Ministry of JUSTICE

**FAMILY PROCEDURE RULE COMMITTEE**

**Conference Suite, 2nd Floor Mezzanine, Queen's Building, Royal Courts of Justice**

**MONDAY 9 OCTOBER 2017**

**List of Attendees**

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| **Mr Justice Baker** | Acting Chair of the Family Procedure Rule Committee |
| **Marie Brock JP** | Lay Magistrate |
| **Richard Burton** | Justices' Clerk |
| **Melanie Carew** | Children and Family Court Advisory Support Service |
| **District Judge Carr** | District Judge (Magistrates' Court) |
| **District Judge Godwin** | District Judge in Wales |
| **Jane Harris** | Lay Member |
| **District Judge Hickman** | District Judge (County Court) |
| **Michael Horton** | Barrister |
| **Dylan Jones** | Solicitor |
| **Hannah Perry** | Solicitor |
| **William Tyler QC** | Barrister |

**ANNOUNCEMENTS AND APOLOGIES**

**1.1** District Judge Carr welcomed Mr Justice Baker to the Committee on behalf of all members and hoped he would enjoy being Acting Chair of the Family Procedure Rule Committee and looked forward to working with him in the future.

**1.2** Mr Justice Baker introduced himself to the Committee. He is the Family Division Liaison Judge for the Western Circuit. He is looking forward to working with all members of the Family Procedure Rule Committee and working through the issued faced by the Committee.

**1.3** The Chair welcomed District Judge Suh, District Judge Hickman and District Judge Godwin who had all been recently appointed to the Family Procedure Rule Committee.

**1.4** Apologies were received from Lord Justice McFarlane, Mrs Justice Theis, Judge Raeside, Judge Waller and District Judge Suh.

**MINUTES OF THE LAST MEETING: 12 JULY 2017**

**2.1** The minutes of the last meeting were circulated on 5 October 2017. District Judge Carr raised two amendments to the minutes.

**2.2** In paragraph 5.19 the third sentence has been amended to now read "*He noted that in criminal proceedings persons under the age of 18 were automatically granted special measures, and particular provision is made for a complainant in respect of a sexual offence or an offence under Section 1 or 2 of the Modern Slavery Act 2015.*"

**2.3** In paragraph 9.28, the second sentence has been amended to now read "*However, he liked the wording by Mr Justice Cobb as it incorporated what the court should do where there is a risk of harm to the other parent with whom the child is living.*"

**2.4** Subject to these amendments, the minutes were approved as a correct and accurate record of the meeting.

**MATTERS ARISING**

***Vulnerable Witnesses Rules and Practice Direction***

**3.1** MoJ Policy informed members that final drafts had been prepared of the Vulnerable Witnesses Rules and Practice Direction taking account of the comments of Committee members. The Rules will be made by a Statutory Instrument and the timetable therefore must factor in the requirements of parliamentary procedure. If all goes to plan, the Rules and Practice Direction will come into force on 27 November 2017.

**3.2** Richard Burton questioned what training will be available to the judiciary, including lay magistrates. MoJ Policy noted that the Judicial College has prepared a training module on the Vulnerable Witnesses Rules and Practice Direction which is to be delivered to the judiciary including lay magistrates. Marie Brock noted the importance of training for lay magistrates but considered the training used by magistrates who also sit in the criminal jurisdiction will be transferrable to some extent to the family jurisdiction.

**3.3** Will Tyler asked whether the Judicial College offers on-line training as it could take some time for face-to-face training to be delivered to all members of the judiciary. District Judge Godwin confirmed that the Judicial College does have the facility to deliver online training. He noted that they also deliver an e-letter for family judiciary which is produced by family

course directors. He questioned whether this could be used to disseminate information to the judiciary. MoJ Policy offered to find out from the Judicial College, whose responsibility it is to develop training for judges, what plans are in place.

***Availability of special measures within family courts***

**3.4** MoJ Policy are working closely with HMCTS colleagues on new training for family court staff on vulnerable court users, liaising with the Judicial College where appropriate. The training focuses on the practicalities of giving effect to measures ordered by the court and will be mandatory for all family court staff. Each family court is also being asked to develop a local protocol setting out the operational procedures for dealing with vulnerable court users. The protocol will cover measures available outside the courtroom, such as separate waiting areas, taking account of building configuration and facilities at each court.

**3.5** District Judge Godwin asked who will be producing the local court protocols. MoJ Policy explained that the onus will be on local HMCTS managers, though they will be encouraged to involve local judiciary. Judge Godwin suggested that Designated Family Judges ought to be involved in devising protocols and for co-ordinating the approach across the family courts in their areas. The Chair asked whether a communication to this effect from the Committee to all Designated Family Judges would be helpful and MoJ Policy agreed that it would.

**Action: MoJ Policy to prepare a communication to all Designated Family Judges.**

**3.6** MoJ Policy updated members that since the last meeting in July 2017, the President and the Minister of State had both approved revised Practice Direction 12J and it had come into force on 2 October 2017.

**CHILDREN PRACTICE DIRECTION**

**4.1** Paper 4 was considered by the Committee.

**4.2** MoJ Policy reminded members that the decision was taken to separate the timetable for implementation of the Vulnerable Witnesses Rules and Practice Direction and the Children Rules and Practice Direction. This was because the previous draft of the Children Rules and

Practice Direction were assessed by MoJ analysts as having significant resource implications at a time of high demand and further work was needed to consider how in that context change could be achieved. Now that work on vulnerable witnesses has concluded, MoJ Policy are moving forward with the Children Rules and Practice Direction. MoJ Policy have worked further with Cafcass, Cafcass Cymru and HMCTS to review assumptions and look at the operational implications for each element of any adjusted Children Rules and Practice Direction.

**4.3** Revised drafts based on the proposed assumptions have not been prepared as members' views are sought first on those assumptions. The key proposed changes involve re-focusing the scope of the Rules and Practice Direction so that they apply only to children who are the subject of proceedings under Parts 12 and 14 of the FPR 2010; and relying on parents in most such cases to inform children about the proceedings at the outset, and also the outcome of the proceedings, in recognition of the fact that Cafcass is often not involved at the conclusion of the case and may not know what decisions have been made and why. In terms of additional reports to ascertain the wishes and feelings of the child in cases where currently this is not done, MoJ policy asked whether it would in practice be feasible to focus on children aged six or over, recognising that there will need to be exceptions to this in appropriate cases. Additionally, that only cases which proceed past the First Hearing Dispute Resolution Appointment are contested and thus ascertaining wishes and feelings or deciding whether a child should meet the judge should focus on those cases. MoJ Policy acknowledged that these assumptions represented a re-working of what the Committee sought to achieve. However, members were asked to consider the desirably of achieving a degree of change that could be implemented now at a time of high demand and pressure on the system with the possibility for further reforms in the future as part of a wider reform programme.

**4.4** MoJ Policy noted that a revised version, even on these assumptions, will still have significant operational impacts on both Cafcass and CAFCASS Cymru. This is particularly the case in private law proceedings in respect of ascertaining the wishes and feelings of the child because the longstanding position is that this work is not carried out in every case and is only undertaken at the direction of the court. Section 7 welfare reports, and even more narrowly focused wishes and feelings reports, require significant professional time to prepare. Members' views were invited on other possible ways of ascertaining a child's

wishes and feelings without ordering Section 7 reports or wishes and feelings reports. Members' views were also sought on the proposed amended scope outlined in the paper.

**4.5** Hannah Perry questioned whether the revised assumptions have been used to reduce by half the anticipated cost of implementing this Practice Direction. MoJ Policy confirmed that the revised costs have been determined by excluding children under the age of six and reducing the number of cases where a professional is required to inform the child of the outcome of the proceedings, for example where there is suitable family member who could perform this role.

**4.6** District Judge Carr questioned the applicability of the assumption in relation to children involved in proceedings under Part 14 of the Family Procedure Rules 2010. He noted that it is unlikely that there will be many children over the age of six who are the subject of adoption applications. MoJ Policy noted that most adoptions will be in the public law context and conceded that it would be more helpful to focus on the proposed limitation of the scope to proceedings under Part 12 of the Family Procedure Rules 2010 and the assumption that the Children Rules and Practice Direction will only apply to children who are the subject of the proceedings. MoJ Policy further noted that whilst the operational impact has been halved by the revised assumptions and re-focus of scope, the operational impact remains significant and cannot be absorbed by Cafcass or CAFCASS Cymru without additional resources given the record levels of increased family court applications. Officials were seeking ideas from the Committee on how a child's wishes and feelings might be obtained in a different way which does not place increased pressure on Cafcass or CAFCASS Cymru whilst also managing the issue of whether children have been coerced by a parent into making statements about their future.

**4.7** Melanie Carew endorsed the revised assumptions. She noted that the limitation of the scope to only apply to children who are the subject of proceedings is because of the concern about resources to support obtaining the wishes and feelings of all affected children. Cafcass is also concerned about courts changing their approach, which would be the purpose of the Practice Direction, and which is highly likely to lead to more work for Cafcass. The Children and Vulnerable Witnesses Working Group have considered the issue and have been unable to find a viable alternative. In terms of who should give the court information about a child's wishes and feelings, suggestions of health visitors, teachers, wider family members have all been rejected by different groups and the end conclusion

always appears to be that the responsibility rests with Cafcass to provide this evidence to the court.

**4.8** Jane Harris questioned whether there is an estimated number of children that may be impacted by this Practice Direction. MoJ analysts noted that there are approximately 7,000 additional cases per annum that will be affected by the provisions of the Practice Direction.

**4.9** The Chair questioned why these children are not caught within existing provisions. Melanie Carew noted that a large number of children are not subject to Section 7 reports prepared by Cafcass. Section 7 reports are ordered in approximately 61% of cases. Of these a small percentage will be prepared by the Local Authority. As the original intention of the Children Rules and Practice Direction was to include all children in all applications, this causes difficulties for Cafcass particularly where the case does not proceed beyond the first hearing and Cafcass are not required to do any work with the family.

**4.10** MoJ Policy noted that even where a case does progress beyond the First Hearing Dispute Resolution Appointment, there are a significant number of cases where Cafcass are not asked to prepare a Section 7 report. The change envisaged by the draft Children Rules and Practice Direction is that Cafcass or CAFCASS Cymru will potentially be asked to explore the wishes and feelings of all children who are the subject of proceedings and inform all children of the outcome, which has a resource impact on these organisations. He further noted that there has been a long-standing agenda around the voice of the child as Cafcass have a Children and Young Person's Board which is keen to ensure that children and young people's voices are heard in proceedings pertaining to them. He reminded members that the proposed policy of Simon Hughes was that children aged ten or over should be able to see the judge if they wish to do so with such visits being facilitated by Cafcass. In contrast, the key issue under discussion now is a proposed requirement to ascertain the child's wishes and feelings in all cases.

**4.11** Hannah Perry noted that the Vulnerable Witnesses and Children Working Group published their report in March 2015 and this report made recommendations about the role of children in proceedings. District Judge Godwin questioned whether it was possible for the rule to apply unless disapplied on allocation by a judge or a legal adviser. Melanie Carew noted that under the current draft of the Practice Direction it is compulsory to obtain the ascertainable wishes and feelings of the child. This Practice Direction is an opportunity for the court to consider making a direction. She accepted that this will not apply to every case

but the inevitable impact will be that there will be directions in additional cases. The issue is largely about how to secure the participation of the child within the proceedings without additional pressures on Cafcass and CAFCASS Cymru.

**4.12** Marie Brock noted that where a case proceeds beyond the First Hearing Dispute Resolution Appointment the court will order a Section 7 report. She questioned the assumption of how a case could proceed from a First Hearing Dispute Resolution Appointment to a Dispute Resolution Appointment without a Section 7 report from either Cafcass or the Local Authority. MoJ analysts noted that 42.5% of cases proceed beyond the First Hearing Dispute Resolution Appointment. 31% of cases have a Section 7 report ordered. There are 11.5% of cases that proceed beyond the First Hearing Dispute Resolution Appointment where a Section 7 report is not ordered. This equates to about 5000 cases per annum which proceed to conclusion without a Section 7 report. District Judge Carr noted that the cases where a Section 7 report is not ordered are where the parties are intractable from their position or where the court has made previous orders and the new proceedings are quasi-enforcement in nature. Richard Burton noted that even with the implementation of the Practice Direction there will still be 11.5% of cases that proceed to conclusion without a Section 7 report.

**4.13** Marie Brock noted that a Section 7 report will be ordered unless there is a reason not to. District Judge Godwin noted that where such reports are ordered the request needs to specify what matters are to be addressed through the Section 7 report. He further noted that wishes and feelings are not obtained in every case where a Section 7 report is ordered; for example, where a fact-finding hearing is ordered it is not appropriate to ask Cafcass to discuss the case with the child until the facts have been found. He considered it essential that there is judicial discretion to decide whether it is appropriate to obtain the wishes and feelings of the child in a particular case. Marie Brock noted that a Section 7 report is usually ordered after a fact-finding hearing before the Dispute Resolution Appointment. MoJ analysts noted that this is consistent with the approach being taken through the revised assumptions.

**4.14** Melanie Carew noted that the assumptions have been made with the expectation that judicial behaviour will change when the Practice Direction is implemented. MoJ analysts noted that they have prepared high and low-end estimates to predict the scale of the

operational impact but even with the revised assumptions there remains a significant operational impact particularly affecting Cafcass and CAFCASS Cymru.

**4.15** Melanie Carew noted that there are examples of low-level contact disputes or disputes about schools where the court would not necessarily order a Section 7 report but the draft Children Rules and Practice Direction would state that the court should take account of the child's wishes and feelings even in these types of cases, which will have a consequential operational impact. She further noted that Cafcass' concern is that they will be asked to become involved in a lot more private law cases than they do currently, particularly as this also relates to informing the child about the outcome of the case.

**4.16** Hannah Perry noted that if a child is asked for their views about the issues in the proceedings then it is right that the child should be told the outcome of the proceedings. MoJ Policy noted that there is a difference between the principle (which is supported by the MoJ) and what can realistically be implemented at a time of huge operational demand. MoJ are seeking members' views on how to progress the draft new Children Rules and Practice Direction in a meaningful way that can be managed operationally without causing undue strain on a system already under significant pressure.

**4.17** Will Tyler noted that the Committee had been considering this question for the past two years. He did not consider it possible for the Committee to endorse a Practice Direction which was not compliant with Article 12 of the United Nations Convention on the Rights of the Child. District Judge Godwin questioned whether it is possible to introduce recitals into the standard form of order which specifies that the judge has considered whether it is appropriate to inform the child and how this should be done in consultation with Cafcass / CAFCASS Cymru and the parents. Where the parents agreed the outcome, he considered it appropriate for them to inform the child of the outcome of the proceedings. Marie Brock questioned how this would apply to cases where the parents are unable to agree an outcome. Melanie Carew noted that members of the judiciary had rejected the possibility of incorporating parents as an option for informing children about the outcome of proceedings.

**4.18** Richard Burton questioned what the next steps would be if the principles and assumptions in the paper were accepted by the Committee. MoJ Policy noted that advice will need to be submitted to Ministers on the operational and resource implication. In giving this advice, officials would ideally like to share a draft of the Children Rules and Practice Direction

which can be implemented within current available resources and with minimal operational impact. The difficulty in the current drafts is the wishes and feelings element, and officials would like to look at alternative ways of obtaining this evidence without relying on Cafcass or CAFCASS Cymru.

**4.19** Hannah Perry questioned whether officials have determined the operational impact by removing those cases where the Local Authority prepare a Section 7 report. MoJ Policy noted that these cases are small in number. Jane Harris noted that independent social workers can be asked to prepare these reports but there will be a financial impact. Marie Brock reminded members that the President of the Family Division is clear that this Practice Direction is not resource neutral and that the Committee should not omit principles because of unresolved operational impacts. MoJ Policy noted that these problems have been raised with the Committee since the provisions were first drafted.

**4.20** The Chair noted that there remain a substantial proportion of cases where a judge will decide that the presumption of a wishes and feelings report should be rebutted; for example, if there was to be a fact-finding.

**4.21** District Judge Carr thanked MoJ Policy for the paper which was helpful. He questioned whether it would be possible to provide more detailed figures. He also questioned whether there are new ways of working between the judiciary and Cafcass which can be implemented to enable a more collaborative approach to ordering Section 7 reports in cases. MoJ Policy agreed and noted that ministers are considering what, if any, future reforms could be implemented within the family justice system. It may well be that a new way of working may form part of any future reforms. MoJ Policy noted that that Committee might want to consider what aspects of the Practice Direction could reasonably be implemented now within current ways of working, leaving the potential for further, and greater, reforms in the future.

**4.22** District Judge Carr noted that the central point for the Committee is that there may be other ways to address the point but operationally it needs to be viable. He has worked with Cafcass in trying to focus the Section 7 report to what is required to resolve the issues in the case. He seeks input from Cafcass in this and has noted that there are occasions when it has led to a reduction in the work to be undertaken by Cafcass.

**4.23** Jane Harris questioned whether any analytical work has been done on whether wishes and feelings reports would reduce demand by courts for a Section 7 report. She noted that

when you have a good quality report on behalf of the child, the parents when presented with this evidence can reluctantly change their stance in the interests of the child. She was hopeful that this approach may reduce the need for Section 7 reports. MoJ analysts noted that the modelling was based on a 10% and 20% increase which is the anticipated change in judicial behaviour, taking into account that following the implementation of any Practice Direction judges might order more Section 7 reports.

**4.24** The Chair noted that the operational impact will depend on judicial behaviour. He questioned whether anyone has analysed judicial behaviour to see why Section 7 reports are ordered or not, in case that impacted on the assumptions. MoJ Policy noted that a potential way forward would be to pilot the provisions which would itself require resources. However, the problem of any pilot is that it aims to test the provisions so there is likely to be a bias towards using the new tools. This also would not assist in trying to ascertain the likely national impact. Therefore, whilst a pilot may confirm officials' concerns about the operational implications it will not necessarily progress the provisions of the Practice Direction. Marie Brock endorsed a pilot as it would help provide an analysis of cases where a Section 7 report was not ordered and the reasons for this.

**4.25** District Judge Godwin questioned whether the judiciary are specifying what is to be considered within a Section 7 report. He considered that there is a positive duty on the judge to state whether the child should be involved and to what extent. District Judge Carr noted that the safeguarding letter has recommendations from Cafcass about the way forward in the case. Cafcass may often recommend a Section 7 report but following dialogue between the judiciary and Cafcass it may be possible to restrict what a Section 7 report addresses, if one is needed at all. This was endorsed by the Chair who noted that a Section 7 report should never be ordered without the court specifying what the report should address. He questioned how many reports are ordered without this information. Melanie Carew was unable to give a figure but noted there are a number of cases that have been ordered without specifically stating what such reports should address.

**4.26** Will Tyler questioned whether the presumption should operate the other way in practice in that if a child is capable of forming their views there should be a duty on the court to seek their wishes and feelings unless there is a positive reason to not do so. This was endorsed by Jane Harris and Marie Brock who were concerned about the child raising concerns as to why they were not consulted on decisions affecting their future.

**4.27** Hannah Perry noted that in Bristol, there was a pilot in which children aged 11 or over could go to the local Cafcass officer with the agreement of both parents. The Cafcass officer would then attend the hearing an hour later and inform the court of the child's wishes and feelings. MoJ analysts questioned whether the child would be taken out of school for this purpose. Hannah Perry confirmed that the child would go to school late that day and a suitable family member would be asked to take the child to the Cafcass office and then to school while the parents attended the court hearing. She noted that whilst this still had a resource impact for Cafcass it appeared to be effective in practice. Melanie Carew noted that this is not happening currently as there would be more impact on Cafcass with attending and returning from court.

**4.28** District Judge Godwin noted that there is the additional problem in relation to sibling groups. Where there are multiple children in a family of different ages it is unrealistic to speak to older children and not expect them to speak to their young siblings about it especially when they all live in the same house.

**4.29** Marie Brock noted that the limitation on scope to children aged six or over appears to be sensible as long as the Practice Direction does not completely prohibit obtaining wishes and feelings of children younger than six where they are able to articulate their wishes and feelings. Melanie Carew accepted that there will be cases where children under the age of six can articulate their wishes and feelings which is why this age was proposed as a middle ground. Hannah Perry questioned whether the school or doctors would be able to assist in this but Jane Harris noted that this would be inappropriate as it would not be appropriate to disrupt the therapeutic relationship between the child and the professional.

**4.30** District Judge Godwin noted that the situation in Wales is difference and the Social Services and Well-being (Wales) Act 2014 places a greater onus on local authorities with a requirement to protect children from birth until death. He noted that parents can involve the Local Authority at any stage where there is a dispute and therefore CAFCASS Cymru need to be aware of the provisions to manage its impact in Wales. He further noted that the Welsh Government has adopted the United Nations Convention on the Rights of the Child whilst England has not and this is a further impact on Wales that needs to be taken into account. MoJ Policy noted that there had been discussions with colleagues in Cafcass and CAFCASS Cymru but the Practice Direction had not yet reached the stage where Welsh

Ministers need to be involved. Officials will continue to liaise with CAFCASS Cymru for them to identify the operational impact of the provisions in Wales.

**4.31** Will Tyler noted that there had been no consideration as to whether there was a more efficient way for Cafcass to undertake the work specified in the Practice Direction. The Chair noted that a pilot on judicial behaviour would assist with this. MoJ analysts noted that before any pilot can be implemented officials would need to consider what the pilot would achieve and how the pilot could be resourced. District Judge Carr considered that a pilot on judicial behaviour may be helpful but it is also necessary to know when Section 7 reports are commissioned and what the purposes of those reports are. Using this information, he considered that it may be possible to identify ways of minimising the operational impact on Cafcass. MoJ Policy noted that it would be necessary to consider what information could be obtained from any pilot. If a pilot suggests that the operational impact is lower than predicted this is helpful. However, this will depend on how the provisions are to be framed in the revised draft Children Rules and Practice Direction and how reliable the findings from the pilot are when applied on a national basis.

**4.32** District Judge Godwin asked if Welsh Ministers would be asked about how they see this proposal in relation to their obligations under the Social Services and Well-being (Wales) Act 2014. MoJ Policy noted that the issues are being considered in respect of the impact in both England and Wales and a different approach between the two jurisdictions should not be the starting point. The aim will be to try and find an approach that works in both jurisdictions which can be approved by the relevant Ministers at the same time. Whilst different approaches may be required in due course, the Committee is not yet at that stage.

**4.33** Marie Brock questioned what the next step will be. MoJ Policy noted that if the Committee accept the assumptions set out in the paper, officials will prepare advice for Ministers as the proposed Children Rules and Practice Direction are not cost neutral. Pending any Ministerial decision, the matter will return to the Committee. However, he re-iterated that it is not possible to put advice to Ministers until the operational implications have been resolved. Marie Brock questioned whether the Committee will need to start again on work on the Children Rules and Practice Direction. MoJ Policy confirmed that they are looking to adjust and modify the existing principles to try and find a version of the Rules and Practice Direction that can be implemented within existing resources. He considered there are

three options for the Committee: do nothing, implement a Practice Direction with some change, or continue to seek a radical change regardless of the operational impacts.

**4.34** Marie Brock questioned whether it would be helpful for the Committee to see the revised draft Rules and Practice Direction as they currently stand. MoJ Legal acknowledged that it has been some time since the Committee saw the drafts. However, the questions for the Committee now are around the scope of the Rules and Practice Direction: these might impact on matters such as the definition of "child" and on the description of the types of proceedings caught, but would not otherwise significantly change the content. Officials would like to avoid producing multiple drafts until clear conclusions are made by the Committee on the way forward.

**4.35** The Chair noted that the conclusion appears to be that there are no alternatives to obtaining the wishes and feelings of children within proceedings beyond Local Authorities, Cafcass and CAFCASS Cymru, However, he further noted that there is an opportunity for officials to undertake more focused work to identify when it is necessary to involve children and identifying cases where this information is, or is not, relevant to the final outcome of the proceedings.

**4.36** Will Tyler raised concern that this has been under consideration by the Committee for some time and questioned whether it would be appropriate to seek Ministerial views on the revised assumptions to see if the revisions would now be approved. MoJ Policy noted that it is highly unlikely that that ministerial advice would pass through internal clearance whilst there remain significant and unresolved operational impacts, at a time when family court proceedings are on the increase. Officials also consider it unhelpful to give such advice to Ministers without first exploring with the Committee other ways of mitigating the operational impact.

**4.37** Will Tyler considered that in order to proceed financial resources will be required. He did not consider a pilot to be purposeful as he could not see any way in which the impact can be reduced in a manner that is fair to all children.

**4.38** MoJ Policy emphasised that the issues was not the financial implications. The problem remains the operational impact on Cafcass and CAFCASS Cymru at a time of record demand on their services in the context of increasing volumes of cases. The purpose of the proposed changes to the scope of the draft Rules and Practice Direction is to try and create

change within the current ways of working. However, decisions will necessarily need to take into account the wider financial climate within which change is being sought.

**4.39** Jane Harris concluded that the assumptions in the revised paper are correct and she did not consider that the pilot would serve any useful purpose. District Judge Carr noted that the Committee needed to consider how to approach this Practice Direction in the future because unless Ministers were accommodated to some extent, it is likely that there will be no Practice Direction which is not desirable.

**4.40** MoJ officials will prepare a paper for the December meeting about the viability of a pilot, and how or whether it could properly identify the operational impact on Cafcass, or better gauge anticipated judicial behaviour adopting the assumptions within the paper before the Committee.

**Action: MoJ to prepare a policy paper for December meeting setting out how or whether a pilot or survey could be implemented, what the pilot or survey would seek to test and the process based on a presumption that the child's wishes and feelings should be obtained unless a judge specifies why this is not necessary and the reasons for not ordering any report.**

**FINANCIAL REMEDIES WORKING GROUP**

**5.1** Members considered Paper 5 and the consultation responses.

**5.2** MoJ Policy noted that ten responses had been received. On the proposal for full procedural de-linking of financial order applications from divorce applications, eight responses were broadly negative, one response commented on the drafting and the final response agreed in principle to the proposal but questioned its viability in practice. Members were reminded that this consultation was to look at the proposed amendments to Part 9 of the Family Procedure Rules 2010 in relation to the impact of procedural de-linking and the proposed financial fast track procedure. The consultation responses revealed practitioners had serious concerns about the operational impact which requires some further consideration around procedural de-linking. Members' views were invited on the consultation response and how this work should proceed.

**5.3** Michael Horton noted that the consultation responses were interesting. He reminded members that prior to consultation, there was some discussion about whether provision for a protective application is required to protect people's rights following procedural de-linking. He noted that the view in the responses suggests that this is unlikely to be popular or necessary. He considered it necessary for the financial proceedings working party to look at this issue again and to identify the rationale behind procedural de-linking. He noted the views of the President of the Family Division but considered it difficult for the Committee to consider this issue without a fuller understanding of the policy rationale behind this. He further noted that the response of practitioners indicates that there is a perception of a certain amount of linkage between divorce proceedings and financial remedy proceedings which cannot be separated.

**5.4** HMCTS considered the benefits of procedural de-linking to be a matter for the Committee. For HMCTS, the administrative de-linking is working well in practice. Whilst they would not oppose further changes if the Committee considered that to be appropriate, they would not actively seek further changes at this time. In their view, the only operational benefit to procedural de-linking would be to remove the question from the divorce petition about making a financial application, which is a question that can be quite difficult to explain to court users.

**5.5** The Chair noted that the President of the Family Division is supportive of procedural de-linking. Michael Horton noted that there are disadvantages because of the re-marriage trap. He considered that the responses clearly show that guidance on the consequences of not making a financial application before re-marriage is not sufficient. Marie Brock noted that a protective application would protect the applicant but not the respondent. Michael Horton noted that would reflect the current position. The respondent can only make a financial remedies application if they issue a Form A application. He further considered that there is a gender issue as most divorce petitions are issued by women who are more likely to be prejudiced by the removal of the safety net of being able to apply for financial remedies in the divorce petition.

**5.6** The Chair questioned whether there could be a system that would give equal protection to the petitioner and the respondent. Michael Horton noted it may be possible to have another application that can be made at the same time as divorce petition. However, it would have an impact on HMCTS as it would require additional resources to deal with the

volume of new applications which would need to be processed and stayed on issue unless either party requests the court to revive the application. Whilst draft rules for this were not included in the consultation draft, the possibility of this option was consulted on, and he considered that in view of the responses it may be appropriate to investigate this option in more detail.

**5.7** District Judge Carr questioned whether the rules could be amended to deem an application being made upon issue of a divorce petition. Michael Horton responded that this would not be possible as not everyone wants to make a financial remedies application. He noted that it would be helpful to have further guidance from the President of the Family Division on the rationale behind procedural de-linking. He noted that the system has been working well and there are no operational problems following the introduction of administrative de-linking. There remains an inherent link between the two processes which will need to be acknowledged despite procedural de-linking.

**5.8** Michael Horton drew members' attention to the response from Withers which questioned whether the new D8 is sufficient to seise jurisdiction. MoJ Legal noted that there is no binding authority that ticking this box will enable the UK courts to seise jurisdiction.

**5.9** District Judge Godwin questioned whether it was possible for the divorce proceedings to include an application for ancillary relief. Then, with procedural de-linking, the petition can be sent to one court and the financial remedies application can be sent to another court with both parties having the option to activate the financial remedy application. Michael Horton responded that this is the protective application, the possibility of which was consulted on, but it would be nothing more than an acknowledgment that the petitioner has issued the application. He noted that District Judge Godwin's proposal is similar to administrative de-linking. HMCTS noted that while there is currently no additional fee for making a financial remedy application in the divorce petition, there is a fee payable for an application for ancillary relief (Form A). Requiring users to submit their Form A application within their divorce proceedings (i.e. at the same time they file their D8) or introducing a separate 'protective application' may result in additional fees for Court users (subject to policy decisions on fees) and additional processing for HMCTS.

**5.10** Members agreed this should be referred to the Financial Proceedings Working Party for further thoughts on how to take this issue forward, with a view to getting the views of the President of the Family Division before the next Committee meeting. Members of the

working party are Judge Waller, District Judge Hickman, District Judge Carr, Michael Horton and Richard Burton.

**Action: Financial Proceedings Working Party to consider the consultation responses and provide an update to the November FPRC meeting.**

**DIVISIONAL COURTS OF THE HIGH COURT**

**6.1** Members considered Paper 6.

**6.2** The Chair noted that the issue is exemplified in a case currently before the High Court which relates to the Trusts of Land and Appointment of Trustees Act 1996 and Mr Justice Moore is sitting with a chancery division judge to determine the issue.

**6.3** Will Tyler noted that the proposed amendments seem sensible. MoJ Legal noted that there is a problem very few people are aware of. The President of the Family Division has been consulted about the proposal and supports it. The proposed amendments mirror amendments to be made to the Civil Procedure Rules to cover the possibility that judges from more than one Division can sit together to ensure there is appropriate expertise to address the issues in the case.

**6.4** District Judge Carr questioned whether there was vires to make the proposed amendments. MoJ Legal noted that they had considered the issue and were satisfied there was vires through a combination of Section 66 of the Supreme Court Act 1981 and the Courts Act 2003.

**6.5** Members agreed the proposed rule amendments. MoJ Legal noted that it would not be appropriate to incorporate these rule amendments into the Vulnerable Witnesses Rules as it may delay the timetable. This will therefore be held on the stocks until the next statutory instrument.

**CHILDREN AND SOCIAL WORK ACT 2017**

**7.1** Members considered Paper 7.

**7.2** District Judge Godwin questioned whether the provisions apply to Wales. MoJ Legal noted that this paper was written by the Department for Education and confirmation of the impact of these provisions in Wales will need to be sought from them.

**7.3** Members noted the paper and concurred with the conclusion that no rule or Practice Direction amendments were required.

**Action: MoJ Legal to confirm with Department for Education lawyers the impact, if any, of these provisions in Wales.**

**PROPOSED PILOT WITH CAFCASS**

**8.1** Members considered Paper 8.

**8.2** MoJ Policy noted that this is a proposed pilot which is supported by Cafcass. The pilot will be run by Judge Newton and will be launched in January 2018. MoJ will endeavour to have a draft Practice Direction prepared for members for the November meeting. Cafcass have identified a proportion of private law cases that are safe to resolve outside the court system. The pilot will look to help these parents settle their case before the first hearing through a series of tailored interventions; for example, mediation, parenting plan meetings, Separated Parents Information Programme. Where parenting plan agreements have been reached, parents will be able to submit this to their court with their application to withdraw the proceedings.

**8.3** This was endorsed by Melanie Carew. She noted that there is a lot of detail about the work with parents which will be undertaken in a short period of time. The pilot is not intending to extend the period of the proceedings. Instead, the interventions will be delivered at the start of the proceedings within the Children Arrangements Programme. The pilot will screen cases to ensure only appropriate cases are diverted into the pilot; for example, cases where domestic abuse is alleged will not be suitable. There has been no research on what happens to those 25% of cases where interventions are successful. This pilot will identify how many cases can be resolved out of court.

**8.4** Hannah Perry questioned whether the usual steps will be taken by Cafcass in addition to the intervention stages; for example the preparation of a safeguarding letter. Melanie Carew noted that the pilot Practice Direction would disapply aspects of the Child

Arrangements Programme to allow cases within the pilot to be dealt with outside that process. This is where a case is suitable for the pilot. The aim is to frontload the application process with interventions to try and save the use of court time later in the proceedings.

**8.5** Marie Brock questioned whether there is any financial aspect to the interventions offered by Cafcass. MoJ Policy noted cases considered suitable for the pilot will be offered interventions for free with the opportunity to resolve the dispute outside the court process. Parties will not have their court fee refunded. Marie Brock noted that mediation is an out of court resolution which is not working well in practice and this pilot seems a more appropriate way of addressing the issues of many parties. However, she noted that there are financial consequences in offering these services and people may issue more applications to obtain these services through the pilot for free. Hannah Perry questioned whether the pilot was artificial long-term as in due course people may be asked to pay for the services being offered by Cafcass under the pilot. District Judge Carr noted that there is merit in the pilot as many parties are unsuccessful with MIAMs as one party may not attend but that party would attend a court hearing. MoJ Policy noted that the evaluation will show whether the interventions are effective and look at how we can encourage litigants to buy into using these interventions in the future.

**8.6** District Judge Godwin questioned whether CAFCASS Cymru and Welsh Ministers had been made aware of this pilot as CAFCASS Cymru is not funded in the same way as Cafcass. MoJ Policy noted that there had been initial conversations with CAFCASS Cymru and further discussions about the pilot are needed. The proposal is for the pilot to run in Manchester for the first six months and, if successful, it may be extended to additional courts which may include courts in Wales. It is at this stage that there will be further discussions with CAFCASS Cymru and the Welsh Government about the implications of the pilot in Wales. District Judge Godwin re-iterated that it was appropriate to contact officials in Welsh Government during the pilot.

**8.7** Hannah Perry noted that it would be helpful if the pilot identified the general savings from those cases that are successful in resolving their disputes outside the court process. MoJ Policy noted that they are hoping to find a comparative group to determine what proportion of cases proceed to a Section 7 report without the interventions offered by the pilot in comparison to the pilot area. The pilot is exploring new ideas and the potential results. Melanie Carew noted that this is not about saving court time but about assisting

parties in resolving their disputes outside the court process. Marie Brock noted that, if successful, there are savings to Cafcass in having to prepare fewer Section 7 reports and savings to court time.

**8.8** District Judge Godwin questioned what consideration had been given to cases where parties had attempted mediation prior to the court proceedings and this failed. MoJ Policy noted that when Cafcass make contact with the parties they will have information about interventions that have been tried previously and failed. The Family Court Adviser will then use this information to determine the most appropriate package of interventions for the family. Currently, there is a core package of interventions but this may be expanded in the future as the pilot becomes more embedded.

**8.9** Members endorsed the pilot proceeding.

**ANY OTHER BUSINESS**

**9.1** District Judge Godwin raised the need for the Family Procedure Rules 2010 to recognise the provisions within the Welsh Language Act 1993. This Act gives equal status in England and Wales to the Welsh Language. Judiciary in Wales have devised draft Rule and Practice Direction amendments to be inserted into the Family Procedure Rules to give effect to the rights under the 1993 Act. Similar amendments are being considered by the Civil Procedure Rule Committee.

**9.2** The Secretary to the Family Procedure Rule Committee reminded members that the work plan for the year had been agreed by the Committee in March 2017. Members would need to consider how best to progress this work in light of its existing programme of work.

**9.3** The Chair suggested that MoJ liaise with the Civil Procedure Rule Committee to see how it is progressing before that Committee and report back to the next meeting as that will assist in determining the amount of support required to progress this work.

**Action: Secretary to Family Procedure Rule Committee to liaise with Secretary to Civil Procedure Rule Committee to ascertain any progress in relation to amendments to incorporate the Welsh Language Act requirements into procedural rules.**

**9.4** The Chair reported that he had received an email from a District Judge on the Western Circuit highlighting an error on the D8 form. This will be shared with MoJ officials to consider as part of their review of the D8 petition.

**Action:Chair to provide details to MoJ Policy to review any required amendments.**

**DATE OF NEXT MEETING**

**10.1** The next meeting will be held on Monday 6 November 2017 at 10.30 a.m. at the Royal Courts of Justice.

Secretary to the Family Procedure Rule Committee
October 2017
FPRCSecretariat@justice.gsi.gov.uk