



Ministry of Justice

FAMILY PROCEDURE RULE COMMITTEE
In the Conference Suite, 2nd Floor Mezzanine Level
Queen's Building, Royal Courts of Justice
At 11.00 a.m. on Monday 12 November 2018

Present:

Sir Andrew McFarlane	President of the Family Division
Mrs Justice Theis	Acting Chair
Lord Justice Baker	Court of Appeal Judge
Melanie Carew	Cafcass
Rob Edwards	Cafcass Cymru
His Honour Judge Godwin	Circuit Judge
District Judge Hickman	District Judge
Michael Horton	Barrister
Fiona James JP	Lay Magistrate
Dylan Jones	Solicitor
Hannah Perry	Solicitor
Her Honour Judge Raeside	Circuit Judge
Michael Seath	Justices Clerk
District Judge Suh	District Judge
His Honour Judge Waller	Circuit Judge

ANNOUNCEMENTS AND APOLOGIES

- 1.1** Apologies were received from District Judge Hickman and William Tyler QC.

MINUTES OF THE LAST MEETING: 10 OCTOBER 2018

- 2.1** The President of the Family Division asked that paragraph 1.3 of the October minutes should be expanded to give more detail on the lay member's decision to resign from the Family Procedure Rule Committee.
- 2.2** Judge Raeside proposed that paragraph 8.5 be amended to remove the wording "Court Director" and replace with "Court Manager" and to replace the word "conclude" with "include". This now reads

Judge Raeside suggested that any District Judge, not just family judges, could be faced with these cases and that this should be drawn to the attention of Court Managers. She suggested that it would be useful to include publicity in the Civil and Family newsletters published monthly by the Judicial College.

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

MATTERS ARISING

Children and family proceedings – update following the Cafcass Child Impact Assessment meeting

3.1 Melanie Carew asked for clarification as to the next steps. She referred to the short paper presented to the Committee in October which set out information on the provisions that exist within Cafcass for ensuring that the voice of the child who is the subject of family proceedings is heard by the court.

3.2 The President of the Family Division stated that this work was important to progress following the previous Ministerial decision and he suggested that his office look at suitable dates for the next meeting of the Family Procedure Rule Committee Children Working Group to take this forward and report back in December.

EU Exit – update on progress made by the working group

3.4 The Acting Chair reported that the working group met on 7 November and looked at the draft amendment to the Family Procedure Rules for the eventuality of a no deal outcome. Judge Waller stated that he had been tasked with co-ordinating comments by Wednesday 14 November and producing a summary of them by 23 November. He thought the stripping out of the rules would be relatively straightforward, the legal drafting could be more difficult as he had no picture of what the substantive legislation will look like.

3.5 The Acting Chair reminded the Committee that the Lord Chancellor had ultimate responsibility for the legislation and the working group were there to assist. MoJ Policy stated that the list of members on the working group had been added to the addendum to the Priorities Table, and that they planned to provide the working group with a draft of substantive statutory changes.

Forms – update on progress to reflect changes required following EU Exit

3.6 MoJ Policy updated the Committee on the position concerning the work on forms in relation to work on EU Exit. Judge Waller said that form amendments will fit in with the timescales on the rule amendments and that he should be able to circulate a summary of the working group's comments on the draft rules in the week of 3 December.

3.7 The President of the Family Division raised the issue of training for the judiciary. Judge Raeside stated that she had spoken to the Judicial College and discussed the proposal for the issue of a second newsletter and the President of the Family Division suggested that the Judicial College are put in touch with Mr Justice MacDonald to ensure that the work is properly joined up.

- 3.8** MoJ Policy said that the EU exit Working Group are working towards the next Committee meeting as one of their timescales and hoped to have a further update ready by 10 December. MoJ Policy asked the Committee to consider whether the forms work could be put before the Family Procedure Rule Committee Forms Working Group to consider the issues as a means of maintaining the necessary pace needed for this process. However, the committee expressed a preference for handling forms changes through the EU Exit working group.

Proposed changes to deduction orders for child maintenance from jointly held bank accounts

- 3.9** MoJ Policy represented lawyers from the Department of Work and Pensions (DWP) who responded to queries from when this item was discussed at the October meeting of the Family Procedure Rule Committee. On paragraph 8.4 of the October minutes, in respect of numbers, the DWP envisage that there may be a higher appeal rate in relation to joint and business accounts. They factored in a 5% - 10% appeal rate against the potential 430 additional deduction orders per year in relation to joint and business accounts (as compared to an approximate current appeal rate of 2.13% in relation to deduction orders imposed against solely held accounts). This would equate to an estimated additional 22 – 43 appeals being lodged per year across Great Britain, as a result of the DWP implementing the power to cover joint and business accounts. District Judge Suh said that this was markedly more than normal and the bench would benefit from a flowchart or training to help them navigate a new jurisdictional area. Judge Waller said he had a step by step guide for the old and new system (specifically on lump sum direction orders) which he will circulate and which may be a good starting point.
- 3.10** The DWP reported that they were not fully clear as to the precise rationale for the exception in the case of lump sum deduction orders (LSDOs) as mentioned in paragraph 8.3 of the October minutes. However, the DWP mentioned that this could be down to the 2-stage nature of making an LSDO and the fact that the 1st stage of this process involves 'freezing' monies held in the account. Keeping the 'freezing' period within certain parameters, in order to reduce the extent to which an affected person's property rights are interfered with (which in the case of joint accounts, could extend to the property rights of other joint account holders), might have informed thinking here i.e. on whether extensions of time beyond 21 days (to file an appellant's notice) should also apply to LSDOs.
- 3.11** DWP policy officials sent an update on training. They said that they were not aware of any additional training that would be available to members of the judiciary, as a result of implementing these powers in relation to joint and business accounts. However, the justice impact assessment completed by the Department (during the course of developing these proposals) would help to inform HMCTS staff as to the nature of any impacts and this might inform them of what, if any, additional training may be needed. Separately, they believed that additional guidance and training will

be made available to departmental caseworkers who are making deduction orders in relation to such accounts.

- 3.12** The President of the Family Division suggested that this could be made clearer by including something in the rules.
- 3.13** The DWP Legal Services and GLD Litigation offered bespoke training on child maintenance appeals. Judge Raeside welcomed the offer but thought that this should be offered to Course Directors. District Judge Suh said that this should also be extended to all District Judges. (Simon – can this be an action to consider at the 10 Dec meeting as there is a lack of clarity as to who is taking this forward).

PRIORITIES OF THE FAMILY PROCEDURE RULE COMMITTEE

- 4.1** MoJ Policy stated that changes to the Priorities Table were continuing to be made on a monthly basis but it was important that the tool becomes more effective especially as a number of pressing issues, including the work reflecting EU exit will need to be considered alongside existing work strands.
- 4.2** MoJ Policy asked for the Committee to consider at what point completed work strands should be removed from the table as they currently provide the Committee with a view as to the requirements needed to complete a work area. The President of the Family Division said that it was not necessary to keep finalised work on the table for any longer than 1-2 months after completion.

COSTS – FAMILY PROCEDURE RULES PART 28

- 5.1** Judge Waller said that he had put a short paper before the Committee following the first meeting of the Costs Working Group. He explained that the Working Group has been established to consider aspects of the costs regime applying to family proceedings. The three main elements, as identified by the former President are to consider the making of free-standing rules relating to costs in family proceedings without reference to the Civil Procedure Rules; to review the “no order as to costs” principle in financial remedy proceedings; and to consider the introduction of fixed pricing and judicial cost capping.
- 5.2** Judge Waller said that he was content with the make-up of the Group especially as they were able to pick up on matters in the Civil Procedure Rules and agreed to report back to the Committee on progress made following the blank piece of paper exercise the Costs Working Group have employed.

Action

Judge Waller to prepare paper for the February meeting of the Family Procedure Rule Committee

THE USE OF SENSITIVE MATERIAL IN FAMILY PROCEEDINGS

- 6.1** Lord Justice Baker gave an oral update in which he explained that the working group set up to consider the use of sensitive information in family proceedings held its first meeting in September, and he updated the Committee on its work so far. Further consideration is required before this issue is brought back to the full FPRC.
- 6.2** Lord Justice Baker stated that he would be forwarding papers on to the Acting Chair as she will be taking over his role on this work. It was agreed that this issue would be discussed again at the first FPRC meeting in the New Year.

ACTION

Working group and MoJ Policy to present outcomes of their work for consideration by the FPRC in February.

PENSION SHARING ON DIVORCE

- 7.1** Lord Justice Baker asked Committee Members to consider an issue raised by Age UK in a letter of 5 October 2018. Age UK referred to their recently published report which looked at financial management in retirement couples and the impact on women's finances. Age UK noted that the biggest barrier to a financially secure retirement for many affected women was the loss of their 'fair share' of pensions when they get divorced. They estimated that approximately one third of women go through a divorce prior to reaching their State Pension age.
- 7.2** Judge Waller questioned whether this issue was suitable for consideration in this forum as there was no function in the Rules to take this forward. Judge Raeside mentioned that there may be a possibility of inviting comments from consumer groups.
- 7.3** Lord Justice Baker referred to the solution suggested by Age UK and backed by the Pensions Advisory Group in which they suggested introducing a 'nudge' into the divorce process, by way of a declaration that both parties would have to sign to affirm they are aware that they can make a claim on their spouse's pension. The President of the Family Division stated that this problem was part of a bigger picture and should not be tackled in its own.
- 7.4** Hannah Perry stated that the online process does offer a way forward for the respondent although this was entirely dependent on prompts to Respondents when acknowledging/responding. MoJ Legal said that the online divorce process is currently in development for the next phase and that there is still time to explore whether additional hint text or wording could be added in to improve users' awareness of their rights. MoJ Legal agreed to discuss with the online divorce team and provide an oral report back at the next meeting.

ACTION

Lord Justice Baker to respond to Age UK

MoJ Legal to update the Committee in December.

HIGH COURT POWER TO SET ASIDE ITS OWN FINAL ORDERS

- 8.1** Judge Waller introduced the item with reference to the *W(A Child)* [2018] EWCA Civ 1904 and Moylan LJ's judgment. He stated that he had spoken to Moylan LJ ahead of the judgment and found no more conclusive research. Judge Waller briefly discussed the issue as to whether the rules should confer jurisdiction under section 17(2) of the 1981 Act to set aside financial remedy orders. The view that was taken previously was that s.17(2) was procedural and did not give or take away any powers. Judge Waller explained that a lot of work needs to be done on the legal basis for the High Court's powers in order to give it expressly the same power as the family court – this could involve primary and/or secondary legislation. It wouldn't be right to simply say "the High Court has the powers of family court in s.31F" as that is arguably the wrong way around (albeit that approach has the attraction of simplicity).
- 8.2** Michael Horton welcomed discussion on this issue and handed a copy of *Daniel Terry v BC Corporate Acceptances Ltd* [2018] EWCA Civ 2422 which corresponded to whether the defendant could apply to set aside the judgment under CPR 3.7(1), although after having reviewed the case the Court of Appeal held that the circumstances in which a final could be varied or revoked under 3.1(7) are rare due to the importance of finality.
- 8.3** Judge Waller stated that he had spoken to MoJ Officials and that they confirmed that as further work is needed, they intend to follow this issue up for presentation at a future Family Procedure Rule Committee meeting.

Action

MoJ to present a paper for the Family Procedure Rule Committee in February.

THE SERVICE OF PETITIONS IN DIVORCE PROCEEDINGS

- 9.1** MoJ Policy introduced the item of *Thum v Thum* ([2018] EWCA Civ 624), in which the wife's divorce petition was issued in England on 26 October 2015 but not served by her on the husband (in Germany) until 27 February 2016. The husband, meanwhile, had issued a divorce petition in Germany on 20 January 2016. The question was whether the English court or the German court was first seised for the purposes of establishing jurisdiction to hear the case (Article 19 of BIIa). The Court of Appeal agreed that it was "undesirable" for a party to seise the court without the respondent being served 'reasonably promptly' and therefore invited the Family Procedure Rule Committee to consider whether any additional obligations as to service (e.g. a deadline) should be included in the Family Procedure Rules.

- 9.2 The President of the Family Division agreed with the action proposed in the paper, i.e. that practitioners should be consulted about current practices, but suggested that this workstrand should be put back on the agenda for discussion in May, when more is known as to what EU exit entails (and in particular whether there is to be an equivalent of Article 19 in the legislation). Hannah Perry stated that Resolution should be involved in this exercise.

Action

MoJ Policy to speak to this item at the Family Procedure Rule Committee meeting in May 2019.

THE USE OF EXPERT FORENSIC PATHOLOGY WITNESSES IN THE FAMILY COURT

- 10.1 The President of the Family Division raised an issue brought to his attention by Professor Tom Jacques, Professor of Paediatric Neuropathology at UCL and Great Ormond Street Hospital. He stated that his colleagues, when acting as expert witnesses in cases starting in the criminal justice system but which then involved proceedings in the family court are often drawn into those proceedings without formal instruction or payment. The President of the Family Division stated that this is a problem which affects Paediatricians and Radiologists and wanted to raise this with the Committee. Judge Waller stated that thought on this issue should also be given to the status of Pathologists.
- 10.2 Hannah Perry said that the existing pay scale in the LAA Guidance is £122.40 per hour for pathologists outside of London and a fixed fee of £432.00 for Experts inside London. These are lower than for other comparable roles eg: Neuroradiologist (non-clinical negligence-cerebral palsy cases) £136.80 in and out of London, so when looking at the overall issue fees payable would need to be considered in tandem with all other points.
- 10.3 The Acting Chair stated that this was an important issue although she did not have the information to fully gauge the strength of feeling but was concerned that action should be taken and suggested that consideration be given to encouraging expert witnesses to attend court due to the shortage of available expert witnesses.
- 10.4 The President of the Family Division proposed that a judicial working group chaired by a High Court Judge be put together to take this issue forward and that Committee Members should be updated under matters arising at the December meeting.

Action

President of the Family Division's office to formulate a working group to look at the issues raised concerning expert witnesses in the family court

ANY OTHER BUSINESS

11.1 Legal bloggers – update on the pilot and feedback on the form amendment

HMCTS reported that no further returns have been received and evaluation will be undertaken within the transparency group.

11.2 Professor Brophy – status of circulated material

The President of the Family Division stated that he had recently met with Professor Brophy and the National Youth Advocacy Service, and that guidance had been produced in relation to anonymity in correspondence, especially online material and they had asked for the President of the Family Division to endorse it. The President of the Family Division therefore stated that he intended on issuing the endorsed guidance in either December or January.

11.3 Family Procedure Rule Committee open meeting

The Acting Chair said that the issue of clear language brought up at the open meeting in October should be followed up and suggested that contact be made again with the Chief Executive of the Personal Support Unit who attended the October meeting, and who offered to assist in ensuring that plain English be applied to documents supporting the rules. The President of the Family Division stated that the West Yorkshire Family Court have produced a document which explains the court process in clear text and that he would forward this to the Committee for use as an exemplar document. Hannah Perry referred the Committee to Resolution's good practice guides and she also offered to share these with Committee Members.

DATE OF NEXT MEETING

- 12.1** The next meeting will be held on Monday 10 December at 11.00 a.m. at the Royal Courts of Justice.

Simon Qasim – Secretary

November 2018

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