initial Writ looks like.

### HEADING

Remember to check which court the case should be heard in, and which Sheriffdom the court is part of. If the case is not in the right court, the other side can challenge the jurisdiction of the case and the Sheriff may decide that it should be raised in a different court. If this happens you will have to pay the costs.

### DESCRIPTION

This is so the court knows what the document is. Here you put “Initial Writ”

### INSTANCE

This is the name for the part that explains who the parties are. You write “in the cause” and then the full name and address of the person bringing the action (you!), and then the word “against” then the full name of your former partner, or whoever you are bringing the case against.

Do not write “versus” or “v” you should only write “against.” If they have a married name and a maiden name, write both, (example: Mary Ann Cairns or Black) as they could be known under both names.

You might not know the address of a person. Look at [OCR 33.4](#). If you do not know the address of a party to the action, you should explain in the condescendence the steps you have taken to try to find out the address of that person.

Once the instance is drafted it will stay the same for the rest of the case unless one party asks the court for permission to amend it, for example if the address changes or there is a mistake in it. If you draft a Minute or any other court documents, be sure to use the same instance that has been used in the Initial Writ.



## **CRAVES**

The next part of the Initial Writ is the “Craves.” A Crave is what you are asking the court for, so it is likely a Crave would be for “residence” or “contact.” You can have alternative Craves so that if the court doesn’t grant one Crave, they might grant the alternative. See the specimen Initial Writ template.

You need to be able to support ALL Craves with the rest of the Initial Writ and the evidence you lead.

Party Litigant pursuers are often taken by surprise when the judge's first words to them are “What do you want?” The answer is what you have set out clearly and concisely in the Craves.

The Crave should be short and very precise, and should be capable of forming part of the “interlocutor” (the written decision of the judge). It should be legally competent and enforceable - it must be something that the court has the power and ability to grant.

Make sure you ask for only what you can guarantee to sustain. Don't be the one who breaks arrangements. Keep in mind what suits your children. If you have more than one child think whether you always want to see them all at the same time or whether you can see them sometimes together and sometimes individually. Try to be generous and flexible as well when it comes to birthdays and religious holidays – offer to alternate and think ahead to possible clashes between a regular contact arrangement and holidays etc.

And think about what is appropriate for the children. What suits a three year old will be different from a ten year old or a teenager. Think about their other commitments – clubs, sports, sleepovers - and work out how to accommodate them in the plans that looked fine on paper!

## **KEEPING THE CHILDREN INFORMED.**

In the Craves you need to ask for a “Warrant to Intimate” on the various people involved in the case, usually your former partner but also including the children.

This means you have the court’s authority to serve them with the Initial Writ. Look at [OCR section 33.7](#). You will see that OCR 33.7(h) provides that children about whom the s11 order is being made should have a Crave asking for intimation..

The rules allow the applicant to include a Crave to “dispense with intimation” on children who are too young to understand the intimation. Remember – all Craves should be supported by the averments in the condescence, including 33.7(7) Craves.

## **CONDESCENCE**

This is the part of the Initial Writ where you narrate the FACTS you wish to rely upon. These are called averments.

You shouldn’t stray into narrating the law or the evidence you think will prove your facts.

The relevant law comes in your “Pleas in Law” later in the Writ.

The evidence is what is said by witnesses (including you) at Proof or evidential hearing. It can be very difficult to distinguish the facts, law and evidence, but you should try.

When drafting the facts, use only one fact per sentence. Use simple straightforward language so that the Sheriff or judge will see what you are saying immediately. The Sheriff will not be impressed



by long, complicated and unnecessary words and, similarly, will be unimpressed by emotive language. Steer clear of adjectives.

Think carefully about the words you use as you could be asked to provide evidence of any facts you write. If you cannot provide evidence when asked it may make your case appear less credible.

## **PARAGRAPHS OF THE CONDESCENDENCE**

The Condescendence should be laid out in numbered paragraphs, each paragraph narrating different facts.

**Paragraph 1:** This should be the background of the case, and should confirm the addresses of the parties, details of the relationship, details of the children including dates of birth, details of the separation, and reference to birth certificates being lodged as evidence. This information is likely to be non-contentious.

You should provide the court with the information it needs to be sure that it has jurisdiction over the case. Narrate why that court is appropriate – usually because the child is habitually resident in that area.

Look at [OCR 33.3](#). It states that an application for a s11 order needs to include certain averments within the condescendence; notably that there are no other proceedings elsewhere that the person making the application knows about.

When the case involves a child, you must lodge an extract Birth Certificate as a production (see above “Productions”). You must narrate the fact that you are referring to that particular birth certificate. The wording should be:

“An extract Birth Certificate is produced herewith and referred to for its terms which are held as repeated herein for the sake of brevity.”

**Paragraph 2:** If the child is too young to understand the action, and you are asking the court for permission to “dispense with intimation” (permission not to serve court papers on the child) you should narrate this here. See the specimen Initial Writ.

**Paragraphs 3,4...:** Set out the facts of your case, beginning with the breakdown of the relationship and what happened after that. Explain the facts surrounding the children and the current situation. Describe the factual basis for the Craves you have asked for.

Use each paragraph to make a different point, and to explain a different set of facts. Even if facts are related, if they are complex you might want to split them up to make it easier to follow. You can use headings if it makes it easier to organise the information.

## **PLEAS IN LAW**

Look at your Craves. Each Crave must have a Plea in Law that supports it. This shows the court that for each thing that you are asking for, there is a relevant bit of law to support it. Look to the Children (Scotland) Act 1995 which sets out the principle that the welfare of the child is paramount.

## **GOLDEN RULES**

Follow the correct structure and layout

Get the names, addresses and jurisdiction correct

Try not to mix up fact, evidence and law

One fact per sentence

Keep your language simple and straightforward

Make sure each Crave is supported by a plea-in-law

Review your Craves and pleas-in-law – do you have facts to support them? Can you support all of those facts with evidence?

You will not be able to lead evidence in court unless there is a factual basis already stated in the Condescence.

For example, if you want to talk during the case about three instances of domestic violence you MUST narrate the FACTS of each incident.

EXAMPLE:

On the evening of 23<sup>rd</sup> March 2009, the pursuer and defender were together at home. They disagreed over Jamie's school work. The disagreement escalated until both parties raised their voices. The defender struck the pursuer. The pursuer did not retaliate. He packed an overnight bag. He did not speak to the defender during this time. He left the house at approximately 7.30 pm. He went to his parent's house in Kilmarnock and stayed there overnight. He returned to the house at 5.30pm on 24<sup>th</sup> March 2009 after finishing work for the day.

This incident can then be explored in court and evidence led about what happened. You cannot bring up other instances of domestic violence unless you have narrated the facts in the averments.

If there were many instances you can say that there were many instances. But to talk about specific instances you should narrate the facts of each instance.

You cannot introduce new facts or evidence when the case is at proof.

## PREPARING FOR COURT

A party litigant will not be expected to know all of the rules of the court, or follow the same protocols as a solicitor. The Sheriff will grant you some leeway and will take into account that you are not a trained or experienced court practitioner. However, it is a very good idea to be well-prepared and reasonably familiar with the court procedures. That way you are giving yourself the best chance to put your case across clearly and efficiently. There is less chance of delay and frustration. Sheriffs are human beings too and the more you can demonstrate that you are assisting the court by being prepared, organised and as focused as possible the more you will make a favourable impression. Thinking out loud and rambling through minute detail of incidents that are not relevant to the best interests of your children will not make a favourable impression.

### LAY ASSISTANTS

Lay Assistants are very recent arrivals on the Scottish legal scene. They are the equivalent of McKenzie Friends in England.

There are strict limits to what a Lay Assistant can and cannot do. The rules are here:

<http://www.legislation.gov.uk/ssi/2010/416/made>

They state that with the permission of the Sheriff, a named individual may accompany a party into the court and assist them in the following ways:

- Provide moral support
- Manage court documents and other papers
- Take notes
- Quietly advise on points of law and issues the litigant may wish to raise with the Sheriff or witnesses

The Lay Assistant is not there to speak for you in court. It is very important that Lay Assistants should not receive any money for the service they provide. It is a voluntary support role only.

If you are going to take a Lay Assistant along to a Sheriff Court, you can write to advise the court and the other side in advance. It is up to the other side to object and they will have to have good reasons for doing so. Your Lay Assistant can sign and provide a note as well to reassure the court that they are familiar of the rules they are working within. There is no fee for applying for the help of a Lay Assistant in the Sheriff Courts though there is a fee and an application form for Lay Assistants in the Court of Session.

## **LAY REPRESENTATIVES**

Lay representatives are an even more recent innovation than Lay Assistants, officially accepted in December 2012 for the Court of Session and April 2013 in the Sheriff Courts. Both courts are still getting used to them.

A Lay Representative is permitted “where it will assist the court” to speak on behalf of the Party Litigant who must be present. The Lay Representative can make oral submissions - speak directly to the judge – in terms of the evidence and the points of law raised by the evidence. Some judges are comfortable in asking the Lay Representative to clarify points of evidence as they arise. They are aware that court time is an expensive resource and Lay Representatives can help keep up the momentum of the proceedings.

The Lay Representative is not allowed to examine or cross examine witnesses. The Party Litigant must do that him/herself.

The Court of Session rules for Lay Representatives are at <http://www.legislation.gov.uk/ssi/2012/189/article/2/made>. The Court has interpreted the rule so far that a new application must be made for each court appearance.

The Sheriff Court rules for Lay Representatives are set out in Act of Sederunt (Sheriff Court Rules) (Lay Representation) 2013, the rules are SSI 2013/91. It appears that permission to Act as Lay Representative can be given at the outset and will cover all connected hearings.

The Lay Representative is permitted to view all relevant papers but agrees to be bound by confidentiality about the proceedings. See appendix 4 for the Sheriff Court form.

Both Lay Assistants and Lay Representatives are often referred to as “McKenzie Friends”. In England and Wales McKenzie Friends are well established in the courts and some of them charge for their services. This has not developed in Scotland so far.

The main advantage of having a Lay Assistant or Lay Representative is to provide you with support and help with note taking and handling court papers. It may also assist you if you are not a

confident speaker, or find it hard to detach from your emotions in a case. Appearing without a lawyer may cost less money, but it does put you at a significant disadvantage,

## **HOW SHOULD I PREPARE MYSELF?**

### **IN THE WEEKS BEFORE:**

Find out where the court is

Plan how you will get there – parking or public transport?

Visit the court so that you know where everything is located

Try to sit in on a few cases so that you can see how people conduct themselves – ask at the front desk to sit in on court hearings, although you won't be able to attend Child Welfare hearings as they are closed to the public..

Check your timetable again – have you sent all of the necessary documents in on time?

### **THE DAY BEFORE:**

Look out what you will wear – you should dress as though you are going to an interview

Make sure your papers are well-ordered

Try to get a good night's sleep

### **ON THE DAY:**

Get there early. Most court business is scheduled for 10am (Ordinary Court) or 2pm (Child Welfare Hearings). Check the time of your case and turn up half an hour early. You may need to go through a security check and this can take a while.

Find your court. The front desk can usually help with this. In larger courts they will direct you to an usher with a list called "The Rolls." S/he will tell you which courtroom you will be in. The Rolls can be checked online beforehand for cases that will call but courtrooms are only allocated on the morning.

Find the solicitor on the other side, introduce yourself and your Lay Assistant or Lay Representative if you have one. Don't worry if the opposing solicitor doesn't show up until 10-15 minutes before the start of the hearing. They may wish to discuss things with you to try to reach an agreement before the case calls. Just because you are in attendance at court it does not mean you must continue with the case. You might be able to sort things out just beforehand. Listen carefully to what the solicitor on the other side has to say and take time to consider whether that might be the best course of action. Don't be bounced but do consider whether a "Minute of Agreement" could be a better option. Negotiations regularly take place right outside the court room or even during proceedings if the Sheriff feels the parties are getting closer so prepare your thoughts in advance about what you will accept or you will offer by way of compromise. Don't find yourself thinking on your feet.

If the court is open, go in and tell the Sheriff Clerk (sitting at the desk in front of the Bench) that you are here. Take a seat and wait for court to begin. Make sure to turn your mobile phone off!

## **IN COURT:**

When the Sheriff comes in, the Bar Officer (Security Guard) will shout “Court Rise” or “Court” and everyone stands up for the Sheriff to come in. The Sheriff should be the first to be seated. This is repeated when the Sheriff leaves the court as well.

Cases are called in the order they are on the Rolls. In ordinary court, there may be a lot of business to get through and you may be waiting for a long time for your case to call. You should be quiet and still during this time. If you eat, drink, use a mobile phone, talk or anything else that is seen as disrespectful you may be asked to leave.

## **WHEN YOUR CASE CALLS:**

When your case is called by the Sheriff Clerk, stand up and approach the Bench. If you are the pursuer, stand on your right (the Sheriff’s left). If you are the defender/respondent stand on the left (the Sheriff’s right). Smile and say Good Morning/Afternoon to the Sheriff and introduce yourself. Speak clearly.

Listen carefully to what the Sheriff and the other side say. Ask for something to be repeated or explained if you need it. Try not to fuss around with bits of paper. If your papers are well ordered and neat it will make it easier to find what you are looking for.

Speak slowly and clearly. The Sheriff will be taking notes as you speak so watch what s/he is writing. Pause after each sentence. When the Sheriff stops writing you can start speaking again.

Try not to be nervous or allow yourself to be provoked by the things the other side says. You will get your turn to respond. Try not to use overly emotive language. You want to come across as rational, sensible, calm, and most importantly you want to convey that the welfare of the child is the most important issue in your mind. You should be polite at all times.

Remember that your conversation in court is with the Sheriff. That will help you defuse possible provocations from the other side. Don’t talk directly to your former partner/solicitor.

When the Sheriff has finished dealing with your case you should say, “Thank you My Lord/Lady” to the Sheriff for hearing your case, even if it hasn’t gone your way.

## **ADDRESSING OTHERS IN COURT**

You can refer to your former partner either formally as Ms, Mrs or Miss or by her first name if it is easier.

Children should be called by their first names when talking about them in court.

Learn the name of the solicitor on the other side and always refer to him/her formally as Mr, Ms etc. They will refer to you as either Mr or as The Pursuer/Defender/Petitioner/Respondent depending upon your position.

Remember it might be a different solicitor appearing in court than the one you have been in correspondence with.

Male Sheriff: My Lord or Your Lordship

Female Sheriff: My Lady or Your Ladyship

You should try to not address the Sheriff as “you.” So instead of saying “As you will see...” you should try to say “As Your Lordship will see...”

Addressing the Sheriff like this shows you are respectful of his/her authority. If you get it wrong don't worry but if the Sheriff corrects you, try not to make the same mistake again. If you are representing yourself resist the temptation to try and sound like a lawyer. You aren't. However be courteous and clear. The two can go together when you stand up and speak.

For example, when you begin use a phrase like:

*"I would like to begin by addressing the matter/issue of..."*

Asking the Sheriff to do something:

*"I would be obliged/grateful if Your Lordship would..."*

If the Sheriff does something for you:

*"I am grateful/obliged to Your Lordship for..."*

If the Sheriff disagrees with you on something don't badger them on it. Write down what it is and why, and move on.

Remember you do not need to use long words or fancy expressions. The Sheriff will be more impressed by a well thought out, and well organised discussion in simple English.

If you don't understand what has been said, try asking the Sheriff for some help, saying something like *"I would be grateful to the court for some assistance with ..."* – then say what it is you are asking. The Sheriff won't tell you how to conduct your case, but should be willing to help with terminology or procedural issues.

## CHILD WELFARE HEARINGS

A Child Welfare Hearing is a discussion in court based on the representations of the parties. It should be held early in the proceedings with the intention of trying to sort things out between the parties by agreement while ensuring the best interests of the child are looked after. The Ordinary Cause Rules governing Child Welfare Hearings are copied at Appendix Three.

A Child Welfare Hearing is not an evidential hearing like a Proof – no witnesses are led and evidence is not tested before the court. It is a chance for the Sheriff to hear from both parties with a view to gathering enough information to consider the best way forward to resolve the case. It is not meant to be a confrontational hearing though you may feel unkind and inaccurate things are said about you and your relationship with your children. Make clear to the Sheriff the assertions you don't agree with but don't get angry or get bogged down in detail. How you conduct yourself in court will influence how your application is viewed.

If a Notice of Intention to Defend is lodged, the Sheriff Clerk will fix the date for the Child Welfare Hearing and let you know. You are still entitled to enroll motions or make other applications to the court while waiting for the Child Welfare Hearing. You will also be in the adjustment period and pleadings will be being amended before the date of the Hearing.

## **GOLDEN RULE**

The Child Welfare Hearing is not about YOU and what YOU want; it is about the best interests of the children. If you want contact, why is that in their best interests? Think about everything from their point of view, not your own.

YOU might want contact all weekend because it suits you. Is that the best thing for the child? If you have more than one child think about the kind of contact that is appropriate to their age. Though you may feel you want to have them all together each time might it be better for them to spend time with you as a family sometimes but on their own with you at other times?

Show that you have thought about your proposals too from your former partner's point of view. Don't make assumptions about what "is good for her". That won't go down well. But it will help your credibility if you can show how much effort you have made to look at your proposals through the eyes of all those affected by them.

## **PREPARING FOR A CHILD WELFARE HEARING**

You might want to consider preparing affidavits as evidence. Witnesses will not be heard at a Child Welfare Hearing so the only way to introduce witness evidence is by affidavit. Affidavits can be useful in support of your case. They can also be helpful in persuading the court that certain issues require further investigation or evidence will need to be heard at proof.

You may also wish to lodge productions as you would for a Proof. There may be no witnesses at a Child Welfare Hearing, but the Sheriff will read the pleadings and look at the productions. Be sure to intimate everything to the other side in advance. See the draft covering letter to include with the productions.

## **AT THE COURT**

Child Welfare Hearings are almost always held at 2pm. They are held in a closed court, meaning it is only for the Sheriff, the parties and their solicitor/representatives including lay assistants. No spectators, friends or family are allowed into court. It is very important that you attend in person. Some Sheriff Courts have the practice of leaving the parents outside the courtroom and only including the lawyers in the Child Welfare Hearing, although this seems to cut across the normal procedure.

Sometimes parties are able to sort things out in advance of the Child Welfare Hearing. In that case you should let the Sheriff Clerk know to avoid unnecessary delay at court. The solicitor on the other side will be involved with this as well.

Once inside the court building, find the specific court the hearing is taking place in. Wait outside that court until your name has been called as each case is heard privately. Your ex-partner will also be waiting in that area. Be polite.

## **APPEARING AT THE HEARING**

Appearing at the Child Welfare Hearing is similar to appearing in court for any other reason – see the previous section on appearing in court for hints and tips. It is not as formal as other court hearings but the same rules of court etiquette apply. The pursuer generally speaks first. If you have a solicitor, s/he will introduce you. You will be given a chance to speak and this is your opportunity



to speak directly to the Sheriff. If you are representing yourself as a party litigant you will simply address the Sheriff yourself. You should introduce your Lay Assistant if you have one.

- When you are not speaking, remain seated
- Stand up when addressing the Sheriff
- Remain calm and polite during the hearing
- Do not tut, roll your eyes etc even if you are annoyed

Be prepared for the Sheriff to interrupt you and ask questions for clarification. You should still be well prepared but it will be more conversational than other court hearings. In some cases the hearing will be very short so don't be surprised if it's over quickly but if the Sheriff asks if you have understood everything accept the invitation and ask if you are unclear about anything at all. It is harder to argue later that you didn't understand if you were given the chance to ask at the time.

## **OUTCOMES**

“Orders” are instructions made by the court to the parties about the issues in dispute. Orders can take the form of “interim orders” (temporary) and “final orders” (permanent).

Final orders are usually only made after a Proof or following a “Joint Minute”. If you find that the arrangements set out in an interim order work well or you have agreed a set of arrangements with your former partner both parties could draw up a Joint Minute. This would allow a final order to be granted to replace the interim order. Final orders are also called “decree” (pronounced DEE-cree)

At the Child Welfare Hearing, the Sheriff might make an order for contact or residence. It is likely to be an interim order. The case could be sisted (put into suspended animation) while the interim order is in place to allow the parties time to see if it works. In many cases, an interim order is as effective as a final order. Final orders are rare at Child Welfare Hearings.

A Sheriff's decision will be set out in an “interlocutor”. There may be many interlocutors throughout a case. The Sheriff will usually write out the terms of the interlocutor in front of the parties. It is extremely important that you are clear what s/he is writing down and that it is accurate if, for example, it is setting out dates and times for contact. It is difficult to correct an interlocutor later if you discover it is incorrect in some way.

If you disagree with the Sheriff's decision you can ask for a written Note of his/her reasons for making it. You should submit a request for the Note in writing as soon as possible, ideally within 7 days. The Sheriff is obliged to supply it within a reasonable time. All decisions are appealable if you have grounds in law. Careful reading of the Note is essential before you make your decision. OCR 12.3 (3)

The Sheriff might decide not to make an order. The Child Welfare Hearing may be continued to another date to allow something to happen in the meantime, for example, negotiations between the parties, the preparation of a report, or for the parties to take part in mediation.

If you are not happy with the outcome of the Child Welfare Hearing, you may wish to enroll a motion asking for another Child Welfare Hearing or a Proof to be fixed. This might be opposed by the other side. See the section on Motions for information on this.



### REPORTS

Sometimes one party to the case or the Sheriff will ask for a “bar report” into the circumstances of the children and the arrangements for their care and upbringing. The bar reporter is usually an experienced family lawyer, but can also be a social worker and his/her report will be very persuasive to the Sheriff. This will be called a “child welfare report” in future.

The reporter covers some of the activities of CAFCASS in England and Wales. CAFCASS does not exist in Scotland.

The reporter will investigate the circumstances of the children. That may involve seeing where the children live, finding out about their daily life and speaking with people who may be closely involved in the children’s life such as the parents, extended family, step family, teacher, child-minder, religious leader, doctor or social worker.

Reports can be very expensive. If one party has asked for a report s/he may be required to pay for it. Often the cost is split equally between the parties. Where a Sheriff orders a report, the case cannot proceed until the report has been written and submitted to the court. When it has been submitted to court the Sheriff Clerk will send a copy to both parties.

The reporters are drawn from a list held by each Sheriff Court. A good reporter will take the time to explain his/her powers, instructions from the court and his/her rules of engagement with all the parties to build confidence that each is getting a fair hearing.

The non-resident parent, especially the father, tends to feel at something of a disadvantage in this process as he is often asked personal questions that a mother with residence isn't. It can be very stressful. It is important to try and keep in mind all the time that the Reporter will make recommendations to the court on what s/he thinks will be best for the child so focus on that rather than past disagreements with your former partner. Remember everything you say may turn up in the report.

Unfortunately you are not entitled to see a draft before it is submitted to court so if you think it is unfair or inaccurate you are only able to challenge its contents in court and that can come over as defensive or aggressive. You have to be very disciplined to challenge inaccuracies calmly so as not to undermine your own case. The system is adversarial but parents seeking a contact order shouldn't be. The conclusion and recommendations are the most important part of the report. If you are reasonably satisfied with them then it may not be useful to challenge every point in the report that you disagree with. You must use your judgment.

We hear regularly of reports being presented to the parties on the day before or even on the day of the hearing at which they will be considered. This is bad practice, and such late submissions could give you the reason to ask for the hearing to be adjourned so that you have time to consider the findings. Think carefully before doing this, as it will delay the case further but let the Sheriff know what has happened so he/she can ask the bar reporter for an explanation.

There are concerns that the system of appointing, training and performance appraisal of reporters is not transparent. They are not required to provide any sort of transcript of the interviews on which they base their recommendations that could assist proper examination in court.

Changes to this system are currently under consideration. Families Need Fathers Scotland is involved in these discussions. Take a look at OCR 33.21 about the appointment of a Reporter and see our separate guide to Bar Reports at [www.fnfscotland.org.uk](http://www.fnfscotland.org.uk).

## **OPTIONS HEARINGS**

An Options Hearing is a hearing for the court to decide the next (sometimes final) stage of the proceedings. OCR 9.11 and 9.12 provide the procedural rules you should know. At the end of the adjustment period (14 days before the Options Hearing) the Pursuer should use the adjusted Initial Writ and Defences to form the Record. A Certified Copy of the Record must be lodged by the Pursuer no later than 2 days before the Options Hearing.

At the Options Hearing, the Sheriff is seeking to “secure the expeditious progress” of the case. If necessary, a continuation of the Options Hearing may be agreed but only for a maximum of 28 days.

The Sheriff will consider any note lodged under Rule 22 procedure. This is called a “preliminary plea.” You should read OCR 22 if this applies to your case.

The Sheriff will “close” the Record, meaning the adjustments are all concluded. That is the Record that the case will proceed on. The Sheriff will usually appoint the case to Proof at the Options Hearing.

There are other options available. If there is a disputed point of law, the Sheriff may appoint the case to a hearing called a Debate. If there is a disputed point of fact, the Sheriff may appoint the case to a Proof Before Answer. Both are unusual in family cases. If your case is going to an Options Hearing, read Chapters 9 and 10 of the OCR so you are prepared for the various possibilities.

## **MOTIONS**

A motion is a way of asking the court for something, usually a procedural matter. An example is where a case has been sisted (suspended) and one of the parties is asking for the case to be unsisted so that the case can be reactivated. Another common example is asking the court to allow amendments to pleadings. Motions can't be used to ask for final orders but could be used to ask for an interim order. They can be enrolled at any point in the case.

Have a look at the Ordinary Cause Rules Form G6 which is the form of motion. A motion MUST be intimated to the other side. The form of intimation is Form G7. If the motion is unopposed, it may be granted by the Sheriff without Parties having to make arguments. If the other side opposes the motion (form G9) the motion will call in court and both parties will have to appear before the Sheriff to make their arguments.

Be careful when considering enrolling a motion that is likely to be opposed. You may end up liable for the expenses of that motion if you lose, including the costs to the other side of opposing the motion.

## **JOINT MINUTE**

A Joint Minute is an agreement between the parties, and it is put before the court to be given effect. Joint Minutes can be a useful way of getting a final order in place when parties are in agreement. It may be useful where there has been an interim agreement that is working well for both parties. The court will still want to know that the terms of the Joint Minute are in the best interests of the child.

The rule relating to Joint Minutes is OCR 33.26.

## **DRAFTING ADJUSTMENTS**

Adjustment of the pleadings is allowed up to 14 days before the Options Hearing (or continuation). Adjustments do not need to be sent to the court, they are exchanged between the parties.

Adjustment is really designed for the condescendence and answers.

If you require to adjust the Instance or the Craves you should enroll a motion to allow a Minute of Amendment in order to make the changes.

You must answer every statement of fact made by the other party. If you do not answer it you are deemed to have admitted it. The best way to ensure you do not erroneously admit something is to include a catch-all denial along the lines of:

“The pursuer’s [defender’s] averments [in answer] are denied [except insofar as coinciding herewith.]”

You should try to be very clear about the instructions for amendment which shows exactly where the adjustments are to go. The idea is that when the Pursuer comes to make up the Open Record s/he follows the instructions of the Note of Adjustments. See the sample Notes of Adjustments in Appendix One.

## **CASE MANAGEMENT HEARING**

Before a proof hearing, a case management hearing will take place in order to consider the issues. Before that hearing parties will have to meet to discuss possible settlement, agree matters not in dispute and discuss what should be presented to the Sheriff at the case management hearing. At this hearing the Sheriff will also consider matters such as the scope for joint agreement of facts, instruction of a single expert witness and the number and availability of witnesses.

This procedure is intended to help streamline the proof hearing, as well as exploring any possible resolution beforehand. It was introduced for cases begun on or after 3rd June 2013, and is covered in new rule 33AA: Expeditious resolution of certain cases.

This is a welcome change, but FNF Scotland suggests that the adversarial nature of proof hearings is not the best way to resolve family matters. We suggest that evidential hearings should be conducted by Sheriffs who are experienced in family cases and who have experience in dispute resolution,

## **PROOF**

A Proof is a hearing of the evidence. As previously explained, Proofs are relatively rare in Family Law cases because Sheriffs are very keen for parties to come to an agreement between themselves. A Proof date will be assigned to you at an Options Hearing, and it is likely that it will be a number of months away. You are expected to try to sort things out in the meantime so that the Proof is not necessary.

Many courts do not have the capacity to lay aside a block of consecutive days for a proof, and some will only offer one day of hearing at the start of a proof with further days to be arranged.. This means that the hearings can spread across weeks or months.

The evidence led at Proof is based on what is written in the Pleadings and with the exception of particular matters that may be agreed with the other side will have to be spoken to by witnesses under oath or supported by productions. The evidence is led by the Pursuer and Defender.

After all the witnesses have been heard the parties will have to pull the threads of their case together, taking into account the evidence that has been heard, in “final submissions”. The Sheriff will take some time to prepare a verdict.

## **BEFORE THE PROOF**

You must lodge the following:

- 1) Productions
- 2) Witness list

The Inventory of Productions should be lodged within 14 days of the interlocutor allowing Proof. A witness list should be lodged within 28 days of the interlocutor allowing Proof. Make sure to check your court timetable for lodging dates. Check with the Sheriff Clerk if you are unsure.

Make sure anyone that you need to give evidence to assist you is on your witness list. You don't have to call everyone on your list but by the same token don't get wrong-footed because someone you believe will give evidence that is likely to support you appears on the defender's witness list. They don't have to call everyone either.

When deciding whether to call a witness, consider what they can tell the court from their direct experience. A witness who has been present when you have been looking after your children or who has seen what happens when the children are handed over for contact can give useful evidence, whereas someone who can only repeat what you have told them about an incident cannot provide much useful evidence. Don't call more witnesses than you need. Several people saying the same thing doesn't help much, and you might be better picking the person who will appear to be the most credible.

The Pursuer is responsible for instructing a shorthand writer to take notes during the Proof. This is expensive but essential if there is a later appeal

## **AT THE PROOF**

### **EVIDENCE-IN-CHIEF**

The Pursuer goes first. All of the Pursuer's witnesses are called and led through their evidence. Their evidence will be taken under oath or affirmation. The evidence must be led by way of open, non-leading questions. That is, the questions should not contain any part of the answer. If they do it is likely the other side will object on the grounds that you are leading the witness. See the examples below for more explanation of open and closed questions.

### **CROSS-EXAMINATION**

When the Pursuer has finished with each witness the Defender has a turn to ask questions that will test their evidence. The questions in cross-examination do not need to be open. They can be closed, or leading questions which suggest the answer within them. See the examples below.

If you are a party litigant you may have to cross-examine your former partner. That is not easy. You must stick to the disciplines of cross-examination and avoid at all costs getting drawn into an argument in front of the Sheriff. Be calm and polite at all times.

## **RE-EXAMINATION**

The Pursuer may re-examine the witness on anything that has come up during cross-examination. You can't bring up new evidence at this time. The purpose of re-examination is to clear up anything that may be unclear after the cross-examination.

## **DEFENCE**

It is then the Defender's turn to lead evidence, following the same pattern of Evidence-in-chief, Cross-examination and Re-examination.

## **OTHER PARTIES**

If a curator has been appointed for the children, or a child has instructed his or her own lawyer, the cross-examination and re-examination will also be carried out by these parties. This adds considerably to the time taken for the hearing.

## **SUBMISSIONS**

When all of the evidence has been led both parties make final "submissions" to the court. This is a speech which sums up all the evidence which has been put to the court during the case, and the legal basis for what you are asking for. At this point you are inviting the Sheriff to prefer your evidence. If you are the pursuer you will be expected to make your submissions immediately after the defender finishes its case. Don't be caught by surprise when you are asked to get straight onto your feet and begin speaking. You should have most of your submission prepared in advance but you will have to take into account anything that has come up in the defender's case.

Your submission has to relate to evidence that you have already produced or to previous case decisions that are relevant. Don't assume that a statement that you are making in the final submission can stand on its own. Some standard case decisions, such as *White v White* are often referred to in contact cases. You can get some insight into how submissions are prepared by reading published judgments from court cases, available on the Scotcourts web site at <http://www.scotcourts.gov.uk/search-judgments/about-judgments> Cases with initials rather than full names are often about contact and residence of children.

## **OPEN AND CLOSED QUESTIONS**

Open questions are those used for the evidence-in-chief. They tend to begin Who, What, Where, When and How. They allow the witness to tell their own story. They can be useful to set the scene. Other useful phrases are "Describe" or "Explain" followed by who, what etc.

Make sure you do not introduce any evidence in your next question that the witness hasn't mentioned already. If you are "leading" the witness (i.e. suggesting things to them) the other side will object. You should also watch for the other side leading their witnesses and object if necessary.

Examples of open questions:

*"Describe what you saw"*

*"Who was there?"*

*"Was anyone else there?"*

*"What were they doing?"*

*"How did they behave?"*

*“Explain what you mean by ‘angry’”*

Closed questions limit the information you can get back. They suggest the answer or at least part of it in the question. They are used to lead the witness in the direction you want. They are useful in cross-examination.

Examples (compare to open questions above):

*“Did you see a red Ford Fiesta?”*

*“Was Susan in the car?”*

*“Was Angela with Susan in the car?”*

*“You saw them shouting at each other didn’t you?”*

*“Were they arguing?”*

*“They were angry at each other, weren’t they?”*

## DEFENDING A CASE

Most of the information in this Guide is for those who are pursuing a case through the Sheriff Court. But for every Pursuer there is at least one Defender. It could be you.

When a party receives an Initial Writ, they should consider whether or not they wish to defend the action. Seek the advice of a solicitor. Look at OCR 9 and also 33.34 for information. If the Defender wishes to defend the action they should lodge a Notice of Intention to Defend (NID) in Form 26 before the end of the notice period – usually 21 days from the date of service of the Initial Writ. As well as a NID, the defender should lodge Defences no later than 14 days after the expiry of the notice period, setting out:

- Craves
- Averments which answer the condescence in the Initial Writ and support the craves, and;
- Pleas-in-law

## DRAFTING DEFENCES

If you are a defender it is very important that the Defences are drafted correctly. OCR 9.7 states:

Implied admissions

9.7. Every statement of fact made by a party shall be answered by every other party, and if such a statement by one party within the knowledge of another party is not denied by that other party, that other party shall be deemed to have admitted that statement of fact.

This means that every statement made in the Condescence should be answered by Defences. Each Article of Condescence should have a Defence that mirrors it.

*“Admitted”*

You start by going through each averment, and if you accept it, write *“admitted that...”* and put the averment there.

Example: *“Admitted that the parties entered into a relationship around February 2006.”*

If you agree with everything in the condescendence, just write “Admitted.” This can often be the case for the first few articles of condescendence that narrate non-controversial facts such as the dates of the parties’ relationship and the names and dates of birth of the children of the party.

#### DENIED

You do not need to deny every averment in the Condescendence that you disagree with. You can simply write:

*“The Pursuer’s averments are denied except as coinciding herewith...”*

This can also be written as

*“Quoad ultra denied”*

These statements mean that everything is denied other than what has been covered by “admitted”, “believed to be true” or “not known and not admitted.” It should be included at the end of every Defence as a “catch all” unless you have admitted the entire Article of Condescendence.

#### NOT KNOWN AND NOT ADMITTED

This is where a fact is outwith your knowledge but you are not admitting it.

Example:

*“Not known and not admitted that on the evening of 2 September 2009 the Pursuer was in the vicinity of Sainsbury’s, Blackhall, Edinburgh”*

What you are saying is that you weren’t there so you can’t be sure, and that you are expecting the Pursuer to lead evidence to prove they were at Sainsbury’s.

#### BELIEVED TO BE TRUE

This statement can be used where the fact is outwith your knowledge.

Example:

*“Believed to be true that on the evening of 2 September 2009 the Pursuer was in the vicinity of Sainsbury’s, Blackhall, Edinburgh”*

What you are saying is that you weren’t there so you can’t be sure, but you are not denying that it happened. It is essentially an admission of that fact – the Pursuer will not need to lead evidence to try to prove they were at Sainsbury’s, as you are not trying to challenge it.

#### EXPLAINED THAT and UNDER EXPLANATION THAT

This is how to start the descriptive bit of your defences.

#### Example

*“Admitted that the Defender works until 10pm, under explanation that he begins work at 11am. Explained that the Defender applied to his manager for a change in working hours and the request was refused. The Defender cares for the children in the morning. The Defender walks with the children to school each day.”*

As with drafting the Initial Writ, the Defences should be drafted in plain language. They should consist of precise statements that offer one fact per sentence. You can amend them during the adjustment period. The Pursuer will in turn be answering the facts you have put in the defences so you may want to adjust them further to answer their averments.

# APPENDIX 1

## SAMPLE INITIAL WRIT

THIS IS INDICATIVE OF LAYOUT AND STYLE ONLY

DO NOT COPY

Court ref. no. F1111/09

Heading: COURT REFERENCE then SHERIFFDOM and COURT

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

Description  
"Initial Writ"

INITIAL WRIT  
In the cause

Instance  
Names and addresses of parties

James Michael Black, residing at 123 Hilltown Street, Edinburgh, EH1 ABC

Pursuer  
Against

Jennifer Louise White, residing at 456 Townhill Street, Edinburgh EH2 DEF

(Assisted Person)

If the party has legal aid

Defender

Craves  
What you are asking the court for

The Pursuer craves the Court:-

1. To make an order requiring that Jimmy John Black born at Edinburgh on 1<sup>st</sup> September 2006 reside with the Pursuer; and to make such an order *ad interim*, failing which;

Ad Interim – on a temporary basis until a final order is made

2. To make an order finding the Pursuer entitled to Contact with the said Jimmy John Black each week from 9.30am on Sunday until 7.30pm on Monday or such times as the Court seems just; and to make such order *ad interim*

3. To grant warrant to intimate this Initial Writ upon the said Jimmy John Black in terms of Rule 33.7(1)(h)

4. To dispense with intimation of this initial writ upon the said Jimmy John Black due to his young age in terms of Rule 33.7(7)

Ask for authority to intimate the action on relevant people who aren't parties - but if child is too young, ask to dispense with this requirement



5. To find the defender liable in expenses

Averments to explain why this court is appropriate, and that no other court proceedings are ongoing

## CONDESCENDENCE

### Background

1. The Pursuer resides at 123 Hilltown Street, Edinburgh, EH1 ABC. The Defender resides at 456 Townhill Street, Edinburgh EH2 DEF. The parties met in February 2003 and entered into a relationship. There is one child of the relationship namely Jimmy John Black born at Edinburgh on 1<sup>st</sup> September 2006. An extract Birth Certificate is produced herewith and referred to for its terms which are held as repeated herein for the sake of brevity. The child is habitually resident in Edinburgh, within the Sheriffdom of Lothian and Borders. The Pursuer is unaware of any other proceedings in relation to this case. This Court has jurisdiction.

Refer to the birth certificate(s)

### Intimation

2. The child of the relationship, Jimmy John Black was born on 1<sup>st</sup> September 2006. He is too young to understand this action. The requirement to intimate this Initial Writ upon him should be dispensed with.

Averments to back up craves 3 and 4

### The Parties' Relationship

3. The parties met in February 2003. They moved into the property at 456 Townhill Street, Edinburgh in May 2004. In February 2006, the parties discovered the Defender was pregnant. The child of the parties, Jimmy John Black was born on 1<sup>st</sup> September 2006. The Pursuer has played an active role in Jimmy's life since his birth. The Defender returned to full-time work 6 months after Jimmy was born. Jimmy was placed in nursery care from 9am – 4pm Tuesday to Friday. The Defender left for work at 6am. She did not provide Jimmy with care in the mornings. The Pursuer had responsibility for getting Jimmy ready for nursery, dressing him, feeding him breakfast and ensuring his bag was packed. The Pursuer took him to nursery every day. The Pursuer had sole care of Jimmy on Mondays.

Use headings if it makes it clearer

### Separation

4. The parties separated in July 2009. On or around the 20<sup>th</sup> July 2009, the parties engaged in an argument. The Defender had returned home from a work party late at night. She was under the influence of alcohol. She was argumentative and began an argument with the Pursuer. She accused him of not having emptied the washing machine as she had requested. The Pursuer was non-confrontational in response. The Defender shouted at the Pursuer causing Jimmy to wake up. The Pursuer felt afraid. The Pursuer decided he could no longer live with the Defender. The Pursuer moved to his parent's house. In around September 2009 the Pursuer moved to 123 Hilltown Street, Edinburgh. He chose the property because of its proximity to the child. The Pursuer collected Jimmy on Sunday mornings. Jimmy stayed overnight at the Pursuer's home on Sunday nights. The Pursuer returned Jimmy to the Defender's address at around 7.30pm on Mondays.

### Post-Separation contact

5. In May 2010, the Defender telephoned the Pursuer to say that Jimmy was unable to stay with him anymore. The Pursuer was concerned and attended at the Defender's address to see him. The Defender refused to allow him to enter the house. The parties engaged in a loud argument on the Defender's doorstep. The Pursuer left the property. The Defender did not allow contact with the child except by telephone. The Defender made threats towards the Pursuer. The following Sunday, the Pursuer attended the Defender's house and found it to be locked up. The Pursuer attended the Defender's house approximately ten times in the following weeks and was refused entry each time.

#### Current Situation

6. The Pursuer works as a hairdresser at a salon on Princes Street, Edinburgh. He begins work at 9.30am. He does not work on Sundays or Mondays. He works predictable hours. He earns approximately £26,000 per year. The Pursuer's home is a 2 bedroom main-door flat in a residential area. He has direct access to a garden. The flat is approximately a quarter of a mile from the Defender's address. The Pursuer's flat is closer to Jimmy's school than the Defender's home. The Pursuer's home is comfortable and appropriate for Jimmy's needs. Jimmy has his own bedroom at the Pursuer's flat. He has a number of clothes and toys at the Pursuer's flat. The Defender is a self-employed sales representative. The Defender leaves home at 6am each morning. She works very long hours. She works unpredictable hours according to client's needs. Even when the Defender is at home, she is often on the telephone or working on the computer. She is unable to give her full attention to Jimmy during this time. The Defender is originally from London and her family live in that area. None of the Defender's relatives live in Scotland. Jimmy is not close to his maternal grandparents. They have only seen him twice a year since he was born. The Defender is unable to provide Jimmy with adequate parental supervision. She is absent from the home for long working hours. She has no family support. It is not in the best interests of the child for him to continue living with the Defender. It would be better for him to live with the Pursuer. It is not in the best interests of the child that no order is made. In all the circumstances it would be better for the child if a residence order was granted as first craved.

#### Current Contact

7. The Defender has refused to allow the Pursuer to contact the child since May 2010, except by telephone. In the event that the child is not residing with the Pursuer it is in their best interests that they maintain personal relations and direct contact with the Pursuer. In these circumstances it would be in the child's best interests that contact be granted as second craved.

#### PLEAS-IN-LAW

1. It being in the best interests of the child that they reside with the Pursuer, decree should be granted as first craved.
2. Failing a residence order, it being in the best interests of the child that they have contact with the Pursuer, decree should be granted as second craved.

How are day-to-day needs of the child met?

Be very careful what you say about the other party – can you PROVE these averments if you needs to, or they just unfounded allegations?

Explain why it is better that an order is made, than no order is made

Include averments to back up all craves – this one is to back up Crave 2

Pleas-in-law reflect the Craves. Include statutory provisions here if appropriate

IN RESPECT WHEREOF

James Michael Black

123 Hilltown Street, Edinburgh

Signed J Black

## SAMPLE DEFENCES

THIS IS INDICATIVE OF LAYOUT AND STYLE ONLY

DO NOT COPY

Court ref. no. F1111/09

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

### DEFENCES

In the cause

James Michael Black, residing at 123 Hilltown Street, Edinburgh, EH1 ABC

Pursuer

Against

Jennifer Louise White, residing at 456 Townhill Street, Edinburgh EH2 DEF

Defender

The Defender craves the Court:-

1. To make an order requiring that Jimmy John Black born at Edinburgh on 1 September 2006 reside with the Defender; and to make such an order at interim.
2. Failing a residence order, to make an order requiring that the said Jimmy John Black have contact with the Defender each week from 6.30pm on Saturday until 9am on Friday, or other such times and dates as the Court deems appropriate, and to make such an order ad interim.
3. To grant warrant to intimate these defences upon the said Jimmy John Black in terms of Rule 33.7(1)(h)
4. To dispense with intimation of defences upon the said Jimmy John Black in terms of Rule 33.7(7)

5. To find the Pursuer liable in expenses

#### ANSWERS TO CONDESCENDENCE

1. Admitted

2. Admitted

3. Admitted that the parties met in February 2003. Admitted that they moved into the property at 456 Townhill Street, Edinburgh in May 2003. Admitted that in June 2003, the parties discovered the Defender was pregnant. Admitted that the child of the parties, Jimmy John Black was born on 1<sup>st</sup> September 2006. Admitted that the Defender returned to full-time work 6 months after Jimmy was born under explanation that the parties could not afford to live on the salary of the Pursuer alone. Admitted that Jimmy was placed in nursery care from 9am – 4pm Tuesday to Friday. Believed to be true that the Pursuer had responsibility for getting Jimmy ready for nursery, dressing him, feeding him breakfast and ensuring that his bag was packed. Admitted that the defender took him to nursery every day. Admitted that the Pursuer had sole care of Jimmy all day on Mondays under explanation that the Defender worked from home on Mondays whenever possible. The Pursuer's averments are denied except as coinciding herewith. Explained that the Pursuer and Defender discussed the Defender's return to work after maternity leave at great length. At the time the child was six months old, the Pursuer earned £18,000. The Pursuer could not support the family on his income alone. The Pursuer was keen for the Defender to return to work. The Defender returned to work but worked from home on Mondays when possible. The Defender assisted the Pursuer with the care of the child on those days she was able to work from home. The Defender returned home from work at 4pm each day. The Defender cared for the child from 4pm each day until his bedtime between 7pm and 8pm. The Pursuer returned from work at approximately 8.30pm Tuesday to Saturday. He attended after-work drinks most Fridays and returned home after midnight. The Pursuer rarely saw Jimmy in the evening. Jimmy was in bed by the time the Pursuer returned home. It is not in the best interests of the child to reside with the Pursuer. The Pursuer is unable to provide evening care for the child. It would be better for the child to reside with the Defender. In all the circumstances it would be better for the child if a residence order was granted as first craved for the Defender.

4. Admitted that the parties separated in July 2009. Admitted that the Pursuer moved to his parent's house. Believed to be true that in around September 2009 the Pursuer moved to 123 Hilltown Street, Edinburgh. Not known and not admitted that he chose the property because of its proximity to the child. Admitted that the Pursuer collected Jimmy on Sunday mornings. Believed to be true that Jimmy stayed overnight at the Pursuer's home on Sunday nights. Admitted that the Pursuer returned Jimmy to the Defender's address at around 7.30pm on Mondays. The Pursuer's averments are denied except as coinciding herewith. Explained that on the 20<sup>th</sup> July 2009 the Defender returned home after a conference. The Defender had anticipated the conference finishing late. She had

left a note asking the Pursuer to empty the washing machine. The Pursuer had not done this. Jimmy's school uniform was in the machine and was required for the following day. The Defender began to empty the machine. She did not raise her voice. Jimmy entered the kitchen. He was fully dressed and was not ready for bed. It was approximately 10.30pm. The Defender put Jimmy to bed. She asked the Pursuer to leave the property for the night.

5. Admitted that in May 2010, the Defender telephoned the Pursuer to say that Jimmy was unable to stay with him anymore. Not known and not admitted that the Pursuer was concerned and attended at the Defender's address to see him. The Pursuer's averments are denied except as coinciding herewith. Explained that the Defender took the child to a friend's house for lunch. The Defender and the child returned in the early afternoon. The Pursuer was sitting in his car outside the Defender's house. The Pursuer began shouting at the Defender from his car. The Defender and Jimmy entered the house and locked the door. The Pursuer shouted through the closed door for a time. The child does not wish to see the Pursuer. The child is afraid of the Pursuer. The Pursuer is easily angered. He frequently shouted at the child.

6. Admitted that the Defender is a self-employed sales representative. Admitted that the Defender is originally from London and her family live in that area. Admitted that none of the Defender's relatives live in Scotland under explanation that the Defender has lived in Scotland for 15 years and has network of close friends in Edinburgh. Believed to be true that the Pursuer works as a hairdresser at a salon on Princes Street, Edinburgh. Not known and not admitted that he begins work at 9.30am. Not known and not admitted that he does not work on Sundays or Mondays. Not known and not admitted that he earns approximately £26,000 per year. Not known and not admitted that the Pursuer's home is a 2 bedroom main-door flat in a residential area. Not known and not admitted that he has direct access to a garden. Not known and not admitted that the flat is approximately a quarter of a mile from the Defender's address. Not known and not admitted that the Pursuer's flat is closer to Jimmy's school than the Defender's home. Not known and not admitted that Jimmy has his own bedroom at the Pursuer's flat. Not known and not admitted that he has a number of clothes and toys at the Pursuer's flat. The Pursuer's averments are denied except as coinciding herewith. Explained that the Defender's home is a two bedroom semi-detached house. The child has lived there since he was born. The child regards the property as his home. The child has a large bedroom at the property. He has clothes and toys there. Jimmy has regular contact with his maternal grandparents by means of an internet video call. This takes place approximately once per week. Jimmy has a close bond with his maternal grandparents. The Defender changed her work pattern since the Pursuer left. She leaves the house at 8am. She takes the child to nursery. The Defender finishes work at 4pm. The Defender collects the child at 4pm and they return home together. The Defender is self-employed and has reduced the number of clients she has in order to cater for the needs of the child. The defender earns approximately £34,000 per annum. The child is thriving under these arrangements. His welfare is best served by the care of his mother. It being in the best interests of the child for the arrangements to remain in place, residence should be granted as first craved for the Defender.

7. The pursuer averments are denied. In the event that the child is not residing with the Defender, it is in the best interest of the child to maintain personal relations and direct contact with the Defender. The Pursuer is unable to provide evening care for the child. In these circumstances it would be in the child's best interests that contact be granted as second craved.

PLEAS-IN-LAW

1. It not being the best interests of the child that they reside with the Pursuer, and it not being better for the child that a residence order be granted in favour of the Pursuer than none be granted at all, decree as first and second craved for the pursuer should be refused.

2. It being in the best in best interests of the child that they reside with the Defender and it being better for that child that a residence order be granted in favour of the Defender than none be granted at all, decree as first craved by the Defender should be granted as craved.

3. It being in the best interests of the child that they have contact with the Defender and it being better for the chil that a contact order be granted in favour of the Defender than none be granted at all, decree as first craved by the Defender should be granted as craved.

IN RESPECT WHEREOF

Signed

## SAMPLE INVENTORY

THIS IS INDICATIVE OF LAYOUT AND STYLE ONLY

DO NOT COPY

Court ref. no. F1111/09

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

### FIRST INVENTORY OF PRODUCTIONS

In the cause

James Michael Black, residing at 123 Hilltown Street, Edinburgh, EH1 ABC

Pursuer

Against

Jennifer Louise White, residing at 456 Townhill Street, Edinburgh EH2 DEF

Defender

1. Extract birth certificate of Jimmy John Black born 1 September 2006.

## SAMPLE ADJUSTMENTS FOR THE DEFENDER

THIS IS INDICATIVE OF LAYOUT AND STYLE ONLY

DO NOT COPY

Court ref. no. F1111/09

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

FIRST NOTE OF ADJUSTMENTS FOR THE DEFENDER

In the cause

James Michael Black, residing at 123 Hilltown Street, Edinburgh, EH1 ABC

Pursuer

Against

Jennifer Louise White, residing at 456 Townhill Street, Edinburgh EH2 DEF

Defender

1. At Article 3 of the Defences, in the 17<sup>th</sup> line after the words “the Defender” delete the words “was keen for” and replace with the word “encouraged”
2. At Article 4 of the Defences, after the sentence ending “conference” insert the following sentences:

“She drove home. She was not under the influence of alcohol.”

3. At Article 4 of the Defences, in the 11<sup>th</sup> line, after the words “uniform was” and before the word “machine” insert the word “washing”
4. At Article 4 of the Defences, in the 12<sup>th</sup> line, after the words “empty the” and before the word “machine” insert the word “washing”
5. At Article 5 of Defences, delete the final sentence beginning “The Pursuer frequently” and insert the following sentences:

“The Pursuer raised his voice towards the Defender during their relationship. He has a previous conviction for breach of the peace. He finds it difficult to control his temper. The Pursuer’s constant bad temper resulted in the breakdown of the parties’ relationship. It is not suitable for the child to be exposed to the Pursuer’s behaviour.”

IN RESPECT WHEREOF

*Signed*



## SAMPLE ADJUSTMENTS FOR THE PURSUER

THIS IS INDICATIVE OF LAYOUT AND STYLE ONLY

DO NOT COPY

Court ref. no. F1111/09

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

FIRST NOTE OF ADJUSTMENTS FOR THE PURSUER

In the cause

James Michael Black, residing at 123 Hilltown Street, Edinburgh, EH1 ABC

Pursuer

Against

Jennifer Louise White, residing at 456 Townhill Street, Edinburgh EH2 DEF

Defender

Use the same heading/instance as the initial writ but a different description

Adjustments may be used to make something clearer or rectify a mistake

1. In Article of Condescence 3, in the tenth sentence, at the end of the sentence after the words "bag was packed" insert the words "for nursery"
2. At the end of the same Article of Condescence, insert the following:

"Under his current terms of employment, the Pursuer is required to stay at work until the salon closes at 8pm. The Pursuer and his manager have discussed changing his shift pattern to finish earlier. The Pursuer would be able to care for the child in the evenings. The Pursuer has a network of close family nearby. The Pursuer's family could easily assist the Pursuer with the care of the child in the evenings. The Pursuer attends drinks at his work approximately once per month. If the Pursuer was caring for Jimmy he would not attend the drinks nights. The Defender's averments in answer are denied."

They may also be used to answer the other side's averments or adjustme

3. In Article of Condescence 4, at the end insert the following:

"The Defender's averments in answer are denied."

4. In Article of Condescence 5, in the fourth sentence, delete the words "loud argument" and replace with the word "disagreement." At the end of the same Article, insert the following:

"The Pursuer is not easily angered. He does not regularly raise his voice. He chastises the child only when necessary and does so in an appropriate manner for a parent. The Pursuer and the child have a close bond. The child is not afraid of his father. The Pursuer's previous conviction for Breach of the Peace dates back to when he was 17 years old. This was before he met the Defender. It was before Jimmy was born. The Defender's averments in answer are denied."

5. In Article of Condescence 6, at the end insert the following:

"The Defender's Averments in answer are denied"

IN RESPECT WHEREOF

Signed

Adjust to deny the defender's averments

## SAMPLE MOTION

THIS IS INDICATIVE OF LAYOUT AND STYLE ONLY

DO NOT COPY

Court ref. no. F1111/09

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

MOTION FOR THE PURSUER

In the cause

James Michael Black, residing at 123 Hilltown Street, Edinburgh, EH1 ABC

Pursuer

Against

Jennifer Louise White, residing at 456 Townhill Street, Edinburgh EH2 DEF

Defender

The Pursuer moves the Court:-

1. To allow the Initial Writ to be amended in terms of the Minute of Amendment forming No 4 of process
2. To find the Defender liable in the expenses of this Motion

Lodged docs  
become part of "Process"  
The Clerk can tell you the number

List the documents of parts of process lodged with the Motion:-

Minute of Amendment

Draft your M of A and enrol your motion to allow it

Date: 10 March 2011

Remember to intimate your motion and relevant docs to the other side to allow them the opportunity to oppose it

James Black

123 Hilltown Street

Edinburgh

Pursuer

# APPENDIX TWO

## FNF SCOTLAND JARGON BUSTER

A comprehensive glossary published by the Scottish Court Service can be found at:

<http://www.scotcourts.gov.uk/library/publications/docs/glossary.pdf>

**Abduction** - Removing a child without the permission of a parent or parents or others having parental rights and responsibilities

**Action** – A case in a civil court

**Adjustment** - Correcting, changing or expanding on the written arguments to the court in court proceedings

**Adoption** – Giving an adult permanent “parental-type” status over a child under 16

**Affidavit** - A signed statement made on oath and treated as “evidence.” It is placed before a court and means the witness doesn’t have to turn up. It can save time but can only be used in certain types of case where there is no real dispute. A written statement cannot be cross-examined.

**Agreement** - a voluntary contract confirming what has been agreed voluntarily between a couple. Can be called a “minute of agreement” or a “separation agreement”

**Aliment** - Money payable for a spouse or a child, enforceable by law. Put in place by way of a court order, a voluntary agreement or under a decision made by the Child Support Agency/CMEC.

**Appeal** – Asking the court to change or cancel an order it has made. This can be on the grounds that the court made a mistake in applying the law or because the factual information given it was not correct when the order was made or, sometimes, because the relevant facts have changed.

**Arrest (Power Of)** - Entitles the police to arrest a person without a “warrant to arrest”, usually where a person has threatened or committed a violent act

**Averments** – statements or allegations

**Balance of Probabilities** – The standard of proof in civil cases. It means that something is more likely than it is unlikely. It is not as high a standard as the criminal standard of proof, where the court must be persuaded beyond all reasonable doubt.

**Welfare/Best Interests of the Child** – this is the most important (often called “paramount”) factor which a court will take into consideration when making a decision to do with children.

**CALM** - a form of mediation in which a couple agree to go to an independent solicitor specially trained in mediation skills, typically to discuss and, hopefully, agree, financial matters

**Capacity** - Is whether or not any person (including a “child”) has sufficient understanding to give a view which will be taken account of by the court in making decisions

**Child Welfare Hearing** - Is a hearing held in private at the court, which may be at any stage of the proceedings, to decide things like the arrangements for where a child lives and the arrangements for “contact” or keeping in touch with the other parent and any other “interested parties”

**Collaboration** - A special type of “alternative dispute resolution” in which a couple get around a table with their lawyers to try to discuss and resolve as many as possible of the financial, child-related and other issues without going to court.

**Condescendence** - A written statement in an action setting out the grounds of action of the Pursuer.

**Contact** – the legal word for the interaction a parent or other individual (usually family member) has with a child. Can take many forms: overnight contact, direct contact, indirect contact (ie letters) supervised or unsupervised. It can be a court order or a voluntary agreement.

**Corroboration** – backing up evidence from another source. The court will not make an order unless all of the important information has been proved, not just by what one person says, but has been backed up by evidence. For example, corroboration could be the evidence of a witness or a document.

**Court of Session** - Is Scotland’s “higher court” (ie above the Sheriff Courts) to deal with appeals and further judgments and high value or legally complex cases

**Craves** - Are what in the preliminary divorce papers are “things asked for” by a claimant to the court, such as for divorce or for a court order as to where a child lives etc and for payments of money

**CSA** – Child Support Agency, established in 1993 to decide who pays money and how much for children up to age 19 in specially defined circumstances. The CSA can get court orders (called “liability orders”), and other orders to enforce payment by those responsible to pay for “children” Now being replaced by the Child Maintenance Service.

**Curator Ad Litem** - Is a person appointed by the court to find out and tell the court what a child’s views are, most typically in relation to where a child shall live and the arrangements for seeing the other parent or any other “adults” who have an interest in the child

**Debate** – A hearing where there is a legal point to be determined. It may be the final hearing – meaning no proof is required and no evidence it to be led

**Decree** - (pronounced DEE – cree) a court order, usually a final order, but can be appealed

**Defences** - The answers (and explanations) to the pleadings of the pursuer, explaining why the court orders should be granted as they have asked for rather than as the pursuer has asked for

**Defender** - A person who disputes the claim of the pursuer and lodges defences.

**Defended Action** – a court case in which an individual wants to dispute the case against them and/or ask the court for something other than what the pursuer has asked for

**Evidence** – Evidence can be oral – spoken in court for the Sheriff to hear, or documentary and be lodged in court as a production (see productions). It must be “corroborated evidence” i.e. not just what is said by one party – it must be backed up by a witness or documentation

**Expenses** - Of a court case (or a case that is agreed under an “agreement” – and does not go to court) can either be agreed or the court can be asked to decide on who pays whose costs. It is rare for a court to make an award that one person pays the other side’s costs in a family case

**Extract Decree** - Each step of an Ordinary Action is recorded in an interlocutor. It is a short summary of what has happened to the case each time it comes before the Sheriff. A copy of the interlocutor is enough in some instances to carry out the order of the Court (what the Sheriff had decided). An extract decree is required where a copy interlocutor would not do and a more formal document is required.

**Habitual Residence** - Has to do with which court family proceedings can be raised in. The case will usually be raised in the court nearest to wherever a child normally lives.

**Initial Writ** - Is the court document that the Pursuer will draft, and which tells the court the reasons what they want and why they want it.

**Interdict** - This is the equivalent of an English “injunction.” It is a court order stopping someone from doing something. You must have a good reason to ask the court to make this order.

**Interlocutor** - this is a court judgment recording what is ordered by the judge at each step along the way. There may be many interlocutors throughout a case as the Sheriff makes decisions.

**Interim** - This usually means temporary.

**Joint Minute** - this is a detailed agreement between the parties. It will tell the court what the parties have agreed. The court will usually grant it and when lodged with the court is enforceable.

**Jurisdiction** - This means a particular court has the authority to hear a case. It can sometimes be complex and you may require the advice of a solicitor.

**Lay Assistant** - A friend or supporter of a Party Litigant who will accompany him/her to court. The Lay Assistant can take notes of proceedings, offer discreet advice to the Party Litigant and provide moral support.

**Lay Representative** - A friend or support of a Party Litigant who is entitled to speak in court and make oral submissions that assist the court but is not permitted, for example, to examine or cross examine witnesses.

**Legal Aid “Advice & Assistance”** - This is a type of legal aid that covers work done by a solicitor (ie letters, negotiations etc) but not representation in court.

**Legal Separation** - Usually means a separation agreement dealing with issues of money and children etc.

**Mediation** - A facility provided to help couples try to resolve contentious matters without having to go through the court process.

**Motion** - An application to the court - it can be for almost anything but is most commonly used for procedural matters, for example to sist a case or to amend pleadings. There is a specific form of motion with rules about intimating it to the other parties.

**Options Hearing** - A hearing at court where both parties are usually present. The purpose for the Options Hearing is to tell the court where the case is at and to determine the future of the case.

**Parental Rights & Responsibilities** - Listed in the Children (Scotland) Act 1995. Automatically acquired by unmarried fathers named on a birth certificate after 1 May 2006.

**Party** – A person involved in a case, ie Pursuer and Defender.

**Party Litigant** – The term in Scotland for someone representing him/herself in court. Equivalent of Litigant in Person in England and Wales.

**Pleas-In-Law** - Short statements at the end of your written pleadings explaining the legal basis for the craves.

**Precedent** - A previously decided case which is used to help decide further similar cases.

**Process** - The collective word for all the documents and productions that have been lodged with the court.

**Productions** – The documents given to the court as evidence.

**Proof** – The final hearing in a case where evidence is heard and the judge decides on matters of fact and law.

**Pursuer** - The person who starts the action and is asking for something from the court.

**Record** - The document created when both sets of pleadings (Initial Writ, Defences and Adjustments to both) are combined into one document for use in the court.

**Residence** - The new word for what used to be called “custody”, generally where the child lives most of the time.

**Reporter** - A person, usually a lawyer or social worker appointed by the court to investigate the circumstances around the child and his/her care.

**Residence Order** - A formal order by a court in relation to where/with whom a child should live.

**Sheriff Court** - The court in which it is likely your case will proceed. You should choose your Sheriff Court based on its jurisdiction.

**Sheriff Officers** - Officers of the court who will, for a fee, serve court papers between parties etc.

**Sist** - Where a case is “put to sleep” while other things are deal with - for example negotiations between the parties.

**Undefended Action** - When an action is raised and there is no defence submitted in time it will become an undefended action.

**Warrant** - An order of court so that all the correct people who have a proper interest in the case are aware of the proceedings

**Witness** - A person who may be asked to go to court to give oral evidence to the court. May also be someone who has given evidence in written form by affidavit.

**Writ** - The first document sent to the court in the case. Also called the Initial Writ.

# APPENDIX THREE

## ORDINARY CAUSE RULES RELATING TO CHILD WELFARE HEARING

33.22A (1) Where-

(a) on the lodging of a notice of intention to defend in a family action in which the initial writ seeks or includes a crave for a section 11 order, a defender wishes to oppose any such crave or order, or seeks the same order as that craved by the pursuer,

(b) on the lodging of a notice of intention to defend in a family action, the defender seeks a section 11 order which is not craved by the pursuer, or

(c) in any other circumstances in a family action, the Sheriff considers that a Child Welfare Hearing should be fixed and makes an order (whether at his own instance or on the motion of a party) that such a hearing shall be fixed,

the Sheriff clerk shall fix a date and time for a Child Welfare Hearing on the first suitable court date occurring not sooner than 21 days after the lodging of such notice of intention to defend, unless the Sheriff directs the hearing to be held on an earlier date.

(2) On fixing the date for the Child Welfare Hearing, the Sheriff clerk shall intimate the date of the Child Welfare Hearing to the parties in Form F41.

(3) The fixing of the date of the Child Welfare Hearing shall not affect the right of a party to make any other application to the court whether by motion or otherwise.

(4) At the Child Welfare Hearing (which may be held in private), the Sheriff shall seek to secure the expeditious resolution of disputes in relation to the child by ascertaining from the parties the matters in dispute and any information relevant to that dispute, and may-

(a) order such steps to be taken, make such order, if any, or order further procedure, as he thinks fit, and

(b) ascertain whether there is or is likely to be a vulnerable witness within the meaning of section 11(1) of the Act of 2004 who is to give evidence at any proof or hearing and whether any order under section 12(1) of the Act of 2004 requires to be made.

(5) All parties (including a child who has indicated his wish to attend) shall, except on cause shown, attend the Child Welfare Hearing personally.

(6) It shall be the duty of the parties to provide the Sheriff with sufficient information to enable him to conduct the Child Welfare Hearing.



# APPENDIX FOUR

## LAY REPRESENTATIVE STATEMENT

Form 1A.2 Form of Statement by prospective lay representative for Pursuer/Defender

Rule 1A.2(2)(b) Statement by prospective lay representative for Pursuer/Defender\*

Case Ref. No.:

in the cause

SHERIFFDOM OF (insert name of Sheriffdom)

AT (insert place of Sheriff Court)

[A.B.], (insert designation and address), Pursuer

against

[C.D.], (insert designation and address), Defender

Court ref. no:

Name and address of prospective lay representative who requests to make oral submissions on behalf of party litigant:

Identify hearing(s) in respect of which permission for lay representation is sought:

The prospective lay representative declares that:

- |     |  |
|-----|--|
| (a) | I have no financial interest in the outcome of the case <i>or</i> I have the following financial interest in it:*  |
| (b) | I am not receiving remuneration or other reward directly or indirectly from the litigant for my assistance and will not receive directly or indirectly such remuneration or other reward from the litigant.    |
| (c) | I accept that documents and information are provided to me by the litigant on a confidential basis and I undertake to keep them confidential.  |
| (d) | I have no previous convictions <i>or</i> I have the following convictions: (list convictions)*   |
| (e) | I have not been declared a vexatious litigant under the Vexatious Actions (Scotland) Act 1898 <i>or</i> I was declared a vexatious litigant under the Vexatious Actions (Scotland) Act 1898 on [insert date].* |

# APPENDIX FIVE

## SOURCES OF FURTHER INFORMATION

The following publications and web pages may be useful.

### [Glasgow and StrathKelvin Practice Note no. 1](#)

This useful note covers topics such as affidavits, bar reports, motions and minutes. [Practice notes](#) from all Sheriffdoms are on the Scotcourts web site.

[http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/sheriff-court/family - civil\\_partnership\\_actions.pdf?sfvrsn=2](http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/sheriff-court/family_-_civil_partnership_actions.pdf?sfvrsn=2)

### [Equal Treatment Bench Book](#)

This is the guide for judges, with a section on party litigants. Useful insight into the judge's perspective.

<http://www.scotland-judiciary.org.uk/Upload/Documents/EqualTreatmentBenchBookfinalNov.pdf>

**The Science of Family Law** by Anne Hall Dick and Tom Ballantine, W. Green

ISBN 0-414-01370-0 £62.(2001)

Written for lawyers but a useful and very readable guide to the whole process.

FNF Scotland guide to Bar Reports see [www.fnfscotland.org.uk](http://www.fnfscotland.org.uk)