



Ministry of Justice

FAMILY PROCEDURE RULE COMMITTEE
In the QB1M,
Queen's Building, Royal Courts of Justice
At 10.30 a.m. on Monday 16 July 2018

Present:

Sir James Munby	President of the Family Division
Mr Justice Baker	Acting Chair
Melanie Carew	Cafcass
District Judge Carr	District Judge (Magistrates' Court)
His Honour Judge Godwin	Circuit Judge
Michael Horton	Barrister
Fiona James JP	Lay Magistrate
Dylan Jones	Solicitor
Lord Justice McFarlane	Judge of the Court of Appeal
Hannah Perry	Solicitor
District Judge Suh	District Judge
William Tyler QC	Barrister

ANNOUNCEMENTS AND APOLOGIES

- 1.1** The Acting Chair acknowledged that this is the last meeting before the Deputy Director of the Ministry of Justice's Family (MoJ) Policy Division retires in September. He thanked her for the support and leadership throughout her time in office and said that she had made a strong impact within the family justice system.
- 1.2** The Acting Chair also recognised that District Judge Carr has reached the end of his tenure after sitting on the Committee for ten years. He was thanked for his contributions to the Committee's work and it was acknowledged by all around the table that his expertise and efforts in progressing the Committee's work out of Committee will be missed.
- 1.3** Apologies were received from Mrs Justice Theis, His Honour Judge Waller, Her Honour Judge Raeside, District Judge Hickman, Robert Edwards and Jane Harris.
- 1.4** Lord Justice McFarlane noted that this will be the last meeting chaired by Mr Justice Baker as a result of his forthcoming appointment to the Court of Appeal. He thanked Mr Justice Baker for his chairing skills and recognised his engagement with all members including when dealing with technical aspects of the Rules. Following his promotion, Lord Justice Baker will fill the vacancy of the Lord Justice of Appeal member on the Committee from October 2018.

MINUTES OF THE LAST MEETING: 16 APRIL 2018

- 2.1 Michael Horton raised amendments to paragraph 5.3 and towards the end of paragraph 9.4 of the June minutes which now reads:

5.3. He suggested the removal of ‘which are listed before a puisne judge’ from the revised draft, as all appeals from the family court to the High Court are to be heard by High Court judges.

9.4 The President of the Family Division said that it would not be possible for the Committee to agree the proposed changes without having sight of the draft regulations. He raised particular concerns about service on an innocent third party and their rights under the new process. This was endorsed by Mrs Justice Theis who noted the need to ensure third parties were protected as far as it is possible to do so against the consequences of non-payment by another parent. Michael Horton pointed out that, at present, PD30A para 9.19 appeared to prevent any extension of time in an appeal against a deduction order, which might operate unfairly against the other joint account holder

- 2.2 District Judge Suh raised amendments to paragraphs 5.9, 8.2 and 9.2 of the June minutes which now reads:

5.9 District Judge Suh proposed drafting amendments to the pilot practice direction to ensure that there was parity between bloggers and journalists in the way that they were allowed access to hearings. She said that these amendments will improve clarity and consistency in cross-referencing. Michael Horton questioned how the changes address the mischief of a person attending court for a personal reason. He noted that the definition of “journalistic purposes” could be interpreted quite widely and questioned the parameters for monitoring the purpose for which legal bloggers attended court. He particularly noted the risk of pressure groups attending proceedings to further their own campaigns under the guise of legal blogging.

8.2 Judge Waller confirmed that revisions proposed by members at the May 2018 meeting have been incorporated into the revised version. Melanie Carew said that these changes reflect HMCTS practice and show the importance of the C1A. She noted that amending the template safeguarding letter was not straightforward for Cafcass but the intention is to send an accompanying message to all Family Court Advisers notifying them of these changes and advising them to address these changes in their safeguarding letter to the court. District Judge Suh suggested an amendment to reflect the fact that the notice of hearing was issued after gatekeeping and the court timetable needed to reflect this.

9.2 Department of Work and Pensions (DWP) Policy explained their intention to maximum collection of child maintenance by introducing regulations to allow deduction orders to be made against joint accounts and unlimited partnership accounts. The enabling power to make such regulations is set out in Sections 32A - 32K of the Child Support Act 1991. District Judge Suh raised the point that the committee had not been provided with details of the enabling powers for the

regulations and it was hard, therefore, to follow some of the drafting and understand the definitions in the draft.

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

MATTERS ARISING

Update on the Bundles Practice Direction/Update on PD9A and the fast track application in financial remedy cases.

- 3.1** MoJ Policy updated members that there has been an out of Committee amendment to Practice Direction 9A to change the terminology within the Practice Direction to reflect the new fast track and standard procedures. Additionally, a specific provision enabling parties to request a track to be changed has been included. These amendments have been included in a single practice direction amendment document which also includes amendments to Practice Direction 12B (increasing the use of Form C1A within private law proceedings) and Practice Direction 27B (changes to bundles) which had previously been agreed by the Committee.
- 3.2** MoJ Policy confirmed that the Practice Direction amendments had been signed by the President of the Family Division and the Minister and will come into force on 30 July 2018.

Amendments to the costs rules in family proceedings

- 3.3** The Legal Secretary to the President of the Family Division updated members as to the progress being made in relation to the forming of the Working Group. The members so far are Philip Marshall QC (representing the FLBA), DJ Teresa Foss (representing the ADJ) and Margaret Heathcote (representing Resolution). HHJ Waller is making enquiries with the Senior Costs judge. Further updates will be provided in the new term.

Proposed changes to make deduction orders for Child Maintenance payments from jointly held bank accounts

- 3.4** MoJ Policy informed Members that the Department of Work and Pensions are reviewing their regulations following Members' views at the June 2018 meeting. They will revert to the Committee in due course upon their Regulations being finalised.

C100 – ONLINE DIGITAL PILOT

- 4.1** Members considered Paper 10 and the annex.

- 4.2** MoJ Policy updated the Committee on the digitisation of the C100 application process which has been designed to make it easier for applicants to complete the form while also making them aware of out-of-court resolution services where appropriate. The pilot commenced on 28 March 2018 in family courts in Reading, Milton Keynes, Watford and Guildford, and MoJ Policy had been taking account of feedback to develop and refine the service.
- 4.3** MoJ Policy explained that the pilot had now entered its second phase and was being rolled out to a further nine family court areas, including Cardiff. Currently, the tool is only available in English but officials are working with the Welsh Language Unit to develop a Welsh language version that can be implemented when the final product is in place. Judge Godwin pointed out that the translation could be outsourced if MoJ were able to fund this work.
- 4.4** The Acting Chair asked for further details of the steps being taken to respond to concerns that had been expressed on social media about aspects of the digital C100. MoJ Policy said that the criticism in question had focused on the part of the tool that seeks details from applicants of their safety concerns. It had been suggested that the questions in this section seemed inappropriately broad in appearing to ask the applicant for details of any abuse they may have experienced, whether linked to the current application or not, and it was thought concerning that if an applicant indicated abuse, they could only complete the form by providing details. MoJ Policy explained that the digital C100 incorporated the questions contained in the paper forms, C100 and C1A. Applicants completing the form online were asked to indicate whether they had experienced domestic abuse. If the answer was yes, they were asked questions along the lines of those posed in the paper C1A. In light of the feedback received, explanatory text had been added to the relevant pages to make it clear that the applicant was required to provide details only of abuse being disclosed as part of the current application. The pages had also been amended to reiterate why the information was needed and with whom it would be shared. This part of the tool had also been changed to make it non-mandatory, with a note added to explain that the information in question could be provided at a later stage in the process.
- 4.5** The Acting Chair acknowledged the work undertaken to address the concerns raised on these issues. He sought clarification that the question would only be asked if a person previously indicated they had experienced abuse. MoJ Policy confirmed this was the case and noted the risk of taking a single screenshot out of context when in fact an applicant, progressing through the tool in sequence, should have a clear understanding of why particular information was being requested.
- 4.6** Will Tyler raised concern about the details of abuse being non-mandatory information especially as the C1A form is a mandatory form where allegations of abuse are made by a party. He further noted that he would expect to be able to cross examine a party on allegations made that were not declared on a C1A form. MoJ Policy explained that the digital form sought to encourage applicants to provide

the information as early as possible by explaining the importance of doing this at the point of application. The changes to this section remained under review as work continued to consider feedback received from users, pilot courts and wider stakeholders. District Judge Suh recognised that work was ongoing but said that it was important to ensure that applicants answer these questions as early as possible in the process to ensure that special measures could be set in place. This was endorsed by Hannah Perry who suggested that applicants should be given a warning that failure to provide details may impact their application at a later stage.

- 4.7** The Acting Chair and Lord Justice McFarlane offered to review the wording of the relevant section, and MoJ Policy agreed to send the text through for comment.

PRIORITIES OF THE FAMILY PROCEDURE RULE COMMITTEE

- 5.1** MoJ Policy circulated an electronic version of the Priorities Table on 14 June 2018. Members were invited to comment on this document by 28 June 2018. No comments were received. MoJ Policy informed members that the table has been revised to include the workstream relating to closed material procedure, to be discussed later in this meeting. Members had no additional comments at this meeting on the workplan.

CHILDREN RULES AND PRACTICE DIRECTION

- 6.1** MoJ Policy confirmed that the Minister had written to the President of the Family Division about the Committee's proposals to introduce rules and a supporting practice direction in respect of children's participation in family proceedings. The Minister had thanked the Committee for the work undertaken on this issue but had decided after careful consideration that it is not possible to agree to implement these proposals at the current time.
- 6.2** The Acting Chair asked whether the Minister would be announcing this decision publicly as there are representatives from the Family Law Bar Association, Resolution and the Association of Lawyers for Children who will be interested to know the final decision. MoJ Policy informed members that the Minister had written to the President of the Family Division, and the President of the Family Division had agreed for a copy of that letter to be shared with the Committee. The minutes of the meeting will provide a public record of the decision and the letter explaining the reasons for it. MoJ Policy explained that they would seek the Minister's views on whether she also wishes to publish her letter and, if so, how.
- 6.3** The President of the Family Division noted that the Minister will not be attending the Children and Young Peoples Conference on 24 July 2018 but would instead be giving a pre-recorded video speech. He asked whether it would be possible to have an advance copy of the Minister's script to inform his own speech. MoJ Policy undertook to consult with the Minister's private office.

- 6.4** Committee members expressed their disappointment at the decision. Will Tyler QC noted that he is regularly asked by the Family Law Bar Association for updates on this workstream. Hannah Perry noted that the proposals were beneficial to children as they would give them an understanding of the court process and a voice within proceedings about them. District Judge Carr noted that, anecdotally, he was at their request, meeting more children within proceedings. This was endorsed by Fiona Charney. Melanie Carew noted that she understood that figures suggested that the number of children requesting to meet the judge was actually very low. She commented that, if there was an increase in that number as a result of the proposals, it would be starting from a very low level and that it's already common for a guardian to ask a child if he or she would like to see the judge.
- 6.5** MoJ Policy acknowledged the Committee's disappointment but observed that the Committee had been advised of the need to seek Ministers' views on the proposals due to the significant operational implications at a time when the system remains under considerable pressure. Following the decision, it would be important for MoJ and the Committee to work together to consider what further steps could be taken in this area. The Acting Chair questioned whether the Committee should write to the Minister in response to the decision. The President of the Family Division had no objection to the Committee doing so. The Acting Chair and Lord Justice McFarlane agreed to discuss this out of committee.
- 6.6** Lord Justice McFarlane asked the Committee to consider next steps for this workstream. He proposed that Members consider the options currently available to the court and identify what supporting guidance, if any, should be reviewed or implemented.
- 6.7** Members noted existing guidance from the Family Justice Council and District Judge Carr noted that further guidance from the President of the Family Division may be required. Members agreed it was premature to form a working group until a review of the existing tools and practices had been completed. Melanie Carew welcomed the construction of guidance and underlined that the Practice Direction did not only relate to the Judge seeing the child but also to other aspects of the child's participation, such as who keeps the child informed about the proceedings and how their voice is heard and how that is considered by the court. She underlined that this new work should be realistic and not lead to plans which could not be fulfilled by Cafcass. Melanie Carew agreed to prepare a paper setting out the tools currently available to Cafcass and when Cafcass currently undertakes work with children for discussion at the next meeting.
- 6.8** The Acting Chair questioned what additional work was being undertaken to consider wider system reform. MoJ Policy explained that Ministers were actively considering potential reform of various aspects of the family justice system, including in respect of private law. The President noted that some of these potential reforms had been under consideration for some time. MoJ Policy acknowledged this and noted that,

among other things, changes in Ministers could lead to changes in priorities and in the timings of different elements of potential reforms.

- 6.9** Michael Horton thanked Committee members for the time they had spent on considering these proposals out of Committee.

ACTION:

Melanie Carew to draft a paper for the October 2018 meeting setting out the existing tools available to practitioners and the judiciary

THE USE IN FAMILY PROCEEDINGS OF SENSITIVE MATERIAL

- 7.1** Members considered Paper 6.
- 7.2** MoJ Policy set out a proposal to introduce a formal closed material procedure through rules of court to facilitate the use of sensitive material in family proceedings. Subject to members views, any process would be made through introducing rules of court into the Family Procedure Rules. MoJ Policy acknowledged that there were various issues to address in considering such a process, particularly around ensuring a right to a fair trial but also protecting the interests and rights of children involved in family proceedings but sought members views on the principle of the proposal.
- 7.3** Lord Justice McFarlane welcomed this workstream. He recognised that this was an area where High Court judges currently used their discretion and judgement to make a decision based on their inherent jurisdiction and formalised criteria were needed to provide judges with guidance and to ensure court users understood the process which was therefore clear to all. District Judge Carr questioned whether the process should also be extended to include public interest immunity cases. District Judge Suh noted the importance of consulting on this proposal before implementing any changes. MoJ Policy recognised the need to consult with stakeholders before any decision is made.
- 7.4** Members supported the principle of the proposal to introduce a formal closed material procedure in the family court. Members agreed that a working group should be convened to consider this proposal in detail. The working group will consist of the current Acting Chair; Lord Justice McFarlane, District Judge Suh and Will Tyler.
- 7.5** Michael Horton questioned whether this work was a priority when taking on-going work streams on the priorities table into account. The Deputy Director of MoJ Policy said that Home Office have been seeking to implement this process for some time but it is only recently that MoJ has been able to offer a resource to look at this issue. MoJ Policy welcomed members views on the priority to be attributed to this work in light of other on-going workstreams.

ACTION:

Working Group to meet and discuss the proposal, with officials, prior to the next FPRC meeting.

FINANCIAL REMEDY PROCESS – OVERALL STRATEGY FOR REFORM

- 8.1** MoJ Policy gave an oral update further to a meeting between MoJ and the Acting Chair, Judge Waller, District Judge Carr, District Judge Suh and Michael Horton which took place following the last Committee meeting.
- 8.2** MoJ Policy gave an overview of the various work strands relating to financial remedies and reform and how these fit together. The HMCTS reform programme included a project to develop an online application process for a financial order on divorce. The Committee had also expressed a desire to simplify Part 9 of the Family Procedure Rules to provide for a single application process for all orders under that part. Other work would look at amalgamating forms. The sequencing of these work strands was important.
- 8.3** In terms of HMCTS reform, a new solicitor application process was in development applying for a financial order on divorce to be piloted. Initially this would focus on consent cases only. Private beta testing of this was due to start in August and would test start a digital Form A and upload of a paper D81 and draft consent order. Phase 2 would extend the process to contested applications involving uploading Form E instead of D81. The private beta stage for this was expected to begin in November 2018. The digital process is moving at pace and there was a need to determine whether and when work on paper forms should be undertaken because of the need to consider learning from the pilot. Work undertaken by Mr Justice Mostyn and Judge Hess would inform phase 2 of the pilot.
- 8.4** Michael Horton agreed that work to amalgamate Paper Form E, E1 and E2 is a priority but questioned whether any consolidation of D50 series of forms should be undertaken as the amount of work would not justify the end result for so few applications made using these forms. He added that a fundamental re-write of Part 9 is required and that this is where efforts should now be concentrated. MoJ Policy thought that unlocking the PDF document to enable an electronic signature might also be desirable as this could help support digital working and Michael Horton suggested that if this was not possible then a print out 'statement of truth' could be another answer.
- 8.5** The Acting Chair told Members that he had attended an impressive HMCTS demonstration of the process on the pilot by distance learning. The President of the Family Division said that he too had received the same demonstration and as digitisation is the driver behind this exercise he suggested that, if HMCTS were in a position to do so, then they deliver the same demonstration before the Committee at the open meeting in October.

8.6 HMCTS Policy confirmed that the pilot is due to start in the South West.

TRANSPARENCY

9.1 Members considered Paper 8 and its annexes.

9.2 MoJ Policy reported that the transparency sub-group met on 11 July 2018 to consider Members' views in respect of legal bloggers from the last meeting. A revised draft of the pilot practice direction had been prepared which includes drafting amendments suggested by District Judge Suh. Members were therefore asked to consider whether previous concerns had now been addressed sufficiently to enable the pilot to test the feasibility of the proposal.

9.3 The main changes to the revised draft are that CileX lawyers are included within the definition of "duly authorised lawyer". MoJ Policy noted that the judge still had discretion to exclude a legal blogger if their purpose for attending court was not clear. The same rules for excluding an accredited media representative would apply to a legal blogger.

9.4 Subject to members' agreement to the revised draft, MoJ Policy hope to have the pilot practice direction signed by the President of the Family Division and the Minister prior to recess. This will enable officials to notify stakeholders of the forthcoming changes over the summer with a view to the pilot commencing from 1 October 2018. The proposed timescales also provide sufficient time for HMCTS to notify staff of the pilot.

9.5 Will Tyler QC and Michael Horton questioned whether the draft should be amended to require the lawyer to confirm that they are not attending in the capacity of an agent or as a lawyer instructed on behalf of a client. Members agreed this amendment was necessary. Will Tyler QC noted that the proposed new form titled 'Notice of attendance of duly authorised lawyer' form would therefore also need to be amended to ask the lawyer to confirm that they are not attending in the capacity of agent or instructed lawyer for any client.

9.6 District Judge Suh questioned whether the word "qualified" in the definition of "lawyer" should be deleted. This was endorsed by Michael Horton and Lord Justice McFarlane. Members agreed to remove the word "qualified".

9.7 Michael Horton noted that the Practice Direction limits reporting restrictions to the main ones set out in statute, however he noted that there were other types of reporting restrictions including those ordered by the court. Members agreed the paragraph should be amended to make it clear that restrictions could be imposed either by statute or order of the court.

- 9.8** Michael Horton questioned whether the proposed forms for legal bloggers should state the reason why the information is being collated to comply with GDPR. MoJ Policy agreed to consider this further with HMCTS prior to implementation.
- 9.9** MoJ Policy noted that the draft does not provide for any active policing of legal bloggers as it operates on a trust basis similar to reporting by accredited media representatives. Michael Horton questioned whether anyone would review the blogs of individual legal bloggers whose identity and blog will be known by the court. Lord Justice McFarlane noted that this is not provided for within the pilot process. MoJ Policy noted that if any issues are identified throughout the course of the pilot, MoJ Policy will review this further with the Committee considering whether judicial guidance is required to support the approach.
- 9.10** Members views were sought on whether legal bloggers should be required to provide a written statement for each court hearing they observe. District Judge Suh considered that they should, with a copy being retained on every court file in a similar process to that of McKenzie friends. This was endorsed by District Judge Carr. Members approved this approach. Lord Justice McFarlane noted that whilst it imposed a burden on legal bloggers it was not so burdensome that it would deter them from attending court.
- 9.11** Subject to these changes, members agreed the pilot practice direction. MoJ Policy noted that once the pilot practice direction has been signed, MoJ will write to stakeholders to alert them of these changes. HMCTS will also ensure court staff are ready and the paper will give clear guidance setting out which category those attending court fall into.

PROPOSED AMENDMENT PURSUANT TO THE WELSH LANGUAGE ACT

- 10.1** Members considered Paper 9.
- 10.2** Judge Godwin noted that much progress had been made on the changes needed to amend the Family Procedure Rules 2010 to incorporate the principles set out in primary legislation to ensure that English and Welsh languages have equal status in the administration of justice in Wales.
- 10.3** Judge Godwin and Judge Jarman of the Civil Procedure Rule Committee had worked together to develop the amendments. The amendments follow those approved by the Civil Procedure Rule Committee but are tailored to the requirements of the family court
- 10.4** Members agreed the draft rule and practice direction amendments. MoJ Policy explained that this will be included in the next statutory instrument planned for December 2018. Dylan Jones questioned whether the Welsh Government needed to be consulted on these changes. MoJ Policy responded that there is no requirement to consult Welsh Government when making rules, because Welsh interests are represented by the recent changes to the Committee's constitution to include a

representative on behalf of the Judiciary in Wales and a representative on behalf of Cafcass Cymru on the Committee.

- 10.5** Judge Godwin thanked MoJ Policy and Legal for the expeditious manner in which they have progressed this matter.

PROPOSED PILOT TO IMPROVE NOTIFICATION TO THE POLICE IN RESPECT OF FEMALE GENITAL MUTILATION AND FORCED MARRIAGE ORDERS

- 11.1** Members considered Paper 11.

11.2 MoJ Policy informed the Committee of a national pilot scheme which seeks to improve notification of Female Genital Mutilation Protection Orders and Forced Marriage Protection Orders to the Police. It was noted that current difficulties with service of these orders on the police means that the police are concerned that they are not being notified when an order has been made, and are consequently unable to implement effective safeguarding measures for vulnerable persons. One of the possible reasons for the police not receiving service is the difficulty in serving.

11.3 MoJ Policy said that they had met with the President of the Family Division and he had also expressed some concerns about the effectiveness of the court service procedure within the rules. To address these concerns, the pilot also amends the service procedure to include a requirement for an order to be served on a respondent within two days of the order being made. HMCTS will be required to refer the file to a judge if a certificate of service has not been received within seven days of the deadline for service on the respondent. Will Tyler questioned how HMCTS will be aware of when to refer a case file to a judge. HMCTS responded that staff will put a diary reminder within 'FamilyMan' to prompt them to check whether a certificate of service has been received so that appropriate action can be taken. Staff guidance has been revised to reflect this new procedure and HMCTS will further amend the guidance as necessary during the pilot.

11.4 District Judge Suh asked why there was no requirement to include a statement of service when giving notice to the police of an application to vary, extend or discharge an order. MoJ Policy accepted that there should be a consistent approach, and therefore this will be revised in the practice direction.

11.5 The pilot will commence on 23 July subject to the President of the Family Division and the Minister both having signed the practice direction document.

AOB

12.1 Judge Godwin raised the issue of disclosure by police which in some cases can take up to four months. He proposed that the existing guidance on this subject be revised and updated. The Acting Chair acknowledged this issue but noted that updating the guidance is outside the remit of this Committee.

- 12.2** Michael Horton raised an issue which had been ruled on in the Court of Appeal, concerning the service of petitions arising from the case of Thum v Thum (Neutral Citation Number: [2018] EWCA Civ 624). The case concerns the wife's divorce petition having been issued in England on 26th October 2015 but not served on the husband until 27 February 2016 and the husband's divorce petition having been issued in Germany on 20th January 2016. The argument is whether the English court or the German court was first engaged for the purposes of Article 19 of the Brussels IIa Regulations. The Court of Appeal has invited the Family Procedure Rule Committee to consider whether any additional deadlines should be imposed in the Family Procedure Rules in relation to service of divorce proceedings under the Brussels IIa Regulation. This issue will be discussed at the next FPRC meeting.

DATE OF NEXT MEETING

- 13.1** The next meeting will be held on Monday 8 October at 11.00 a.m. at the Royal Courts of Justice. This meeting will be the Committee's annual open meeting.

Secretary to the Family Procedure Rule Committee
August 2018
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