Ministry of Justice

FAMILY PROCEDURE RULE COMMITTEE

Conference suite, 2nd floor mezzanine,
Queen's Building, Royal Courts of Justice
Monday 12 June 2017, 10.30am

Present

Sir James Munby	President of the Family Division
Mrs Justice Pauffley	Acting Chair of the Family Procedure Rule Committee
Marie Brock JP	Lay Magistrate
Richard Burton	Justices' Clerk
Melanie Carew	Children and Family Court Advisory and 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
Mrs Justice Theis	High Court Judge
William Tyler QC	Barrister
His Honour Judge Waller	Circuit Judge

Announcements and apologies

1.1 Apologies were received from Lord Justice McFarlane, Her Honour Judge Raeside and Dylan Jones.

1.2 The Secretary to the Committee was on leave, and Mrs Justice Pauffley thanked the MoJ policy official taking her place.

Minutes of the last meeting, 8 May 2017

2.1 Mrs Justice Pauffley expressed the Committee's gratitude to District Judge Carr for agreeing the draft minutes so that the meeting on 8 May would be quorate. The minutes were approved with no amendments.

Matters arising

3.1 No matters arose, except that the Committee agreed to go through the draft Rule and Practice Direction on vulnerable witnesses and deal with redrafting and with comments from the consultation that were not discussed at the previous meeting.

3.2 Matters from May not being discussed at the meeting would be carried over to July.

Consideration of Practice Direction 3AA (vulnerable witnesses)

4.1 MoJ policy presented a paper raising discussion points concerning practicalities and resource implications in transcribing, clarification of the extension to parties who ask questions in chief or cross-examine, and participation other than by way of giving evidence.

Pre-recording and transcription

4.2 Draft paragraph 5.4 of the revised draft PD set out the duty of the court to consider the best way in which a person should give evidence, for example whether evidence should be pre-recorded and transcribed beforehand. Mrs Justice Theis noted the ability of the family court to piggyback on joint directions where a vulnerable witness had given evidence in a related criminal case.

4.3 Draft rule 3A.7(l) set out that the court must have particular regard to the costs of any available measure. To reflect both this duty and the resources available at a location, MoJ policy had suggested two amendments to paragraph 5.4 of the revised draft PD: qualifying consideration of transcription with the condition "if funds are available" and including a requirement to consider the logistical possibility of pre-recording.

4.4 District Judge Darbyshire noted that the court would have to consider logistics anyway and that consideration of transcription depended not only on funds but also on the priorities of the judge and the court service. Marie Brock JP felt the term "measures" covered all considerations, and MoJ legal explained that the amendment had been made, at the risk of duplication, to cover other matters in relation to which directions might be made (beyond "measures" as defined in the draft rules).

4.5 The President observed that HMCTS funding for transcription would always be available if evidence were given in court before a hearing, and that it would fall to the Legal Aid Agency if evidence were given at trial where public funding was in place. He suggested that the wording "if funds are available" would invite litigation. MoJ policy did not expect frequent recourse to pre-recording of evidence and transcribing of it.

4.6 Since children were within the remit of the PD, the President asked how this fitted with the Government's policy to extend pre-recording under section 28 of the Youth Justice and Criminal Evidence Act 1999. MoJ legal said that the PD reflected the current situation and would change with any new legislative provision, but noted that the Prisons and Courts Bill (which fell when the election was called) had not included provision extending section 28 to

family proceedings. MoJ legal confirmed that the PD applied to both video and tape recording.

4.7 District Judge Carr questioned whether MoJ could be sure of the likely level of take-up of pre-recording of evidence and transcription: he suggested that applications might currently be being turned down. Mrs Justice Pauffley noted that cases involving sexual abuse were the most obvious place for applications, and Marie Brock JP noted that pre-recording could become popular even though it was not the reality today. MoJ policy stated that pre-recording was there to meet the needs of the child, which should be the guiding factor rather than anything else.

4.8 The President said that special measures had effected, and would continue to effect, a "sea change" and that the proposition that the Practice Direction would simply result in "business as usual" was not founded in reality: people would take them up more and more, and rightly so. He observed that children in Hague abduction cases were increasingly asserting their right to give evidence and be heard. There was a general feeling among members that numbers would grow, though Melanie Carew had not yet seen a significant increase in the use of such evidence. District Judge Darbyshire said that the question was to what extent applications were being acceded to and that the PD would increase applications, and Melanie Carew noted that there was an increase in children meeting judges on the back of the proposed children PD. Jane Harris suggested that children would feel safer and better protected giving pre-recorded evidence and she agreed with District Judge Carr that it was a more attractive way to participate than a live link.

4.9 The President observed that pre-recording had been the direction of travel eighteen years ago with the passage of the 1999 Act, and that if it was good enough for the criminal court, it was good enough for the family court because of the family court's regard to the welfare of the child. He said that the family court was moving into a new world, which would cost money, and that the PD would be a waste of time if money was unavailable.

4.10 The President drew attention to Mr Justice Hayden's "very strong comments" about resourcing the prevention of abusive cross-examination in a judgment the previous month, [2017] EWHC 1195 (Fam). William Tyler QC suggested this was a matter for primary legislation or case law, noting that guidance simply needed to say how pre-recording could happen.

4.11 Members agreed that a recording was of little use without a transcript. The President said that if lack of funding was a given, guidance had to be local so that it could address local practicalities.

4.12 Mrs Justice Theis thought that draft rules 3A.7(k) and (l) – consideration of the availability and costs of measures – covered the matters that MoJ policy had raised regarding proposed amendments to draft paragraph 5.4 of the PD. William Tyler QC said that the court must consider the best measure and then flag it if it was not available or could not be funded, so that those who funded the court service became aware. MoJ legal noted that draft rule 3A.8(5) placed a duty on the court to set out the reasons that a measure determined to be necessary was not available.

4.13 Members agreed that draft new rule 3A.7(m) – consideration of any matters set out in the PD – covered the issue and that the amendments MoJ had proposed in new paragraph 5.4 of the PD to make the issue explicit would therefore not be needed.

Participation other than by way of giving evidence

4.14 Following the previous meeting, MoJ legal had drafted new paragraphs 4.1 and 4.2 in the PD, to set out how the court would manage directions where a party's vulnerability would affect participation in proceedings. The President said that changing "the structure and timing of the court day" at new paragraph 4.2 would generate a storm of protest, and His Honour Judge Waller suggested that referring to the court "hearing" would clarify the intention. With this amendment agreed, the President was content with new paragraph 4.2. Members' experience matched his observation that children generally performed much better at giving evidence in the morning.

4.15 Mrs Justice Pauffley noted that, as discussed at previous meetings, most judges in the family court would step in to prevent cross-examination of a witness by a person accused of abusing that witness (the criminal court could not do so but could appoint an advocate). MoJ legal said a statutory bar on cross-examination of vulnerable witnesses had been proposed in the Prisons and Courts Bill, which fell before the election.

Draft Rule: points arising from consultation

4.16 Draft rule 3A.1(d)(ii) had been amended to remove the putting of questions from the function of an intermediary, following consideration by the Official Solicitor. Draft rule 3A.7(c) had been amended to cross-refer to the issue of abuse.

4.17 It was agreed to keep both rule 3A.7(m) and rule 3A.8(f), which had similar wording, to make clear that the PD should be considered at those stages.

Draft Practice Direction: points arising from consultation

4.18 The wording "vulnerable or intimidated" had been deleted from paragraph 1.2 to make language consistent. The President observed that "intimidated" was a term associated with provision in the criminal court and that the family court should align with criminal Rules and Practice Directions as far as possible. Mrs Justice Pauffley noted that "intimidated" was the word most commonly appearing in applications for special measures.

4.19 Members discussed the read-across from the criminal court and the fact that, in the family court, "vulnerable" included "intimidated" and went wider than it. As District Judge Carr pointed out, "intimidation" referred to something that had happened to the witness, and rule 3A.7 set out the particular considerations for establishing vulnerability.

4.20 The President concluded that "intimidated" should appear in both the Rule and the PD but that a definition was not necessary: how it was effected was a matter of draftsmanship, but "intimidated" had to be more upfront than the reference in rule 3A.7(h), and it had to be

made clear that it included perception (for example, when the presence of someone in the public gallery affected a party).

4.21 Members agreed that a new paragraph (a) should be built into rule 3A.7 referring to actual or perceived intimidation, with the current text of paragraph (h) being moved into part of the new paragraph (a).

4.22 MoJ legal agreed with the President to amend paragraph 1.2 of the PD to clarify that the intention behind the deletion was not to take non-party witnesses out of ambit.

4.23 Members agreed not to include "discrimination" in the checklist of vulnerability factors at paragraph 2.1(d) because this checklist was not exclusive. MoJ legal agreed with the President to change "concerns raised" in paragraph 2.1 (and elsewhere) to "concerns arising": the President noted that intimidating behaviour might be visible to the judge but not to others, who therefore could not raise a concern.

4.24 Members discussed whether to include coercive or controlling behaviour in the checklist at paragraph 2.1(a). The President noted that Southall Black Sisters had raised the issue of stranded spouses in relation to PD12J (domestic abuse relating to child arrangements), and meanings of terms used in both Practice Directions would need to marry up.

4.25 On the ability of a party to "attend the hearing without significant distress" at paragraph 3.1(d), His Honour Judge Waller was concerned that most vulnerable witnesses were in significant distress: judges had to manage that. MoJ legal advised that the Prisons and Courts Bill had set out that significant distress meant distress that would be heightened by the lack of a measure. District Judge Carr said that "significant" was a good word because it meant of such a degree that the court had to take note of it.

4.26 The President noted that there was provision for criminal and family judges to sit together and said that vulnerable witnesses should be heard at the earliest practical opportunity.

4.27 Members considered suggestions raised in consultation from the Association of District Judges, the Family Justice Council, the Family Justice Young People's Board, Legal Action for Women, the Magistrates Association, Resolution and the Society of Professional McKenzie Friends.

4.28 Members agreed that the reference to Family Justice Council guidance in new paragraph 5.1 was appropriately broad and could include future guidance.

4.29 Resolution had suggested explicit inclusion of Achieving Best Evidence in the checklist of the court's considerations at new paragraph 5.6. The President said it should be referred to, and William Tyler QC noted that a video-recorded interview was not evidence until it was before the court. The President agreed with MoJ legal that a separate paragraph would best deal with Resolution's suggestion, by referring to interviews that had been given but not used in evidence in previous criminal or family proceedings.

4.30 The Magistrates Association had suggested explicit reference to interpreters and intermediaries at new paragraph 5.3. Marie Brock JP felt that this would give litigants in person, who might not know of their availability, the opportunity to challenge. It was agreed

that consideration of participation directions at new paragraph 5.5 covered the issue and that there was therefore no need to amend.

4.31 Members agreed with the working group's recommendation that it was not necessary to incorporate reference to directions ordering professional McKenzie friends to put questions in cross-examination.

Revision to Practice Direction 12D (wardship)

5.1 The draft revision to PD12D corrected a point of law, following the President's judgment handed down on 4 May, [2017] EWHC 1022 (Fam) [pdf file]. The draft revision set out that wards of court should not have additional privileges and protection over other children when police and other statutory agencies were carrying out their statutory powers of investigation or enforcement, including in radicalisation cases. These agencies would not, then, be required to seek leave of the court before interviewing a child who was a ward of court.

5.2 Mrs Justice Pauffley reported that the President and the wardship working group had accepted the revision, including changes MoJ had suggested, and she said the Committee was very grateful to the group for its rapid response. All members were content.

5.3 Members also accepted an unrelated amendment to PD5A (court documents) relating to the discontinuation of Form D8A (statement of arrangements for children).

5.4 The President insisted that correction of PD12D was urgent because it was wrong in law, because it could interfere with the operational requirements of the security services, and because recent events had made the matter especially pressing. MoJ policy and legal explained the steps that officials were continuing to take to accommodate his request for the amendments to come into force on a given date and without delay.

5.5 Other Government priorities following the election, along with the fact that junior Ministerial appointments and portfolios had not been confirmed, meant that timing was uncertain. The President accepted that officials were doing all they could, but he would do everything in his power to expedite the PD's coming into force should a delay arise.

5.6 [Update: following the meeting, the new Lord Chancellor approved the amendments, which came into force on 16 June. In an announcement on the judicial website, the President set out the reasons for the revision and acknowledged the assistance of both the Rule Committee and officials.]

17th View from the President's Chambers

6.1 The President's View on divorce and money [pdf file] of 15 May had been tabled for members' initial thoughts, along with a forthcoming article on Financial Remedies Courts by His Honour Judge O'Dwyer, His Honour Judge Hess and Joanna Miles: the article would be

published in the June issue of *Family Law*. Proposals for Financial Remedies Units might entail Rule changes.

6.2 District Judge Darbyshire probed the thinking behind how the proposed distribution of courts would meet litigants' needs. The President noted that, for divorce proceedings, having a Designated Family Court as a hub with additional hearing centres worked well, and similarly in the Court of Protection. If a judge had to travel from the hub to accommodate litigants, he said, so be it. There was a consensus that the family court benefited from judges who understood local variation in house prices.

6.3 District Judge Carr observed that a separate "financial" bench made sense: a consistent team would have a fully trained and conversant judiciary. District Judge Darbyshire suggested that training be looked at, which Mrs Justice Pauffley noted currently consisted of one module at the DDJ induction course.

6.4 The President said that it would be helpful to identify at the July meeting what amendments to rules and Practice Directions, if any, would be required to enable regional Financial Remedies Courts to be set up. This did not need to extend to proceedings for enforcement of financial orders, which was a lower priority at this stage.

6.5 The article had suggested revision of fees to reflect procedural delinking, since financial remedies were considered part of the same proceedings and therefore attracted a lower fee than the divorce application itself. The President argued that the arithmetic was relatively straightforward, and MoJ policy agreed that officials would consider this issue separately and in light of the Government's overarching fees policy.

6.6 District Judge Carr asked whether amendments on the Trusts of Lands and Appointment of Trustees Act 1996 (TOLATA) could go into any reintroduced Prisons and Courts Bill. The President had noted in his View that Lord Justice Briggs, in his report on civil justice reform, had proposed amendments to allow the family court to hear TOLATA cases, but the Government had rejected them.

6.7 There was general agreement from members that MoJ policy should put proposals to include such amendments in any forthcoming Bill to the Bill team, though Michael Horton observed that proceedings under TOLATA and Schedule 1 to the Children Act 1989 were, outside London, listed together to enable joint case management and this worked fine. MoJ commented that the Bill's being reintroduced in the new Parliamentary session might depend on the content remaining as it had stood in the previous session.

6.8 The President had not invited the Financial Remedies Working Group to discuss his View, but he would be open to their doing so. His Honour Judge Waller suggested the working group might wish to consider TOLATA amendments.

6.9 Michael Horton noted that the issues the court needs to consider in TOLATA claims were very different from those to be considered in a financial remedy claim, such that he was not sure that a single form could be created for use for TOLATA and all financial remedy claims. The President suggested that it would not be a superhuman task to amalgamate Form A and the TOLATA form, and he observed that Lord Justice Ormrod had railed against requirements for litigants to deal with multiple different papers.

Any other business

7.1 The timescale for scoping procedural delinking had been moved back: MoJ policy intended to table a paper for consideration at the July meeting.

7.2 The President said that he would have a tweaked draft of PD12J on 4 July, noting that even one as assiduous as Mr Justice Cobb took leave. William Tyler QC said that the Family Law Bar Association were taking a keen interest in the PD.

7.3 William Tyler QC also noted paragraph 48 of the judgment concerning fairness in adoption that Mr Justice Charles handed down on 8 May, [2017] EWHC 1041 Admin:

> "It seems to me that it would be sensible for those responsible for issuing guidance concerning the adoption process and for the Family Court (and its Rules Committee) to consider:
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> "i) what information should be given to parties to the care proceedings and others involved in the adoption process about the stages of the adoption process and the ways in which it can be challenged. The approach taken by the Upper Tribunal (see Rule 40 of the Tribunal Procedure (Upper Tribunal) Rules 2008) may be of interest and it is a confirmation of the point that the communication of relevant information on how individuals may challenge decisions is an ingredient of a fair process, and
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> "ii) more generally what guidance should be given on *Re F* and what fairness requires in the context of a decision to place for adoption."

7.4 Hannah Perry requested an update on the children PD at the July meeting. MoJ policy noted that officials were prioritising work on the vulnerable witnesses PD but that MoJ analysts would cost the draft children rules and Practice Direction so that they could put advice to Ministers and then inform the Committee.

7.5 MoJ legal noted that officials would circulate for signature out of Committee a short amending SI, to insert a statement of truth into the divorce application and to make the Financial Proceedings Working Party's "tranche 1" amendments, with the intention that it would come into force on 7 August (date to be finalised).

Date of next meeting

8.1 The next meeting would take place on Monday 10 July at 10.30am in the Royal Courts of Justice.

MoJ Policy
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June 2017
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