Ministry of Justice

FAMILY PROCEDURE RULE COMMITTEE
In the Conference Suite, 2nd Floor Mezzanine,
Queen's Building, Royal Courts of Justice
At 10.30 a.m. on Monday 04 December 2017

Present:

Sir James Munby	President of the Family Division
Mr Justice Baker	Acting Chair of the Family Procedure Rule Committee
Richard Burton	Justices' Clerk
Melanie Carew	Children and Family Court Advisory Support Service
District Judge Carr	District Judge (Magistrates' Court)
District Judge Godwin	District Judge in Wales
Jane Harris	Lay Member
Michael Horton	Barrister
Fiona James JP	Lay Magistrate
Lord Justice McFarlane	Judge of the Court of Appeal
Hannah Perry	Solicitor
Her Honour Judge Raeside	Circuit Judge
District Judge Suh	District Judge
Mrs Justice Theis	High Court Judge
His Honour Judge Waller	Circuit Judge

ANNOUNCEMENTS AND APOLOGIES

1.1 The Chair welcomed District Judge Suh for whom this was her first meeting since her recent appointment to the Family Procedure Rule Committee. The Chair also welcomed Fiona James, the Committee's new lay justice member, for whom this was also her first meeting today.

1.2 The Chair noted that the Committee also says goodbye to Marie Brock JP. Her last meeting was intended to be November 2017 which was cancelled and unfortunately, she was unable to attend this meeting. On behalf of the Committee, Marie was thanked for all her efforts and contributions to the Family Procedure Rule Committee during the term of her appointment.

1.3 Marie asked that the following message be read out on her behalf:
"I have been honoured to be a member of the FPRC and in particular to be able to contribute to the work relating to Vulnerable Witnesses and Children. I have learnt so much in my time on the Committee not just about the rules, but also about everything that goes on behind the scenes. I would like to record my admiration and

respect for the teams from MOJ and HMCTS that support our work. I wish all the FPRC team the very best for the future and thank you all for taking into consideration the views of this "lay justice"."

1.4 Apologies were received from District Judge Hickman and Dylan Jones.

MINUTES OF THE LAST MEETING: 9 OCTOBER 2017

2.1 Judge Raeside questioned what the issue referred to in paragraph 4.7 of the minutes related to: "*The Children and Vulnerable Witnesses Working Group have considered the issue and have been unable to find a viable alternative.*" MoJ Legal noted that the issue related to finding a suitable alternative to Cafcass or Cafcass Cymru undertaking matters set out in the draft rules such as providing reports on the wishes and feelings of a child to the court.

2.2 The minutes were approved as a correct and accurate record of the meeting.

MATTERS ARISING

Judicial College training plans relating to vulnerable parties and witnesses

3.1 MoJ Policy reported that officials have made contact with the Judicial College to discuss the training plans relating to vulnerable parties and witnesses in family proceedings.

3.2 The Judicial College has spent the last two years training the judiciary. Each course has had a specific module on the topic of vulnerable parties and witnesses. Judges who have been on these courses will be prepared for the implementation of the new vulnerable witnesses rules and practice direction. Judge Raeside noted that both the private and public law courses have had at least an update on the proposed rules and Practice Direction. She confirmed that she has been regularly sending the Judicial College updated versions of the revised rules and practice Direction.

3.3 For magistrates and legal advisers, the Family Court Bench Book is in the process of being updated to reflect the new vulnerable witnesses rules and Practice Direction. Core training materials for magistrates and legal advisers will be updated in due course. The Equal Treatment Bench Book is also being updated generally and is due to be published in 2018.

3.4 MoJ Policy reported that there is a wider plan to create e-learning modules for all levels of judiciary. The intention is to provide a series of e-learning modules around litigants in person, including "the unrepresented vulnerable person", identification, special measures, asking questions, etc., to cover the new rules and practice direction. This project will be starting in the new year.

Local court protocols relating to vulnerable parties and witnesses

3.5 Officials have devised an intranet article, the contents of which has been approved by the President of the Family Division and Kevin Sadler. This article has been available on the Judicial Intranet since Monday 27 November 2017, to co-incide with the implementation of the vulnerable witnesses rules and practice direction.

3.6 Judge Raeside questioned whether it is for court managers to devise the protocol. The President of the Family Division noted that it is for each court to compile a list of facilities which are available and unavailable based on the template provided.

Children and Social Work Act 2017: application in Wales

3.7 MoJ Policy reminded members about discussions at the last meeting relating to the commencement sections 8 and 9 of the Children and Social Work Act 2017. Following members' questions about the impact of these provisions on Wales, officials have received confirmation from the Department for Education that both of these provisions do extend to and apply in Wales, as well as England (pursuant to section 69 of that Act). This is consistent with the fact that family proceedings, except welfare advice to courts (amongst a few other exceptions which are not relevant for this purpose), are not devolved.

3.8 Colleagues in the Department for Education have confirmed that they have been in contact with colleagues in Wales regarding the commencement of sections 8 and 9 of the 2017 Act, and colleagues in Wales are content with this.

3.9 The President of the Family Division noted that there are certain aspects of family law that have been devolved to Wales. He reminded members that Part 3 of the Children Act 1989 no longer applies to family proceedings in Wales. He noted that judges and practitioners in Wales are more aware of the differences that exist between England and Wales than judges and practitioners in England.

3.10 The Chair questioned whether there is a brief guide that can be used to understand the wider background. Lord Justice McFarlane noted that there is a brief guide in Hershmann and McFarlane. He further noted that it is good to be aware of the changes being made in Wales and consider how those changes can be built on in England. District Judge Godwin noted that there is a very good summary in the 2016 Red Book's supplemental addition which is now incorporated in the 2017 edition.

Incorporation of Welsh Language Act requirements: update as regards the CPR 1998

3.11 At the last Committee meeting, District Judge Godwin raised the question of potential Family Procedure Rules 2010 and Practice Direction amendments to incorporate the requirements of the Welsh Language Act into the family court. Similar amendments have been requested at the Civil Procedure Rule Committee.

3.12 MoJ Policy reported to members that enquiries have been made with the Civil Procedure Rule Committee who have confirmed that they have not received the requested amendments. Family justice policy colleagues will need to consider the

proposed rule and practice direction amendments in more detail. However, whilst waiting for the Committee to assign a priority to this additional work stream, officials will work with colleagues in Welsh Government to consider how the ways of working between England and Wales can be improved. Further work is also being undertaken to appoint a person to represent the interests of Welsh Family Proceedings Officers on the Family Procedure Rule Committee.

3.13 District Judge Godwin noted that the requirements of the Welsh Language Act 1993 have never been incorporated into the Family Procedure Rules 2010. Draft amendments have been prepared by judges in Wales in consultation with the Welsh Language Unit. An example of the requirements included is that the Welsh Language Unit will provide accredited interpreters to those who wish to speak Welsh in proceedings in Wales which is a right of Welsh speakers. The draft submitted was thought to be a comprehensive amendment to the rules. He further noted that the draft amendments are not extensive but they are important in respect of what they inform and will mean when implemented.

3.14 Judge Waller noted that this question has been considered by officials in relation to the online divorce project and probate work. The question of what Welsh Language work is to be done on those projects is still under discussion. He reported that there has been a recent business case to address Welsh language issues but no decision has been made to date and this work remains in progress.

3.15 Members agreed that these draft rule amendments should be considered first by the Civil Procedure Rule Committee which can then be adopted by the Family Procedure Rule Committee.

Actions: **District Judge Godwin to email proposed amendments to Civil Procedure Rule Committee**
Jo Thambyrajah to notify chair of the Civil Procedure Rule Committee Mr Justice Peter Coulson

Domestic Abuse and Legal Aid

3.16 The Deputy Director at MoJ Policy noted that the Minister today announced reforms to the domestic abuse evidence provisions in relation to legal aid. A number of changes are being made to the evidential requirements supporting legal aid applications where a party alleges domestic abuse. The changes include removing the time limit for the provision of evidence and increasing the types of evidence that will be accepted in considering such applications. The changes make it easier for victims of domestic abuse to access legal aid. The statutory instrument introducing these changes will come into force in January 2018.

3.17 These changes have implications for the provisions in Practice Direction 3A and the circumstances in which a party is exempt from partaking in a MIAM prior to issuing proceedings. Earlier in the year, the Committee agreed to mirror the legal aid changes into the MIAMs list of exemptions in Practice Direction 3A. Officials are

working on draft amendments to the practice direction for those provisions to be introduced in parallel with the amended legal aid regulations. It is hoped that there will be minimal delay between implementation of the legal aid changes and the corresponding amendments to the MIAM provisions. Any delay will be due to the time required to amend the relevant court forms.

3.18 Officials will send a final draft of the practice direction amending document to the President of the Family Division for consideration and approval once the legal aid statutory instrument has been finalised.

CHILDREN PRACTICE DIRECTION

4.1 Members considered Paper 4.

4.2 MoJ Policy reminded members that at the October 17 meeting, officials suggested amendments to scope of the children rules and practice direction to address concerns about the operational impacts of the proposed changes. Following a lengthy discussion at the last meeting, members did not actually endorse the proposed changes and the revised assumptions. Since the last meeting, officials have further revised some of the assumptions, particularly around the degree of anticipated behavioural change resulting in increased orders for section 7 reports and the modelling around the type of section 7 report needed to ascertain wishes and feelings more generally. These revised changes will potentially further reduce the operational impacts of the children rules and practice direction.

4.3 The President of the Family Division questioned what is meant by operational impacts. MoJ Policy noted that it is about practitioner availability to undertake the type of work proposed in the rules and practice direction. The President of the Family Division concluded that operational impacts relate to human and financial resources of implementing the rules and practice direction.

4.4 MoJ Policy informed members that substantive advice will be submitted to the Minister in the New Year once further analytical work has been undertaken. The Minister has been briefed on the issue and is aware of its importance. He has confirmed that he is supportive of the work in principle but considers it necessary to find a way to make the proposals work operationally at a time of continued demand on the family justice system.

4.5 The Chair requested a summary of the steps taken to date. MoJ Policy reported that the judicially-led Vulnerable Witnesses and Children Working Group made its proposals in 2015. Shortly after, MoJ undertook work with the Committee to assess the operational and resource impacts of the proposed rule and practice direction changes.

4.6 Officials submitted advice to then Minister, Dr Philip Lee, who decided that it was possible to operationalise the changes relating to vulnerable witnesses and that this work should be prioritised. He also concluded that further work was required on the

children rules and practice direction. It was proposed that the children and vulnerable witnesses work should proceed on separate timetables. The rule and practice direction changes relating to vulnerable witnesses have now been implemented.

4.7 Officials have worked with Cafcass, Cafcass Cymru and HMCTS to look at available options to mitigate the operational impact on Cafcass and Cafcass Cymru. The assumptions made in 2016 have been refined further after it was considered that the initial assumptions may have been overly high-level. Officials updated members on the outcome of this review at the October 2017 meeting.

4.8 Officials have identified some areas where the operational impact could potentially be reduced by altering the overall scope of the practice direction.

4.9 Officials asked members to endorse the revised scope of the proposed changes. Officials are unable to finalise the modelling work on the revised assumptions until there is certainty about what the rules and practice direction are seeking to achieve. The views of members are required to finalise the work currently in progress. Once this work is finalised, officials will give substantive advice to Ministers on how the proposed changes can be accommodated by Cafcass, Cafcass Cymru and HMCTS. The Minister will then make a decision taking into account the competing priorities within his portfolio, the funding settlements for both Cafcass and Cafcass Cymru, and the Ministry of Justice's overarching financial position.

4.10 Refinements introduced under the new revised assumptions mean that the anticipated operational impacts are further reduced. The question of whether the remaining operational impacts are affordable will depend on a variety of factors. Additional money does not necessarily ensure that the proposed amendments can be implemented operationally. MoJ Policy will work with analysts to finalise the modelling work by the end of the calendar year and intend to submit substantive advice to the Minister in the new year. Officials are unable to indicate when the Minister will consider the submission and respond.

4.11 MoJ Policy reported that the possibility of a pilot had been discussed at the last meeting. This was because of the concern that some impacts of the proposed practice direction remain uncertain because of their dependency on judicial behaviour in ordering section 7 reports. Officials have considered what further information a pilot could provide to assist in progressing the children rules and practice direction. Officials will include this option in the advice to the Minister, to consider whether a pilot could usefully provide any additional information.

4.12 At this stage it is not possible to give an indication of when the rule / practice direction changes could be implemented. Any implementation date will depend on the scale of the impact and time required to implement it operationally. Members' endorsement of the proposed scope of the provisions would assist officials in finalising the modelling to prepare advice to Ministers. However, the revised

assumptions do not automatically mean that the revised version is able to be implemented operationally.

4.13 District Judge Godwin noted that Cafcass Cymru is funded by the Welsh Government. He questioned what communication has there been with Welsh Ministers about this practice direction. MoJ Policy responded that officials have not liaised with Welsh Ministers at this time as MoJ have not given substantive advice to their ministers. However, MoJ Policy confirmed that colleagues in Welsh Government (civil service level) are aware of this work and have been involved in discussions about how this can be implemented operationally.

4.14 Judge Raeside noted that the proposals from the judicially-led Vulnerable Witnesses and Children Working Group was led by what children and young people were saying about their experiences in the family justice system. The proposals also took into account how children could have a voice in proceedings which are about them to ensure compliance with the United Nations Convention on the Rights of the Child. She considered any revision of these proposals to be a substantive policy decision which should be made by the President of the Family Division. She did not consider it appropriate for the Family Procedure Rule Committee to amend the recommendations of the judicially-led Vulnerable Witnesses and Children Working Group. MoJ Policy responded that the purpose of the proposed revisions is to seek to implement a model that would improve current practices. It would represent a move towards a longer-term position. Officials have raised operational impact concerns with the Committee's working group since the outset of this project and the current proposals are intended to move forward to enable the children rules and practice direction to be implemented.

4.15 Mrs Justice Theis acknowledged MoJ's attempts to try and progress this work given the length of time that has passed since the initial recommendations of the judicially-led Vulnerable Witnesses and Children Working Group. However, she considered it necessary to exercise caution in approving modelling assumptions that would amend the rules which were initially proposed by others as being necessary for implementation.

4.16 Michael Horton questioned what would happen next if the Family Procedure Rule Committee did not endorse the revised scope proposed by officials. MoJ Policy responded that it would be necessary to model based on the existing provisions of the draft rules and practice direction and that would form the basis of advice to the Minister.

4.17 Judge Waller noted that the difficulty of the existing scope of the draft rules and practice direction is that they involve incorporating other areas of proceedings, for example financial proceedings, domestic violence, in all of which the interests of children in the outcome is considerable. He considered that currently Cafcass and Cafcass Cymru are involved in lot of the cases being discussed, e.g. domestic violence work, and therefore the proposals are a natural extension of that work. If the scope of the rules and practice direction is extended to other types of family proceedings,

e.g. financial proceedings, this is a different category of work entirely and would necessarily require significantly greater resources. He questioned how to balance the aim to give children a voice in these proceedings against the Minister's difficulties in finding resources to undertake this work when there is no obvious scope.

4.18 MoJ Policy noted that section 7 reports are mostly required in cases which proceed beyond the First Hearing Dispute Resolution Appointment. He further noted that there are concerns about prolonging a case that would otherwise be concluded at the First Hearing Dispute Resolution Appointment because the court is required to obtain an additional report. He considered that there is a balancing exercise between making private law cases proceedings longer than they currently would be and Cafcass (and Cafcass Cymru) undertaking additional work that they would not otherwise do currently.

4.19 Judge Raeside noted that the Committee's Children and Vulnerable Witnesses Working Group was asked to implement the recommendations of the judicially-led Vulnerable Witnesses and Children Working Group. She considered if the Family Procedure Rule Committee is being asked to implement anything that is different to that report then the agreement of the President of the Family Division is required. This was endorsed by Hannah Perry. Hannah Perry noted that at the last meeting, Will Tyler has raised the difficulty of the Family Procedure Rule Committee endorsing something that is not in compliance with the United Nations Convention on the Rights of the Child. She agreed with Judge Raeside that this is a bigger decision that this Committee could not make.

4.20 The President of the Family Division noted that no minister has ever publicly stated that ministerial thinking on this subject is driven by operational implications. He questioned where in the paper from MoJ there was reference to the relevance of considering wishes and feelings of children in proceedings when deciding what rule provisions to make. He had seen none. He is currently not prepared to endorse any changes on the basis of operational implications. He further noted that the recommendations were intended to be a significant and radical change and it was obvious from the start that implementation of these proposals would require significant human and financial resource.

4.21 MoJ Policy noted that it is a difficult position. He noted that there is a significant operational impact if the assumption is that only Cafcass and Cafcass Cymru will undertake this work under the proposed provisions. Whilst discussions about these rules and practice direction have been on-going, there have been record levels of increasing demand in both public and private family law proceedings and Cafcass and Cafcass Cymru are both doing their best to meet this rising demand.

4.22 Melanie Carew noted that Cafcass have raised concerns about the significant operational impact from the start of this project. She noted that the Committee's Children and Vulnerable Witnesses Working Group found a clear lacuna as to who would do this work. Discussions to exclude Cafcass and Cafcass Cymru and identify another appropriate person found no viable solution. She considered that, without

amending the drafts to reflect the proposed revised model, the operational impact is significant in terms of the human and financial resources required to implement this. There were also concerns about who could undertake this work if Cafcass and Cafcass Cymru did not do so. She noted that the Committee is in a principled dichotomy between whether they strive for the perfect practice direction without any consideration of the operational impacts or whether the Committee agree to remodel the proposals to enable it to be implemented operationally.

4.23 Judge Waller questioned whether the Minister can only be given advice on one option. MoJ Policy noted that it is possible to do work on both options but this will take longer before substantive advice can be submitted to the Minister.

4.24 District Judge Carr raised concern about the Family Procedure Rule Committee making a decision on a policy question. He considered the role of the Family Procedure Rule Committee is to implement policy decisions of the Ministry of Justice and its Ministers. He noted that what is affordable and operationally viable is a matter for the Minister. He endorsed Judge Waller's proposal for the Minister to be presented with both options and considered the Committee's role would then be to implement that model. This was endorsed by Lord Justice McFarlane who noted that it is not for the Committee to amend the substantive policy without the Minister having had sight of it and the different options.

4.25 Jane Harris acknowledged the concerns of Cafcass in respect of the operational implications as a result of the proposed changes. She noted that it is possible for there to be additional human resource through the utilisation of independent social workers but conceded that this has a financial impact. MoJ Policy noted that it would also be necessary to consider whether some of the independent social workers are on the list of self-employed workers used by Cafcass which, if the same, would limit the number of additional extra available people to undertake this work in practice.

4.26 District Judge Godwin noted that the Welsh Government has adopted the United Nations Convention on the Rights of the Child. Therefore, as a matter of policy the Welsh Government are obliged to consider the provisions of the Convention when implementing policy in Wales. He considered it necessary to put advice to Welsh Ministers now as they have an enhanced duty to consider the voice of the child. MoJ Policy noted that it is not appropriate to submit advice to Welsh Ministers without also submitting advice to Westminster Ministers especially when Cafcass Cymru are raising the same operational impact concerns as Cafcass.

4.27 Rob Edwards on behalf of Welsh Government noted that the issues for Cafcass Cymru and Wales are very similar to the issues raised by Cafcass. He echoed concerns about resource pressures in respect of both funding and the number of available personnel who can do the extra work. He endorsed MoJ Policy's view that, once the modelling approach is finalised, Welsh Ministers will be given advice at the same time as when MoJ advise their Ministers. He confirmed that in the advice Ministers will be asked to consider how the proposals can be implemented into

Welsh Law taking into account their obligations under the United Nations Convention on the Rights of the Child.

4.28 The Committee remained concerned about the revised modelling proposals but concluded that this is a matter of policy which is beyond the remit of the Family Procedure Rule Committee. They considered it appropriate for the Minister to be given modelling for both scenarios for a decision to be made.

Actions: **MoJ Policy to model operational impacts for the rules and Practice direction as drafted and with proposed revised modelling assumptions and submit substantive advice to the Minister in the new year.**

FINANCIAL PROCEEDINGS: PROCEDURAL DE-LINKING AND PROPOSED FAST-TRACK CHANGES

5.1 Members considered Paper 5 and its annexes.

5.2 Judge Waller reminded members that the Financial Proceedings Working Party was set up to examine the recommendations of the Financial Remedies Working Group which published its final report in July 2015. Within those recommendations was a proposal for what is generally termed "de-linking" of matrimonial and civil partnership proceedings from financial proceedings. He noted that there remains a statutory link between the two types of proceedings but acknowledged the peculiarity in it being open to a party to make an application for a financial order in a divorce petition even though no action is taken on this until a Form A has been submitted to the court.

5.3 The Financial Proceedings Working Party have looked at the consultation responses received following the consultation over the summer on the proposals to 1) separate out financial and divorce proceedings procedurally (referred to as "procedural de-linking"); and 2) amend the current shortened procedure for more straightforward financial applications. The Financial Proceedings Working Party met on 15 November to discuss the consultation responses and next steps.

5.4 The Financial Proceedings Working Party have concluded that there are several disadvantages to procedural de-linking as outlined in the consultation responses. HMCTS have noted that administrative de-linking is working well in practice, with divorce and financial proceedings now being able to take place in different court locations. It is proposed that, for the time being, the ability to make a financial application in the divorce petition should be retained, but to ensure parity between the parties there should be a similar ability to make a financial application in the acknowledgement of service. The next stage would then be a wider review of the Part 9 Family Procedure Rules 2010 provisions on procedures for financial applications, at which point it may be appropriate to review again the ability to make a financial application in the application for a matrimonial or civil partnership order, or in the acknowledgement of service.

5.5 Further, there was a lack of support for the inclusion of a lump sum provision in relation to the criteria for the shortened (fast-track) procedure for financial applications applying to a given case, as any such amount would be arbitrary. The Financial Proceedings Working Party therefore recommend that the shortened procedure should only be used for applications for periodical payments alone. Judge Waller noted that the problem with the current procedure is that it is not widely used and it is hoped that by simplifying the procedure and making it more available more cases will be considered suitable for the shortened procedure.

5.6 Judge Waller invited members' views on whether they are content to adopt the recommended approach to procedural de-linking and the proposal that the fast track procedure will only apply to applications for periodical payments alone.

5.7 The President of the Family Division noted that procedural de-linking is the first step to having a common form and common process for all types of applications. He wants to move quickly in creating a unified process for all family financial applications in the future. This is therefore a temporary step in acknowledgment of the real and practical problems that proceeding with this in the immediate future would cause.

5.8 MoJ Policy noted that there are no policy objections to the proposal but it would be necessary for officials to consider what form amendments are required and when this work can be undertaken.

5.9 District Judge Godwin noted that retaining the ability to make a financial application in the petition is essential, with the respondent being given a similar opportunity when responding to the petition. However, he considered it would also be helpful if the application for a decree nisi indicated where such an application has been made on the petition (or in future the acknowledgment of service). He considered that it would assist with the de-coupling arrangements if the financial court were provided confirmation through the decree nisi giving court that there is such an application. The President of the Family Division noted that it will be necessary for judges to go on familyman and see what has happened in terms of progress with any financial application. He acknowledged the difficulties caused by the inadequate IT system currently in operation.

5.10 Michael Horton noted that this is the current practice which is working well. He noted that there may be some evidential problems in cases where a party wishes to proceed with a financial application after remarriage and the court has not retained the petition in which the application was originally made. He has been involved in a case where the court accepted that there would have been a prayer for ancillary relief in the original divorce petition. He questioned whether that same assumption could be made if it becomes possible to make a financial application in an acknowledgement of service. The President of the Family Division questioned whether the future court's record system in 2037 would be able "talk to" the system from 2017 to establish whether the claim was originally made in the petition? Michael Horton's concern is that due to the potential evidential status of this

question it may be necessary to indicate on the decree nisi the progress of any financial application, as the decree nisi will be retained indefinitely. This was endorsed by District Judge Godwin who noted that paper files are destroyed after a short period. By contrast a decree nisi is for life. Therefore, the decree certificate should be available digitally and subject to retention periods can be easily identified. HMCTS noted that it may be possible to add a variable paragraph to the certificate of entitlement to a decree to assist in the retention of this information.

5.11 The Committee's views were invited on whether they endorsed the fast track being used for applications for periodical payments only. Judge Raeside questioned whether there would be any limit to the amount of the periodical payment being sought. Judge Waller noted that it is easier to gate keep an application relating to periodical payments per se, rather than relating to specific sums. He confirmed there would be no limit to the amount of the periodical payment application.

5.12 Lord Justice McFarlane questioned the rationale behind the inclusion of a small lump sum. Judge Waller noted that any lump sum would be arbitrary and risks the possibility that people might improperly limit their claims and then inflate them when the case is before a judge. He further noted that the number of cases to which the £25,000 limit would apply is very small and the introduction of a lump sum limit will cause more practical complications than it would solve. Judge Raeside noted that the figure is equally arbitrary in civil, however, if it is necessary for a case to change track it does. She noted that there are no significant issues raised by this in civil proceedings. Judge Waller responded that the limit would most likely apply to Schedule 1 Children Act 1989 proceedings where there are no housing issues but the caring parent seeks a small lump sum to pay for expenses. It will apply to cases where there is no property dispute or with low level savings accounts. District Judge Suh endorsed this noting that she is struggling to think of a type of case where it would be possible to particularise the amount of the lump sum claimed at the outset, and that very few cases, even in deprived areas, are likely to relate to a sum less than £25,000.

5.13 The Family Procedure Rule Committee agreed with the Financial Proceedings Working Party's proposal to not proceed with procedural de-linking, but to allow for a financial application to be made in an acknowledgement of service. The Committee further approved limiting the proposed amendments to the fast track procedure only to applications for periodical payments.

5.14 Judge Waller noted that there are some additional drafting points to address following the Committee's endorsement of the proposals relating to de-linking and the fast track procedure. Judge Waller suggested that the Financial Proceedings Working Party remain after the meeting and discuss those with MoJ Legal. MoJ Legal noted that the main issue for discussion was that raised by the Family Law Bar Association of how parties should prepare for a first hearing if they do not know they are going into a financial dispute. Members endorsed the working group addressing these points out of Committee. District Judge Suh offered to join that meeting.

Actions: Financial Proceedings Working Party to address drafting points of revised rules
MoJ Legal to circulate draft rules out of Committee to the working group for approval
Revised rules to be approved at February 2018 FPRC meeting

PROPOSED PILOT WITH CAFCASS

6.1 Members considered paper 6 and its annexes.

6.2 MoJ Policy reminded members that the Family Procedure Rule Committee endorsed the proposed pilot at the October 17 meeting. The aim of the pilot is to reduce the number of private law cases in the court system by helping parents to resolve their issues outside the court process. On receipt of an application, the case will be assessed for its suitability for the pilot. Suitable cases will enable Cafcass to offer a package of interventions tailored to those parents. It is hoped that this will enable parents to resolve their disputes before the First Hearing Dispute Resolution Appointment which will in turn reduce the burden on the court system and improve outcomes for children and families.

6.3 MoJ Policy noted that the main change by the pilot is to Practice direction 12B at paragraph 13.2. This provision prevents Cafcass from speaking to the parties on any issue other than that relating to the safety of the child. Under the pilot, Cafcass will receive the application and talk to the parties about all the issues in the case before the hearing to attempt to assist parties to resolve the case privately outside the court process, where it would be safe to do so.

6.4 Under the pilot, it is intended that there will be a joint assessment of whether a case is suitable for the pilot. This means that Cafcass will be present at the gatekeeping meeting with the District Judge and legal adviser to have discussions about whether a case is suitable to remain within the pilot, or whether it ought to revert to the usual process under Practice direction 12B.

6.5 Melanie Carew noted that the pilot will be implemented as discussed at the October 2017 meeting. Cafcass do not intend to divert people who do not wish to be diverted to an out of court process or where there are issues raised which makes the case unsuitable for the pilot. That is why the pilot practice direction enables appropriate rules to be amended to allow the pilot to continue. The pilot practice direction does not prevent a case from 'exiting' into the Child Arrangements Programme and the processes within that being complied with, where this is appropriate or necessary.

6.6 District Judge Godwin questioned whether the pilot will affect Wales. MoJ Policy noted that currently the pilot will only apply to Manchester. However, based on the outcome of the pilot, it may be extended in due course to include Wales. In the circumstances, the text of the draft Practice Direction 36F does not include references to Wales or Cafcass Cymru.

6.7 The President of the Family Division noted that there is a separate positive parenting pilot where the children's guardian appointed under Rule 16.4 Family Procedure Rules 2010 will work with the parents to resolve the issues. This pilot is different as it operates immediately upon an application being made to the court with the intention of diverting parents from the court process so they do not require a court hearing at all.

6.8 The President of the Family Division questioned the court name in the draft pilot practice direction. He considered it should be amended to state Manchester Civil and Family Justice Centre. MoJ Policy responded that this amendment would be made in the final draft.

6.9 The President of the Family Division further questioned why paragraph 6 of Practice Direction 12 J is disapplied for the purposes of the pilot. MoJ Legal responded that the intention is that where cases within the pilot reach agreement outside of court, the consideration of this agreement can be considered through judicial boxwork as opposed to a court hearing. The purpose of disapplying this paragraph of the practice direction is to ensure that the court would be happy to make such orders without the parties being present at court and particularly without the benefit of the traditional safeguarding letter (which will not be prepared for pilot cases). Melanie Carew noted that there are discussions on-going about what will be the precise stage when the pilot concludes. If two parents reach agreement out of court with Cafcass involvement then there will be a decision about whether the proceedings should be withdrawn and whether there should be an order or not. She raised concern about people partaking in the pilot, reaching agreement and still being required to go to court which, in her opinion, would defeat the purpose of the pilot which is to divert people away from court. She noted that instead of a safeguarding letter, courts would instead have a written document from Cafcass endorsing the agreement as being safe for the child and checks will have been undertaken during the process to ensure it is appropriate for resolution through the pilot. Judge Waller noted that if there is a document from Cafcass saying it is safe this would be sufficient for a judge to consider the agreement through judicial boxwork. The President of the Family Division noted that there is no need to exclude the application of Practice Direction 12J. Cases will either fall within the exception contained with the paragraph or they will not and parties will be required to attend. Judge Waller noted that this is a small group of judges considering this initially and therefore guidance may assist in addressing this concern. MoJ Legal noted this and agreed to revise the draft practice direction accordingly.

6.10 Lord Justice McFarlane questioned whether there will be any record of the reasons why people do not opt into the pilot where Cafcass consider a case to be suitable. Melanie Carew noted that it was not possible to confirm this at the meeting but would expect that as part of the evaluation of the pilot it would be necessary to look at what made people engage and why others chose not to engage with the process. She considered that it would be helpful if there was a one line explanation as to why a case was not suitable for the pilot being identified within the gatekeeping process. Melanie Carew agreed to take this point back to Cafcass. She further noted that the

big question to explore within the pilot is why mediation has not been taken up as anticipated by the Family Justice Review. She considered that it is important to have a better understanding of why people do not engage with this option. MoJ Policy noted that there is a detailed document with questions about the pilot and risks factors and this could be used to note if the parents indicate that they do not wish to partake in the pilot and their reasons for this.

6.11 Judge Raeside questioned whether the application fee would be remitted to encourage more people to take part in the pilot. MoJ Policy responded that the interventions offered under the pilot are free and the value of these interventions exceed the court fee. Judge Raeside acknowledged this but raised concern that court users would not be able to see the benefit. Melanie Carew responded that this was discussed but a decision was made to retain the court fee within the pilot. She noted that the role for Cafcass will be to encourage parents to partake in the pilot notwithstanding that they have paid a court fee. MoJ Policy noted that there may also be difficulties in getting a respondent to engage with the pilot and the respondent is not required to pay a court fee.

6.12 MoJ Policy noted that there will be a joint evaluation of the outcomes of the pilot between MoJ and Cafcass analytical services. The evaluation framework is being developed and it is intended that there will be a full evaluation which will include qualitative and in-depth interviews with those who partake in the pilot.

6.13 Hannah Perry questioned whether the pilot is supported by local mediators who may have to change their terms and client care arrangements to enable sharing of the discussions within mediation with Cafcass. MoJ Policy noted that information about discussions in mediation will only be shared with Cafcass with the consent of both parties, which is the current position for any other type of case. The pilot practice direction provides clarity that there is an expectation that mediators will share this information where there is consent from the parties to do so. Hannah Perry questioned how any information shared with Cafcass will be stored and used. She considered the situation where a case is suitable for the pilot, parties engage in mediation, the case for some reason is no longer suitable for the pilot and Cafcass later write a report in the proceedings. She questioned how the report writer will ensure information from the mediation is not disclosed to the court inadvertently in a future welfare report. This was endorsed by Michael Horton. Melanie Carew responded that both parties have to agree to the information being shared with Cafcass. Communication about the pilot scheme will also address this concern. If they agree to participate in the pilot then they will be made aware that if there is relevant information concerning the welfare of the child then Cafcass will have a duty to act on this information. The mediator will continue to store the information.

6.14 Michal Horton questioned whether parties will be explicitly told that information shared with the mediator could now be made public. He further questioned whether there will be any specific action for mediators or Cafcass to make it clear to the parties why they are being asked to give their consent. MoJ Policy responded that the intention is to gain better understanding of what has been agreed in meditation

and identify what issues remain in in dispute. Cafcass are not seeking a verbatim account of what parties discussed during the meditation to reach that point. The sharing of information between mediators and Cafcass is intended to inform and update Cafcass on how discussions are progressing between the parties, not to identify precisely which issues are and are not agreed.

6.15 District Judge Godwin noted that if the pilot is extended to Wales an amendment would be required to the Practice Direction. MoJ Policy responded that further details about when, where and how the pilot should be rolled out will be considered in the future based on an evaluation of this pilot. Any extension of the pilot would consider specific changes needed for any future pilot court. Melanie Carew noted that the amendments under Practice Direction 36 only allow the pilot to commence. If it is to be extended beyond the current end date a further pilot practice direction will be required.

6.16 District Judge Suh noted that under paragraph 24.12 in paper 6c it is not necessary for parties to seek involvement of the court where the application for permission to withdraw proceedings is made by email rather than the usual C2 application. She raised concern that this may be applied more widely which may have an impact on HMCTS and managing this operationally. She considered that if the provision was to remain for applications to be withdrawn by email it may be necessary to consider Practice Direction 29 provisions to ensure the judge can only deal with a written request to withdraw if the other party has had the opportunity to make representations in writing. MoJ Policy responded that they have spoken to judges and HMCTS who are also keen to use the formal C2 application form for administrative purposes. MoJ Policy seek the option to withdraw by email at the end of the pilot process to assist the parties where time is limited. The concern is that another court form might lead parties back into the court process having resolved the issues in dispute between themselves outside the court process. If the judges support this concept, then MoJ Policy will seek agreement for a template email with Judge Newton and the pilot will be used to test whether withdrawal by email works operationally. MoJ Policy confirmed that if a C2 application is required, the fee would be paid out of the pilot budget rather than requiring court users to pay this fee. The President of the Family Division noted that withdrawal by email would be more attractive if there is a dedicated email address set up for this purpose. MoJ Policy endorsed this and would explore this option further through the pilot.

6.17 The President of the Family Division questioned what plans were in place to publicise the pilot. MoJ Policy noted that the pilot is due to commence on 22 January 2018. Anthony Douglas intends to make a public announcement once the final pilot practice direction has been signed. MoJ Policy noted that there needs to be careful public handling of the pilot in light of recent concerns and ensure people fully understand the purpose of the pilot.

Action: Melanie Carew to take back to Cafcass how to record cases unsuitable for the pilot within the gatekeeping process

DIGITISED C100 APPLICATION FORM

7.1 Members considered Paper 7.

7.2 MoJ Policy noted that there has been a recent increase in the volume of private law applications made using the C100 form, and a study of which found that 25% could have been safely resolved outside of the court process. MoJ Policy propose to digitise the C100 to help safely direct court users to other methods of dispute resolution where it is appropriate to the circumstances of their case. The key aim of the project is to signpost and direct families to out of court dispute resolution methods by providing relevant and easy to understand information whilst the application is being completed digitally. This can be done by integrating the relevant information leaflets into the digital form itself, and also by building in nudge techniques to allow the user to understand other options that are available to them. There are different options being explored to test the nudge technique and input from users will be sought in deciding the most appropriate format. It is also anticipated that by digitising the form it is possible to reduce the number of errors made by court users when completing the C100 form. For example, it has been found that 50% of court users bypass the MIAM exemption section as a number of applicants simply do not fully understand the question. The digital team will seek to provide additional information to assist the applicant whilst completing the form. MoJ Policy are working closely with HMCTS, Cafcass, Cafcass Cymru and MoJ lawyers on this project. An advisory group of solicitors, barristers and mediators has also been convened to assist in the design of the online C100 form. It is hoped that the online form will allow the user to navigate through the application form more easily as well as having more understanding about the questions being asked of them, which should help them to provide more detailed information in response. The underlying intention is to make the application form easier and user-friendly for court users.

7.3 MoJ Policy are intending to pilot the new digital form. No decision has been made as to which court will be used for the pilot. MoJ Policy and HMCTS are discussing the available options. It is hoped that the pilot can begin in Spring 2018 with a pilot practice direction being prepared before then and presented to the Family Procedure Rule Committee for consideration.

7.4 Lord Justice McFarlane questioned when an online version would be available. MoJ Policy responded that it is hoped to have a fully developed version to share with the Committee when presenting them the practice direction to consider. His Honour Judge Wildblood is part of the advisory group and officials are engaging with him separately to ensure judicial involvement in the final design of the form. The President of the Family Division expressed scepticism over the timetable and has requested a version which he can test to destruction over Christmas.

7.5 Judge Raeside questioned whether officials were working with anyone from Plain English and consumer interest organisations. MoJ Policy responded that they will liaise with these organisations to ensure a representative advisory group is in place

before the final design is approved. Judge Raeside noted that in developing the form there needs to be flexibility to ensure that people without access to the internet are not denied access to the court. MoJ acknowledged this and responded that work on the digital C100 was being undertaken with a digital team with experience in digital forms whilst also seeking input from the contents designer whose expertise is the paper forms. The Deputy Director for MoJ Policy noted that this project is benefiting from a large amount of work MoJ have done in engagement with Citizens Advice. All the information about Child Arrangements Orders have been refreshed based on their engagement with court users and understanding reactions of users. Further MoJ have developed guidance to try and explain some of the terms to litigants in person that are routinely used in the courts. This background work as provided useful information for this project to ensure the form is capable of being understood, particularly by litigants in person.

7.6 The President of the Family Division questioned whether the online form would provide an explanation of terms whilst being completed by the applicant. For example, in the MIAMS section, would there be a box to state click here if you do not understand what mediation is. MoJ Policy noted that this idea and other similar ideas are being explored. MoJ Policy will be seeking user input to decide on the best option to inform court users of alternative types of dispute resolution. The President of the Family Division noted that the difficulty in the project will be to ensure that there is sufficient signposting and reliable information to court users about out of court dispute resolution options.

7.7 The Deputy Director of MoJ Policy noted that officials are monitoring how people view the different pages within the application and the digital team will try and use this information in developing the digital form. The President of the Family Division noted that the final design of the form should assume that the user has no knowledge or understanding of terminology routinely used in the courts, for example mediation.

7.8 The President of the Family Division questioned whether users will have to complete a form or whether it would be a questionnaire. MoJ Policy confirmed that the application would still be a form because an application is being made to the court. However, in completing this form digitally, the applicant will be invited to answer a series of questions which will then create the form at the end. MoJ Policy confirmed that they have been in contact with officials working on the online divorce reform project and learning from decisions made within that project and where possible mirroring those techniques for the C100.

ANY OTHER BUSINESS

Transparency Project

8.1 The Chair informed members that Lucy Reed from the Transparency Project has requested that the Family Procedure Rule Committee consider whether the current rules restricting press attendance at court hearings should be relaxed to include

exemptions for academics and recognised legal bloggers. The document received from Lucy Reed which includes the proposed rule changes was shared with members at the meeting.

8.2 Members noted that bloggers would have liked to attend family court hearings but are not able to do so as they do not hold a press card. They are not recognised as professional journalists. The President of the Family Division noted that there are a small but significant number of legal bloggers which include Lucy Reed and the Transparency Project. He noted that they would like to have the right to attend family court hearings on the same basis as accredited press journalists.

8.3 The President of the Family Division questioned by what is meant by "duly authorised lawyers". He noted that it is not the responsibility of the court to censor the actions of some bloggers. Lord Justice McFarlane noted that Rule 27.11 of the Family Procedure Rules 2010 sets out a list of people who may attend court hearings and this includes a discretionary power to the court to allow additional persons. The President of the Family Division noted that the basis of the proposal from Lucy Reed is that their attendance should not be at the discretion of the court.

8.4 Judge Raeside noted that the concerns around this relate to policing the reporting of court cases to ensure only accurate information is relayed about the hearing with some recourse for those who irresponsibly or deliberately portray misleading information about the case. She considered that the purpose behind Rule 27.11 was to provide some regulation about who may report what happened in the proceedings outside the courtroom. She noted that the proposals as currently defined by Lucy Reed will raise policy questions.

8.5 The Chair noted that MoJ Policy will need the opportunity to consider the proposals in more detail.

Actions: **Jo Thambyrajah to write to Lucy Reed seeking clarification of what is meant by the phrase "duly authorised lawyers"**

Meetings

8.6 The Chair noted that there are a large number of people coming from across England and Wales to attend meetings of the Family Procedure Rule Committee. He noted that whilst such meetings generally conclude in the morning, the whole day is wasted for those who need to travel to and from London. He questioned whether it is possible to consider involvement in these meetings by more modern electronic methods which will save on members having to travel e.g. video meetings to take place through facetime or skype.

8.7 Jane Harris noted that telephone conference facilities are difficult as there are difficulties in hearing clearly everything that is said in the meeting and also difficulties in holding the phone for such a long time. She further noted that there is a video link option but it requires the link to be suitable secure to avoid others

listening in which raises concerns about the viability of skype. This was endorsed by Judge Raeside who noted that the difficulty is in ensuring everyone has access to the same equipment to make it work effectively. She considered that it would be desirable if it was possible to improve the room and the facilities for people who are on the phone to enable them to partake more in the meeting.

8.8 The President of the Family Division accepted the difficulties around telephone conference meetings. He noted that a commercial organisation would ensure appropriate electronic systems were in place to reduce the time wasted by people travelling to and from meetings.

8.9 MoJ Policy questioned the viability of having full day meetings at less frequent periods. The President of the Family Division did not consider this to be appropriate. Judge Waller noted that historically these meetings lasted a full day as there was more business. He further noted that to effectively partake in the meeting investment into the HMCTS estate would be required. This was endorsed by District Judge Carr.

8.10 Members concluded that whilst it was desirable to improve participation in meetings by other electronic methods, it was not possible at this time because of the resources available.

DATE OF NEXT MEETING

9.1 The next meeting will be held on Monday 5 February 2018 at 10.30 a.m. at the Royal Courts of Justice.

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