



Ministry of Justice

FAMILY PROCEDURE RULE COMMITTEE – OPEN MEETING
In the Conference Suite, 2nd Floor Mezzanine,
Queen's Building, Royal Courts of Justice
At 10.30 a.m. on Monday 5 December 2016

Members

Mrs Justice Pauffley	Acting Chair of the Family Procedure Rule Committee
Marie Brock JP	Lay Magistrate
Melanie Carew	Children and Family Court Advisory Support Service
District Judge Carr	District Judge (Magistrates' Court)
District Judge Darbyshire	District Judge (County Court)
Jane Harris	Lay Member
Michael Horton	Barrister
Hannah Perry	Solicitor
Her Honour Judge Raeside	Circuit Judge
His Honour Judge Waller	Circuit Judge

Observers

Kirstie Gibson	LexisNexis
Amandeep Gill	Thomson Reuters
Lucy Hadley	Women's Aid
Robert Hill	Jordan Publishing Ltd
District Judge Howard Kemp	AHMDJ Family Sub Committee
Evelyn Reid	LexisNexis
Claire Sanders	LexisNexis
Nigel Shepherd	Resolution
Richard Strong	Oyez Professional Services

ANNOUNCEMENTS AND APOLOGIES

- 1.1** The Chair welcomed Members and guest observers to the Open Meeting of the Family Procedure Rule Committee and thanked observers for expressing an interest in the work of the Committee.
- 1.2** Apologies were received from Lord Justice McFarlane, Mrs Justice Theis, Will Tyler QC, Richard Burton and Dylan Jones.
- 1.3** Apologies were received from the following observers to the open meeting of the Committee: District Judge Foss, Philip Marshall QC, Helen Pustam and Sian Hawkins.

MINUTES OF THE LAST MEETING: 7 NOVEMBER 2016

- 2.1** The minutes of the meeting of 7 November 2016 were circulated on 2 November 2016.
- 2.2** Michael Horton raised one amendment to the minutes. Paragraph 3.5, the second sentence on the fourth line of that paragraph was amended to read *“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.”*
- 2.3** Subject to this amendment, the minutes were agreed as a correct and accurate record of the meeting.

MATTERS ARISING

- 3.1** There were no matters arising from the minutes in addition to the agenda items.

QUESTIONS TO THE COMMITTEE

- 4.1** The Chair invited those observers who had put questions to the Committee to read them out. They would then be answered by a member of the Committee.
- 4.2** **Q.1 What recommendations from the Financial Remedies Working Group report are the Committee likely to be taking forward and over what period of time? (Question by Nigel Shepherd, read out by Chair)**
- 4.3** Michael Horton responded noting that some recommendations from that report have been acted on by the Committee already. An example of this could be seen in the setting aside Rules which came into force 3 October 2016.
- 4.4** The Committee is working on a variety of recommendations from the Financial Remedies Working Group Report, including looking at the ongoing use of the shortened procedure

under Chapter 5 of Part 9 FPR, making applications under Part 3 of the Matrimonial and Family Proceedings Act 1984 without notice, and strengthening the place of the Financial Dispute Resolution appointment. The Family Procedure Rule Committee's Forms' Working Group will be working with MoJ officials to look at various financial remedy standard forms. The Committee hopes to make provision in Rules to separate the operational process of divorce proceedings from financial remedy proceedings and officials are considering the necessary IT changes to support this separation.

- 4.5** The timescales for the main amendments currently planned depends partly on the technical changes proposed by the Committee's Financial Remedies' Working Group to accommodate the de-linking of financial proceedings from matrimonial applications and partly upon the time required for consultation. The Committee will work further with officials to discuss these changes and endeavour to implement them by the end of 2017. Some of the work mentioned above may require a technical consultation and this will be undertaken as notified to interested parties in due course.
- 4.6** The Financial Remedies Working Party is also undertaking further work on Calderbank offers and costs but this requires further work to be undertaken and implementation will be further in the future.
- 4.7** Q.2 What was the Committee's reasoning for PD10A, paragraph 3.1 in relation to without notice non molestation orders and occupation orders with a power of arrest? (Question by District Judge Foss, read out by Chair)
- 4.8** Judge Raeside referred to Paragraph 3.1 of Practice Direction 10A. She noted that when the Committee was drafting the Family Procedure Rules in 2007, it was considered necessary to preserve the option of attaching a power of arrest if the court so wished. The minutes for February 2007 record discussions as to the practice as to whether orders made in private should then be pronounced in open court. At that time, the Committee decided to retain the provision but review it in light of the consultation on transparency and after the amendment Rules arising out of the 2004 Act came into force.
- 4.9** The rationale for incorporating the provision has its origin in a Practice Direction issued by then President, Stephen Brown, in 1998, [1998] 1 FLR 496, which was itself drawn from earlier directions on the same theme. The Rule Committee Secretariat could be emailed and provide a copy of this Practice Direction if required. The rationale is that where an order is made in private which may affect the liberty of the subject, the making of the order should be a matter of public record. Judge Raeside acknowledged there is a need for this paragraph to be reviewed to determine whether it should be retained; and any such review will be considered in light of other priority work before the Committee.
- 4.10** Q.3 "In September's "Modernising Our Justice System" paper, the Lord Chancellor, Lord Chief Justice and Senior President of Tribunals said that the "...Rules and divorce forms are long and complex and have changed little since the 1970s..." and then pledged "...to simplify the process and put as much as possible online..." Can the FPRC please estimate how long the process of simplification will take and if it becomes mandatory to conduct

divorce proceedings online, what is the earliest date online divorce could be introduced”?
(Question by Richard Strong, read out by Chair)

- 4.11** Judge Waller acknowledged that the Committee appreciates the anxiety amongst the profession about how things will work in the future. He explained that there is an overarching project about how the divorce process will work. A board has been set up to oversee this project which has the benefit of officials with expertise in the area. Work is on-going with the online divorce reform pilot. Those involved wish to ensure that there is robust testing before it is released to the wider public. Judge Waller confirmed that he has been working with officials to simplify the wording of the current D8 petition as part of the online divorce project to build uniformity between online and paper processes. In turn, officials have used this work to help simplify the wording in the paper format of the D8 petition. It is intended that the simplified paper D8 petition will be introduced from April 2017. Officials are working with the Rule Committee’s Forms Working Group to approve the new form and will then commence the implementation procedure for this date.
- 4.12** With respect to the online divorce project, it is intended that the first pilot stage of this will be implemented in early 2017 with the aim that initially those involved in the pilot (and those wanting to take part in it) will input their details online. That will generate a form online, which in turn can be printed and sent to court to be issued as currently. In due course it is intended that it will be possible to apply online, and then later that it will be possible to file an acknowledgement of service online, and so on. At this stage it is not possible to give full timescales for when HMCTS will be able to introduce a full online system as the project is still in the testing phase and dates are subject to change. HMCTS will keep court users updated through their various stakeholder engagement facilities to ensure interested parties have sufficient time to prepare for digitalisation of divorce. The President of the Family Division will be invited to make a series of pilot Practice Directions modifying the Family Procedure Rules 2010 and Practice Directions as necessary to support each stage of the roll-out of the online system.
- 4.13** Q.4 What assessment has the Family Procedure Rule Committee made of the suitability of Practice Direction 12J and the treatment of survivors of domestic abuse in the family courts? (Question by Lucy Hadley)
- 4.14** Marie Brock noted that since the implementation of Practice Direction 12J, the Committee has not undertaken a review of this Practice Direction. The Committee is aware that the President of the Family Division has commissioned a review into the effectiveness of this Practice Direction which is being undertaken by Mr Justice Cobb and Ms Justice Russell. Following the outcome of this review, the Committee will consider what action, if any, is required. Any action required will be prioritised in accordance with other work before the Committee.
- 4.15** Q.5 Have recent changes increased access to justice for poor children and their families? (Question by Evelyn Reid)

- 4.16** District Judge Carr acknowledged knowing Evelyn Reid through his work with Lexis Nexis. He noted that the purpose of the work of the Family Procedure Rule Committee and the Family Procedure Rules is to support the administration of justice. He stated that the Government currently has a number of initiatives in operation in relation to family justice. The Committee's role is to support those initiatives to make the justice system as simple and as accessible as possible to give everyone trying to access the courts a chance to do so.
- 4.17** He considered how the Committee is supporting new methods of work such as digital divorce and demonstrating its understanding of the need for justice to operate in a new environment. It has to be recognised that there are many more litigants in person and who need support. The effort has to be to assist them as much as possible. He acknowledged how issues in relation to vulnerable witnesses have been subjected to much debate. However, it should be noted that the Committee has spent much time trying to make the system as effective as possible for vulnerable witnesses. The aim is to ensure they have a fair hearing and to make them feel as comfortable as possible within the court process, attempting to learn lessons from the criminal sphere.
- 4.18** District Judge Carr noted that in the future the Committee will be looking at the role of children. Committee members are aware of the issues surrounding settlement conferences but will await the outcomes of the pilots before making decisions on how to support future initiatives with any Rules and / or Practice Directions. He re-iterated that the Committee is alive to the developments that are taking place within the family sphere and above all Members place their statutory duty first in ensuring that the Rules that are made are as clear and comprehensible as possible.
- 4.19** Q.6 Has new draft Part 3A of the Family Procedure Rules been finalised? If so, when will it be disseminated and implemented? If not, what are the estimated timelines for finalising and implementing this new Part of the FPR? (Question by Amandeep Gill)
- 4.20** The Chair explained that a decision has recently been made by the Committee to vary its approach. The draft new Part 3A of the Family Procedure Rules remains work in progress. A decision has been made to proceed with the Vulnerable Witnesses Practice Direction and the Children Practice Direction on separate timetables following consideration of the drafts by the previous Minister for Family Justice, Dr Lee.
- 4.21** The Vulnerable Witnesses Practice Direction provides for the use of practical protections for vulnerable adults and children when they are giving evidence in the family court. The Committee is intending to consult on this Practice Direction and there would be discussion later in the meeting about how to progress the Vulnerable Witnesses Practice Direction (See Section 5).
- 4.30** The Chair further explained that Sir Oliver Heald QC, the Minister for Family Justice has asked his officials to undertake further work with the Judiciary to explore ways in which the draft Children Practice Direction can be adapted so as to identify ways to strengthen further children and young people's involvement in proceedings about them. The Minister and the Committee are conscious of the need to get this right whilst also making sure the system continues to operate effectively at a time of increasing demand and pressure. The

Committee has asked its Children and Vulnerable Witnesses Working Group to work with officials to consider all the available options and timescales for the completion of the Children Practice Direction.

- 4.31** Q.7 What oversight arrangements do the Committee currently have in place to monitor the implementation of Practice Direction 12J in child contact proceedings in which there has been an allegation of domestic abuse? (Question by Lucy Hadley)
- 4.32** The Chair acknowledged that the Committee does not monitor the implementation and progress of Practice Directions after they have been made. She noted that all members of the judiciary should be aware of the need to follow Practice Directions which are designed to create consistent practice in family proceedings but are not intended to limit judicial discretion in any way. Therefore there may be variations in how members of the judiciary deal with cases. The Committee cannot comment on individual cases and how individual members of the judiciary interpret and rely on Practice Direction 12J within the course of proceedings. If parties are concerned about a judge's use of the Practice Direction to the extent that it gives rise to a valid ground of appeal that is an option open to parties to consider in an appropriate case. The Committee will consider if any action is required as a result of the review on the effectiveness of this Practice Direction, currently being undertaken by Mr Justice Cobb and Ms Justice Russell.

VULNERABLE WITNESSES: DRAFT FPR PART 3A AND DRAFT PRACTICE DIRECTION 3AA

- 5.1** The Chair noted that following the drafts approved by the Committee at the last meeting, officials have prepared a revised version of the Vulnerable Witnesses Practice Direction. Analytical work has since been completed and advice has been submitted to the Minister. Officials are awaiting a decision from him on the question of consultation. They hope to receive a response from the Minister by 09 December 2016 at the latest. In the event the Minister and Secretary of State approve consultation of the Practice Direction officials would plan to send the draft consultation documents to Committee members out of Committee by the end of the week commencing 12 December 2016. Officials anticipate any consultation will be launched in the New Year (2017) and intend to send out a detailed timetable to Committee Members with the draft consultation documents once notification of the Minister's decision has been received.
- 5.2** MoJ Policy updated members that a Ministerial decision has now been received authorising a consultation on the Vulnerable Witnesses Practice Direction. Members will receive draft consultation documents on an earlier timetable than initially anticipated in view of an earlier decision being provided by the Minister.
- 5.3** Judge Raeside questioned whether the Rules will also be provided in any consultation. MoJ Legal confirmed that although the draft Rules will be provided with any consultation document, they will not be the focus of the consultation as the draft Rules have already been consulted on but will be provided to assist with context. The consultation questions will focus on the draft Practice Direction.

Action: *Draft consultation papers to be sent to Committee members for consideration out of Committee*

ONLINE DIVORCE REFORMS

- 6.1** The Chair updated members on the progress of online divorce reforms. A draft of the pilot Practice Direction was submitted to the President of the Family Division to consider, inviting any comments from him by 30 November 2016. Officials submitted a final pilot Practice Direction to the President of the Family Division for signing on Thursday 1 December 2016 which he has signed. This is to be considered by the Minister in the week commencing the 12 December 2016.
- 6.2** Judge Waller added that the work of this project is being overseen by the Project Board which last met in November 2016 and will be meeting again in January 2017. Michael Horton noted that this process involves gathering the online data for the creation of the initial D8 application form.

DE-LINKING DIVORCE AND FINANCIAL REMEDY PROCEEDINGS

- 7.1** The Chair noted how the paper by HMCTS detailed the operational changes needed to ensure that divorce / dissolution proceedings can be dealt with in one court location (a Divorce Centre), with associated financial remedy proceedings being dealt with in another court location (e.g. an applicant's local court).
- 7.2** The administrative de-linking proposed by HMCTS would not be contingent on amending Rule 9.4 Family Procedure Rules 2010 as it is an operational change which could be accomplished without Rule changes. Subject to costings, the administrative change could be made even if a financial application can still be made in a divorce/ dissolution application.
- 7.3** The effect of the proposed rule change to Rule 9.4 by the Committee's Financial Proceedings Working Party would mean that it is no longer possible to make a financial remedy application in the divorce/ dissolution application.
- 7.4** If the Committee nonetheless wished to amend Rule 9.4 Family Procedure Rules 2010 so that a financial application cannot be made in the divorce/dissolution application, then officials in MoJ and HMCTS would request time to consider the implications of this further. Officials would also like to be sure there would be no adverse implications in jurisdiction race terms.
- 7.5** The Chair indicated that the President of the Family Division is concerned about the contents of the paper and intends to meet officials in January 2017 to discuss the way forward.
- 7.6** HMCTS sought the Committee's views on its position. HMCTS accepted that a link is always necessary between the divorce and financial remedy proceedings because the two types of proceedings are linked in law. HMCTS officials explained they are willing to explore the

recommendations of the Financial Proceedings Working Party but emphasised the difference between having separate locations for divorce files and financial proceedings files and removing the ability to apply in the divorce petition for financial provision. Both ideas are distinct recommendations; and HMCTS suggests that implementation of either requires an effective discussion and exploration with policy officials as well as the Financial Proceedings Working Group to establish the most appropriate way forward.

- 7.7** Judge Waller noted that from his experience with the online divorce project, trying to devise in a question and answer format, a series of questions asking users to explain that an applicant can make a financial application within their divorce petition, in plain English, is extremely difficult. It is a complex concept for the ordinary user to understand.
- 7.8** The working party has considered ways in which this can be dealt with. The proposed solution removes the ability to apply for financial provision in the divorce petition, and then provides for “protective applications”. The protective application will need to be designed to enable a party to make an application but then not proceed with it immediately, so as to protect his (or her) position when the divorce is finalised. However Judge Waller accepted there is more work to do which will be affected by what is possible within the capabilities of the Familyman system; and the implications of the proposals may need to be further considered. Judge Waller considered administrative de-linking to be a start but it is not the aim. In his view, the goal should be to remove the need to make an application for financial remedy proceedings within the petition but to make a separate application which is linked to the divorce. He considered that the way forward is to look at how the administrative de-linking can happen and then build on that in discussion with the President of the Family Division.
- 7.9** HMCTS noted that if two separate case numbers are created on Familyman in respect of the same parties, the link between the cases is lost which creates extra work for HMCTS staff. The proposed solution however, enables customers to have their divorce heard in one place and the financial remedy proceedings in another.
- 7.10** Judge Raeside confirmed the need for divorce and financial remedy proceedings to be connected. Judge Waller confirmed that the onus is on the applicant to provide the court with an update on the progress of the financial remedy application. District Judge Darbyshire noted that there is a link to when the decree nisi is issued by the court. Once the dissolution of the marriage is finalised, the financial remedy application becomes a stand-alone proceeding.
- 7.11** Judge Raeside noted the importance of the IT systems being able to link to each other so that in the event of the divorce proceedings being dismissed, withdrawn or concluded the financial remedy proceedings can still be located. HMCTS noted that their proposed solution enables this to happen as it does not create two separate case numbers, but offered to work with the Committee’s Financial Proceedings Working Party and policy officials to discuss a workable solution and agree a way forward.
- 7.12** Judge Waller noted that in the event of a decision to proceed with complete separation between divorce and financial remedy applications, consultation will be required. He

further considered that there would need to be public re-education as people would have to know what to do to protect their rights.

Action: *Officials to meet with Financial Proceedings Working Party in January 2017 to discuss the options and way forward*

FINANCIAL REMEDIES WORKING GROUP UPDATE

- 8.1** Judge Waller noted that the paper presented to the November 2016 meeting provided an update of the changes required. Judge Waller talked members through Paper 8 and explained the attached draft Rules.
- 8.2** Judge Waller explained that the proposal is to amend Rule 9.15 of the Family Procedure Rules 2010 to strengthen the Financial Dispute Resolution Appointment process. The proposed amendment provides for a positive obligation on courts to list cases for a Financial Dispute Resolution Appointment unless there is a positive reason not to do so.
- 8.3** It is also proposed to amend the types of cases to which the Chapter 5, Part 9 – shortened procedure – should apply. A further included change is a proposed new Rule 9.20. This would set out what the court must do under the shortened procedure to try to resolve the application at the first hearing. The reason for this proposed amendment is because the Rules in Chapter 5 of Part 9 are short and are silent on this issue.

As regards applications under Part 3 Matrimonial and Family Proceedings Act 1984, it is proposed that the current provisions in Part 8 be amended (to reflect current practice) so that an application for leave should be made without notice, but with discretion for the court to order notice to be given to the respondent in appropriate circumstances.

- 8.4** Judge Raeside endorsed the proposed changes. She questioned how the proposed figure of £25,000 for the shortened procedure was arrived at and how many potential cases that might cover? DJ Darbyshire noted that this figure was chosen because it is the fast track limit in civil cases and was used as a comparative figure. Judge Raeside further questioned whether this was the appropriate figure because it was, for example, not representative of Surrey. In that area it would only cover a small number of cases. Judge Waller noted that the Financial Proceedings Working Party was of the view that in setting the figure the consensus was that cases involving larger sums of money required greater case management, which was why this figure was agreed upon.
- 8.5** Judge Raeside further noted the provisions related to lump sums and observed that some parties to proceedings may have debts and asked how this may affect the proceedings. District Judge Darbyshire noted that in such situations, the case may not be suitable for the shortened procedure as it is meant for simple and straightforward cases.
- 8.6** Hannah Perry questioned whether the draft amendments should include a provision for cases under the standard track to be moved to the shortened track and vice versa. Judge Waller observed there is no need for such provision as once a case has commenced on the standard track the court sets the timetable. If it transpires that it is less complex than

initially believed, the case will simply finish earlier than anticipated. Hannah Perry endorsed this, noting it is all about robust case management by the court.

- 8.7** Judge Waller observed that the Financial Proceedings Working Party intends to meet with officials in January 2017 and discuss the way forward. It is hoped that there will be a consultation paper on the proposed changes in due course. One of the matters to be consulted upon is the proposed £25,000 limit. Michael Horton noted that if the consultation is issued in February 2017, the draft Rules will not be implemented for April. The Committee agreed the Rules would not be implemented until October 2017 at the earliest.
- 8.8** Judge Waller thanked Michael Horton for drafting the proposed Rule amendments.

RATIFICATION BY THE USA OF THE 2007 HAGUE MAINTENANCE CONVENTION

- 9.1** Members read paper 9.
- 9.2** The Chair noted that officials have concluded that no amendments are required to the Family Procedure Rules 2010 and existing Practice Directions. On 30 November 2016 officials had discussions with USA officials; and it is agreed that there should be guidance issued by the President of the Family Division in due course. UK and US officials will work together to establish how the relevant Conventions will work in practice and draft guidance will be put before the President for consideration and approval.
- 9.3** District Judge Carr questioned what would happen to existing orders. The Secretary agreed to speak to the policy official and lawyer involved in the discussions and write to District Judge Carr with a response.

Action: *Secretary to write to Judge Carr with a response to the question of what happens to existing orders once the USA have ratified the 2007 Hague Maintenance Convention*

ANY OTHER BUSINESS

- 10.1** Michael Horton requested there to be an agenda item for 2017 meetings discussion about the period of time to be allowed for sending an answer to a petition where the petition is served overseas.
- 10.2** Judge Raeside noted that the President has issued draft guidance on without notice non-molestation orders. The Committee agreed that this would be forwarded to the Secretary for distribution to the Committee to invite responses from Committee members who wished to respond.

DATE OF NEXT MEETING

- 11.1** The next meeting will be on Monday 6 February 2017 at 10.30 a.m. at the Royal Courts of Justice

11.2 The Chair thanked members and observers for attending the meeting and wished everyone a Happy Christmas.

Secretary

December 2016

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