



FACULTY OF ADVOCATES

Response from the Faculty of Advocates

Discussion and Questions in relation to Commission and Diligence in family actions in the civil courts.

The Faculty of Advocates welcomes the opportunity to comment on the issue of Commission and Diligence in family actions in the civil courts. We have the following views in relation to this matter.

Current Law and Practice in the area of Commission and Diligence in Family Actions in the Civil Courts

The current practice and procedure is not as set out in paragraphs 1.03 and 1.04 of Annex B of the consultation document.

The current practice and procedure can be summarised as follows.

An application for commission and diligence is made by motion, and the specification of documents must be lodged with that motion. Intimation of the motion and specification of documents must be made to every other party to the action. Where recovery of documents in the possession of the Crown, including medical records, is sought, intimation must be made to the Lord Advocate, who is entitled to be heard on the

motion. In addition, in the Court of Session, intimation must be made to the Advocate General where documents are sought which are in the hands of public authorities exercising functions in reserved matters. Intimation is not required to any other haver of documents, and no haver other than the Lord Advocate and Advocate General has a locus to appear and oppose the motion.

The specification of documents itself is a list of the documents and classes of documents which are sought to be recovered. Neither the specification nor the motion require to set out the relevance of the documents sought to the case but only documents whose recovery can be justified by the pleadings should be sought to be recovered. That matter may be argued in court if the motion is opposed, in whole or in part. The specification of documents may be approved by the court as it stands, or specific calls may be deleted or adjusted, or it may simply be refused.

If the motion is granted, the optional procedure is usually followed initially, whereby the haver is requested to produce any documentation in his possession falling within the terms of the specification. The haver should produce the documents he has and return the signed certificate confirming he has complied with the court order. The haver should produce any documents for which he claims confidentiality in a separate sealed packet marked "Confidential". The party who has served the order may then make a motion to open the sealed packet, which must be intimated to all parties and to the haver. The question of confidentiality will be determined by the judge at the hearing on the motion, and the haver therefore has the opportunity to be heard on the matter.

If the party who has served the order using the optional procedure is not satisfied that full compliance has been made with the order, he may proceed to fix a commission,

which requires to be intimated to all parties, and to which the haver is cited to appear. The haver may be examined under oath at the commission, where the only legitimate purpose of any questioning is to trace and recover a document, or copy, if in existence, or to explain how the document came to be destroyed if it is no longer in existence. The haver is entitled to refuse production on the ground of confidentiality. If the haver produces documents for which he claims confidentiality they should be enclosed in a separate sealed packet and the matter dealt with by the judge rather than the commissioner. It is possible for the commissioner to make certain excerpts from documents recovered, and in those circumstances only the excerpted entries will be made available to parties.

For further detailed discussion of the current practice and procedure, reference may be made to Macphail on Sheriff Court Practice at paragraphs 15.44 to 15.83, and McSporrán and Young on Commission and Diligence.

A Change to the Law?

We are of the view that the law in this area does not require to be changed.

As highlighted in the Scottish Government Discussion Paper, it is not possible for those providing services to children to guarantee absolute confidentiality. Where an application is made for records of the services provided to children, such as counselling services, to be produced, the court requires, in considering the issue of confidentiality, to carry out the balancing exercise which is explained in the case of *In the matter of A (A Child) [2012] UKSC 60*. The consideration of the Human Rights Act in this case is binding

upon the Scottish courts. There is an expectation of confidentiality between the child and the service provider, and the decision of the court, in carrying out the balancing exercise required, must have the interests of the child as its paramount consideration. The balancing exercise is also set out by Lord Glennie in the criminal case of *WF Petitioner [2016] CSOH 27*. The same balancing exercise is required to be carried out in relation to requests under the Data Protection Act.

In relation to the reference to the Scottish Law Commission Report, we are of the view that this report has been overtaken, to a large extent at least, by the European Convention on Human Rights.

A Change to Practice and Procedure?

We are of the view that the practice and procedure outlined above generally works well, and that there is no need for any changes to practice and procedure in this area.