



Ministry of Justice

**FAMILY PROCEDURE RULE COMMITTEE
In the Conference Suite, 2nd Floor Mezzanine,
Queen's Building, Royal Courts of Justice
At 10.30 a.m. on Monday 7 November 2016**

Members

Mrs Justice Pauffley	Acting Chair of the Family Procedure Rule Committee
Richard Burton	Justices' Clerk
Melanie Carew	Children and Family Court Advisory Support Service
District Judge Carr	District Judge (Magistrates' Court)
District Judge Darbyshire	District Judge (County Court)
Michael Horton	Barrister
Dylan Jones	Solicitor
Hannah Perry	Solicitor
Mrs Justice Theis	High Court Judge
William Tyler QC	Barrister
His Honour Judge Waller	Circuit Judge

ANNOUNCEMENTS AND APOLOGIES

- 1.1 The Chair welcomed all members to the meeting.
- 1.2 Apologies were received from Lord Justice McFarlane, Judge Raeside, Marie Brock and Jane Harris.

MINUTES OF THE LAST MEETING: 10 OCTOBER 2016

- 2.1 The minutes of the last meeting were circulated on 2 November 2016 and were approved as a correct and accurate record of that meeting.

MATTERS ARISING

- ***Family Procedure (Amendment No. 3) Rules 2016***

- 3.1 The Minister (Dr Phillip Lee) signed the Family Procedure (Amendment No. 3) Rules 2016 on 17 October 2016. The Rules have been laid in Parliament and will come into force on 14 November 2016.

3.2 Officials have undertaken a review of associated forms and leaflets and identified relevant amendments required to support the Rule amendments. The changes to these forms and leaflets will come into effect on the same date. There are a total of nine (9) forms and guidance notes to be amended. These will also be translated into Welsh.

- ***Service Of Protective Orders And Missed FGM Protection Order Consequential Provisions***

3.3 Members considered the draft statutory instrument in Paper 3.

3.4 MoJ Legal confirmed that the draft statutory instrument reflects decisions made by the Committee in the meetings in September and October 2016 in relation to protective orders in the form of draft Rules. It was noted that the draft statutory instrument also contains a new “missed consequential” linked to Female Genital Mutilation Protection Order changes, and the agreed amendment linked to the planned insertion of a statement of truth into the D8 divorce/ dissolution application form. MoJ Legal explained if members approve the contents of the draft Rules at this meeting, members will be invited to sign the statutory instrument which will include other Rule amendments in early 2017. Members approved the draft statutory instrument.

3.5 Michael Horton questioned what sanction, if any, would apply if a person served a protective order in non-compliance with the Rules; for example if a litigant in person served a non-molestation order on the respondent would this still amount to good service? Members agreed that it would not amount to good service, but the order might be enforceable notwithstanding the absence of proper service. Many orders provide that they take effect from the date the respondent is served or is otherwise made aware of the terms of the order. If an order was drafted in this way and was ‘served’ by an applicant acting in person personally on the respondent, a breach of the order would give rise to the offence under s 42A of the 1996 Act, and would also be enforceable by committal proceedings. MoJ Legal noted that HMCTS may need to consider the wording of orders as to when any protective order would take effect i.e. from the time the respondent was aware of the terms of the order or from the time the respondent was served with the order as the latter might allow a respondent to challenge on the technicality that he/she had not been properly served so the order did not take effect. HMCTS endorsed this and agreed to consider the wording of orders prior to implementation of the Rules. Richard Burton noted that the aim is to discourage litigants in person from serving protective orders so clear guidance would help with this.

Conclusion: Members approved the draft statutory instrument which is to come into effect in April 2017

Action: HMCTS to revise wording in orders where required to make clear that a protective order takes effect once the respondent is aware of its terms

DRAFT FPR PART 3A (CHILDREN AND VULNERABLE PERSONS: PARTICIPATION IN PROCEEDINGS AND GIVING EVIDENCE) AND DRAFT PRACTICE DIRECTION 3AA IN RELATION TO CHILDREN AND VULNERABLE WITNESSES

- 4.1** Members considered Paper 4 and annexes Papers 4a and 4b.
- 4.2** The Chair noted that revised Rules and a draft Practice Direction in relation to vulnerable witnesses which incorporates children as witnesses, had been prepared for the Committee's consideration. She further noted the proposal that, if the Minister, and Secretary of State, approve consultation of the revised drafts, the Committee will be asked to consider draft consultation documents out of Committee to avoid further delay in progressing the matter.
- 4.3** MoJ Policy endorsed this noting that the amendment to the draft Rules and Practice Direction reflects the Committee's decision following the October 2016 meeting and incorporates comments from the Children and Vulnerable Witnesses Working Group since that meeting. Early indications from analysts indicate that the costs can be met and work is being commenced with HMCTS to ensure there are adequate practical provisions in place to ensure there are measures to facilitate vulnerable persons (including children) giving evidence.
- 4.4** MoJ Legal explained that there were relatively few drafting amendments to the revised Rules and Vulnerable Witnesses Practice Direction following the October 2016 meeting. MoJ Legal explained the drafting changes made to the Rules and Practice Direction. MoJ Legal considered the necessity of including Rule 3A.12 but concluded that it was advisable to incorporate this Rule given the importance of the principle which led to the Committee seeking its inclusion. These changes were endorsed by the Committee.
- 4.5** Will Tyler noted that the revised Rules and Vulnerable Witnesses Practice Direction address the anomaly that would otherwise have occurred by excluding vulnerable non-party children from the protections afforded under these Rules and Practice Direction. He questioned whether the policy intention is now that these Rules and supporting Practice Direction should be the primary source of guidance in relation to children giving evidence in the proceedings. He considered if this was to be the case, there may be a need to include an additional paragraph to incorporate guidance in relation to Re W and the Family Justice Council Guidance, as these are also relevant to the issue of children giving evidence.

- 4.6** MoJ Legal noted that the Vulnerable Witnesses Practice Direction deals with the protections available after the court has made a decision that a child should give evidence in the proceedings and the Re W considerations and Family Justice Council Guidance has already been taken into account by the court. They further noted that the concerns over children giving evidence is where a lot of the resource concerns came from and if that was built into this Vulnerable Witnesses Practice Direction that may impact the progress. They considered that it was appropriate for the Children Practice Direction to address considerations in relation to Re W and the Family Justice Council Guidance in due course as courts often look at different Practice Directions and alternative sources for varying purposes.
- 4.7** Will Tyler re-iterated his concern that in deciding which protections should be afforded to children when they are giving evidence in proceedings, Re W considerations will need to be taken into account by the court and cannot be dis-applied. He remained concerned that a Practice Direction would be published without further guidance cross-referencing to Re W and Family Justice Council Guidance.
- 4.8** MoJ Legal raised concern that attempting to incorporate this guidance into the Vulnerable Witnesses Practice Direction might expand it considerably beyond the initially agreed remit of the proposed amendment. They noted that the Vulnerable Witness Practice Direction deals with the measures available after a decision has been made for children to give evidence with the earlier considerations being addressed by the court applying existing principles from Re W and the Family Justice Council Guidance, which in due course may be referred to in the Children Practice Direction.
- 4.9** District Judge Darbyshire noted that it is difficult to deal with cases where caveats are involved in the Practice Directions. He considered that it was better to proceed with the Vulnerable Witness Practice Direction as drafted rather than defer it further in the hope of incorporating additional provisions. He further noted that there is on-going work in relation to a Children Practice Direction which can aim to make better provision for children who are not a party to proceedings. This was endorsed by Melanie Carew who acknowledged the dilemma raised by Will Tyler but considered it better to proceed with the Vulnerable Witness Practice Direction as drafted even if this required an amendment in the future when the Children Practice Direction was later introduced.
- 4.10** The Chair noted the possibility that the Children Practice Direction could look very different to the Vulnerable Witnesses Practice Direction as the latter caters for the child as a witness whereas the former will be focused on a child's participation in the proceedings as opposed to their giving evidence. Judge Waller noted that when the Vulnerable Witnesses Practice Direction is referred to the presumption will be that

the child will be giving evidence in the proceedings therefore there is little purpose in then referring to what needs to be taken into account in deciding whether the child should be giving evidence. This was endorsed by Melanie Carew who noted that these Rules and the Vulnerable Witnesses Practice Direction relate to what should happen after a decision has been made for the child to give evidence not the process about whether the child should give evidence.

4.11 Will Tyler noted that in the initial Children Practice Direction (previously known as Practice Direction 3AA) paragraph 6.1 was an uncontentious paragraph that could be incorporated into the revised Vulnerable Witnesses Practice Direction. He considered it odd to exclude this paragraph as court users then have two Practice Directions with one setting out considerations for whether the child should give evidence and the other setting out the procedure when a child does give evidence. MoJ Legal acknowledge there is a potential gap in the drafting which will need to be re-considered and addressed when the Children Practice Direction has been finalised.

4.12 [REDACTED]

4.13 [REDACTED] He [Richard Burton] noted that if further provisions are added and further Ministerial decisions are made further splits may be required. Hannah Perry noted that Rule 3A.5 provides that the court must consider whether a witness’s evidence would be diminished by reason of vulnerability and that Rule 3A.7 sets out a list of factors which could amount to vulnerability. She therefore considered it helpful to include reference to the Re W guidance in the Vulnerable Witnesses Practice Direction as the Rules refer the courts to the criteria which interlinks the Re W criteria. This was endorsed by Mrs Justice Theis who noted that the Re W exercise of deciding whether a child should give evidence would need to include consideration of what support could be given to the child if he/she were to give evidence, so there is not a clear distinction between deciding whether the child should give evidence, and only after

that deciding what measures could be put in place to support the child giving evidence. She did not have an objection to incorporating the Re W paragraph into the revised Vulnerable Witnesses Practice Direction. This was further endorsed by the Chair who noted that a failure to do so may lead to courts missing out a stage in the decision-making process.

4.14 MoJ Legal noted the views of the Committee and agreed to undertake further work on the Vulnerable Witnesses Practice Direction with policy colleagues [REDACTED]

4.15 Judge Waller proposed the inclusion of the Re W paragraph could be included after paragraph 4.6 which would fit in with the general reference to techniques to be employed by the court. Judge Waller also raised the need for consistency in the language in the revised Rules when referring to participation directions. MoJ Legal acknowledged this point and agreed to reconsider the drafting.

4.16 MoJ Policy noted that the Secretary of State is interested in vulnerable witnesses and children generally and so in addition to the new Minister for family justice, Sir Oliver Heald QC, approving any consultation document, the Secretary of State will also be considering the documents. Once approval has been obtained from them both, consultation documents will be circulated to members out of Committee for comments.

4.17 The Chair raised a concern from the President of the Family Division over the latest public lines in relation to children and vulnerable witnesses. The President of the Family Division does not agree with these lines and raised concern about the involvement of Special Advisers into the activities of the Committee.

4.18 Dylan Jones questioned the procedure if the Committee proceeded to make the Rules and the Lord Chancellor or Minister did not allow them. Judge Waller noted the different procedure for Family Procedure Rules and Practice Directions. If Family Procedure Rules were made by the Committee and not allowed by the Minister then this would become a matter of public record. However, if the President of the Family Division made a Practice Direction which was not allowed by the Minister, then this is less likely to become a matter of public record. Will Tyler noted the procedure is set out in Section 79 of the Courts Act 2003 and in the event of the Minister disallowing Rules, written reasons must be provided for that decision.

- 4.19** MoJ Policy noted that they had attended many Family Procedure Rule Committee meetings over the years and hoped that the Committee and officials would be able to work together to avoid reaching such a situation. This was endorsed by the Deputy Director, MoJ Policy who noted that such a situation is not helpful to what the Committee is striving to achieve in relation to Children and Vulnerable Witnesses. In relation to the President of the Family Division's concerns over the public lines, she understood the difficulties and sensitivities over the involvement over Private Office and Special Advisers, however, it was routine for any statement from the Ministry had to be agreed with Ministers' offices and this meant that special advisers were involved in agreeing the wording. This is therefore not involvement in the work of the committee by Ministers' special advisers, just an explanation of how the public lines were created.
- 4.20** District Judge Carr noted that there is no definition of participate in either the Rules or the Practice Direction and questioned whether this was deliberate. He queried whether giving evidence is participation, given there is one draft Rule about "participation" and another draft Rule about "giving evidence", and if not then it seems odd to refer to something the court directs to facilitate the giving of evidence as being a "participation direction". MoJ Legal suggested that the answer may lie in amending the Rule about participation so that it expressly refers to "other than in relation to giving evidence", so that it is apparent that the Rules about "participation" and about "giving evidence" both relate to some form of participation, meaning the label "participation direction" then works in both contexts.
- 4.21** Mrs Justice Theis questioned the timetable in relation to the Children Practice Direction. MoJ Policy explained the methodology used to calculate the resource impact which underpins the Children Practice Direction. The next step proposed by officials is to work on a revised draft Children Practice Direction with Cafcass, CAFCASS Cymru and HMCTS. This draft will be based on the September draft of the Children Practice Direction.
- 4.22** Melanie Carew noted that she is happy to work with officials but that not everything previously suggested by Members would be in a revised draft presented at future meetings.
- 4.23** Hannah Perry raised concern that there may have been an element of double counting in the analysis for example in interviewing directly affected children and the subject child where they would both be residing in the same premises and in children meeting judges. This was endorsed by the Chair. Melanie Carew responded that the number of children visiting judges in private law cases is very small which

was confirmed by MoJ Policy. Melanie Carew noted the concern is in private law cases where children want to see judges outside the hearing time which significantly increases costs.

4.24 The lawyer for CAFCASS Cymru and Welsh Government endorsed Melanie Carew's comments on behalf of CAFCASS Cymru. He further confirmed his willingness to work with officials in preparing a revised Children Practice Direction.

4.25 The Committee endorsed the proposed way forward acknowledging the timescales for this are unknown at this meeting.

Conclusion: Drafting amendments to the revised Rules and Vulnerable Witnesses Practice Direction were endorsed by the Committee

Actions:

- 1) Officials to consider inclusion of a cross-reference to Re W and Family Justice Council Guidance in the Vulnerable Witnesses Practice Direction, subject to policy considerations**
- 2) Officials to meet with Cafcass, CAFCASS Cymru and HMCTS to prepare revised Children Practice Direction**

AMENDMENTS TO THE CONSTITUTION OF THE FAMILY PROCEDURE RULE COMMITTEE

5.1 Members considered Paper 5 and annex Paper 5a.

5.2 The paper sets out the proposed amendments to the constitution of the Family Procedure Rule Committee and if the Committee endorses the proposed approach, the matter will not return to the Committee unless there is a delay in the proposed timetable.

5.3 MoJ Legal noted that members are asked to approve the general nature of the proposed approach as, because primary legislation is being amended, consultation will be needed with Parliamentary Counsel before a draft Order can be placed before the Lord Chief Justice. It is only once his approval to any wording has been obtained that a final Order will be submitted to the Secretary of State for signing. MoJ Legal further noted that officials have been informed by the Public Appointments Team that the proposed provision for a CAFCASS Cymru member is too broad as currently drafted and would require amendment to avoid the need to an open competition. Officials will work with CAFCASS Cymru to find a wording to incorporate reference to a nomination by the Welsh Government.

- 5.4** Dylan Jones questioned whether the Committee would be agreeable to having a member of the Welsh Judiciary observing the Committee meetings whilst the amendments were being made. The Chair endorsed this suggestion but noted there could be a concern that this would raise an expectation that the person attending would then become a member of the Committee. Judge Waller noted that Mr Justice Moor would have a potential candidate in mind to nominate and perhaps this judge could be invited to observe Committee meetings. The Secretary noted that perhaps an invitation could be extended to the open meeting. This was endorsed by the Committee.
- 5.5** Judge Waller queried the drafting of proposed Section 77 (2) (c) Courts Act 2003 and suggested Family Division Liaison Judge for Wales instead unless this was varied by Parliamentary Counsel. He further endorsed the drafting in proposed Section 77 (2) (d) in retaining the option for one judge of the Principal Registry of the Family Division if so appointed.
- 5.6** The Lawyer for CAFCASS Cymru and Welsh Government noted that he had read the documents and was grateful for the opportunity for CAFCASS Cymru being invited to join the Committee and was looking forward to working with the Committee in the future. He appreciated the drafting difficulties in relation to CAFCASS Cymru as they were not a statutory body and exercised specific functions on behalf of Welsh Ministers and were happy with whatever drafting was considered necessary by Parliamentary Counsel to facilitate this. He aimed to attend in person wherever possible and contribute based on the papers in the future.

Conclusion: The general draft proposed amendments were endorsed by the Committee and it was left to the discretion of officials to liaise with Parliamentary Counsel to devise the final wording for the Order

Actions: Secretary to invite the Judge to be nominated by the Family Division Liaison Judge for Wales to the Open Meeting of the Family Procedure Rule Committee

FINANCIAL REMEDIES WORKING GROUP UPDATE

- 6.1** Members considered Paper 6.
- 6.2** The Chair raised on behalf of the President of the Family Division his concern that work on 'separating' divorce and financial remedies is a top priority and, given the

ongoing work on digitisation of divorce, should proceed as soon as possible. The President of the Family Division would like a detailed paper on this topic to be prepared for the next meeting.

- 6.3** Judge Waller noted the views of the President of the Family Division and summarised the outstanding work of the Financial Remedies Working Party.
- 6.4** Judge Waller recommended to the Committee that Part 9 of the Family Procedure Rules 2010 should be revamped so that the Chapter 5 procedure applies to specific types of application (for example, for periodical payments only), rather than applying to specific statutory provisions (for example, Schedule 1 Children Act 1989). He suggested that the Financial Remedies Working Party can complete the drafting of the Rules for that in a relatively short time frame.
- 6.5** With regard to financial dispute resolutions, draft amendments have been prepared to give greater focus to the financial dispute resolution appointment. Judge Waller also proposed amendments so that an application under Part 3 Matrimonial and Family Proceedings Act 1984 can be made without notice. He proposed that the drafting on these points be undertaken in consultation with officials for the Committee's consideration for April implementation.
- 6.6** Judge Waller acknowledged that work on updating Form E is currently on-going. The aim is to develop a single form. He noted that there may be an issue with where this fits in with the Law Commissions proposals on Enforcement but currently views this as two separate projects. He also considered there to be a need to look at Form A, but considered this to be linked to separation of financial enforcement proceedings. There is further work needed on both these forms.
- 6.7** Judge Waller noted that, in view of the President of the Family Division's email to the Committee, priority ought to be given to de-linking divorce from financial remedy proceedings. He noted that he has been looking at the online divorce reform project and attempting to devise a sensible final page to deal with making a financial remedy application in a way that is accessible to litigants in person, which has been difficult and which would also be a good reason to proceed with de-linking. He noted that this is a procedure that can be dealt with simply in the Rules but the issue is the IT System (familyman) used by Her Majesty's Courts and Tribunals Service.
- 6.8** MoJ Policy noted that in law there is an inherent link between divorce proceedings and the timing of making related financial orders, clarified that what is proposed is

an operational “de-linking” of divorce and financial applications in terms of how they are handled by courts. Judge Waller confirmed that was the case.

6.9 HMCTS reported that a request has been made to have an enhancement to update the familyman system to enable de-linking, because it is not possible to implement a brand-new system because it is too cost-prohibitive when a new system may be implemented in the future. The request is aimed at operationally separating the ancillary relief proceedings from the divorce petitions so that hearing centres are able to utilise functions more easily. The quote is progressing and HMCTS will provide an update at the next meeting. Judge Waller noted that the procedural changes are dependent on the facility to procedurally de-link divorce from financial remedy and the Rule changes needed to support this process. HMCTS noted the enhancement is due in April 2017.

6.10 Judge Waller sought the Committee’s views on whether a consultation would be required on the various proposed amendments to rules around financial proceedings, and who should be consulted. The Committee agreed given the nature of the proposed changes there should be a short consultation targeted to key stakeholders.

Conclusion: Members agreed there should be a short targeted consultation on proposed rule changes in relation to financial remedies proceedings

Actions:

- 1) Judge Waller to work with the financial remedies Working Party and officials to prepare draft Rules and timelines for any consultation**
- 2) HMCTS to provide a paper on the progress for de-linking divorce and financial remedy proceedings**

ANY OTHER BUSINESS

- **RATIFICATION BY THE USA OF THE 2007 HAGUE MAINTENANCE CONVENTION**

7.1 Members considered paper 7.

7.2 Members noted that the United States of America has ratified the 2007 Hague Maintenance Convention which will come into force for them on 1 January 2017. Members further noted that they may be asked to consider matters out of Committee or at the next meeting as required.

DATE OF NEXT MEETING

Minutes – Family Procedure Rule Committee 7 November 2016

- 8.1** The next meeting is on 5 December 2016 at 10:30 am at the Royal Courts of Justice. This will be an open meeting of the Family Procedure Rule Committee. 12 people have requested to attend this meeting.

Secretary

November

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