



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 4 February 2019

Present:

Mrs Justice Theis	Acting Chair
Melanie Carew	Cafcass
Rob Edwards	Cafcass Cymru
His Honour Judge Godwin	Circuit Judge
District Judge Hickman	District Judge
Her Honour Judge Raeside	Circuit Judge
Michael Seath	Justices Clerk
District Judge Suh	District Judge

ANNOUNCEMENTS AND APOLOGIES

- 1.1** Apologies were received from the President of the Family Division, Lord Justice Baker, His Honour Judge Waller, Fiona James JP, Hannah Perry, Dylan Jones, Michael Horton and William Tyler QC.
- 1.2** The Acting Chair recognised that there were only eight sitting Committee Members in attendance at the meeting and asked if the rules governing quorate for any decisions made could be checked and confirmed at the meeting in March.

MINUTES OF THE LAST MEETING: 9 NOVEMBER 2018

- 2.1** His Honour Judge Godwin asked that paragraph 7.6 of the December minutes be amended to reflect the length of time court staff have to set aside for submitting full material onto 'FamilyMan'. The paragraph now reads:

The President stated that he had also recently been made aware that the standardised orders produced by Mostyn J and HHJ Hess and published by Class Publishing is not in widespread use and asked for opinions of legal practitioners in considering this further. HM Courts and Tribunals noted that there are data protection issues which might prevent this, although Michael Horton noted that if a Judge wants to use the package it was a question of individual choice. However, he thought that the tone and consistency used in the software still needed further work. Judge Godwin said that Court Staff currently have to type out the long orders onto 'FamilyMan' without the ability to copy and paste which takes a long time; he suggested that the recitals to orders should be placed within a schedule which could then simply be appended by staff to orders once approved by the judge, with the operative part of the order coming first as was always the case in the past. That would help simplify the process, and improve litigants in person's understanding of

the order. District Judge Suh stated that the system was particularly burdensome with Michael Seath noting that in feedback he has received from Legal Advisers, it had taken them up to two hours a day to re-submit the same information from the schedules.

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

PRIORITIES OF THE FAMILY PROCEDURE RULE COMMITTEE

- 3.1** Ministry of Justice Policy reported that following discussion at the previous meeting of the Family Procedure Rule Committee in December colleagues have reconsidered all aspects of the priorities table and feel that the document in its current form now fully reflects a more accurate position of the Committee's work at the time it was drawn up.
- 3.2** Ministry of Justice Policy explained that the table has now been sub-divided into three sections, MoJ priority workstreams; MoJ business as usual workstreams and additional FPRC workstreams (based on FPRC's indication of priorities). A number of subjects currently on the table will be subject to further change including that on Closed Material Proceedings, the CAFCASS pre-court resolution pilot, the set aside matter, registration orders and the C100 pilot will be reflected further for the March FPRC meeting.
- 3.3** The Female Genital Mutilation pilot was discussed as part of the priorities exercise. Ministry of Justice Policy reported that the Minister agreed to extend the pilot in its current form which will allow further time to speak to stakeholders including the judiciary and welcomed views as part of this work. The Acting Chair welcomed this course of action but suggested that this be re-visited for the March FPRC meeting where a further collation of responses from stakeholders will be more fully known.
- 3.4** Ministry of Justice Policy reported that the work being currently undertaken by the Costs Working Group had been slightly delayed due to illness and that the table will be updated following their deferred meeting of that group which has now been rescheduled for the end of February.
- 3.5** Judge Raeside asked why the work on financial remedy enforcement had been removed from the table. Ministry of Justice Policy said that the decision had been taken to prioritise the work on financial remedies in line with other pressing issues but could restore this to the table as a 'wish-list' item and to flag this as a future discussion item with Judge Waller. The Acting Chair suggested that HHJ Waller be invited to look at this point and financial remedy forms to express a view as he has proposed a way forward in the past.
- 3.6** Melanie Carew asked that the workstream relating to the disclosure of material to non-party children should also be moved off the table. The information sought can often be provided after it has been suitably redacted, and whilst the redaction process may be considered to be a barrier to disclosure, it does not mean that the

door is shut to obtaining the required information. The Acting Chair said that she is aware of some courts who send back a one-page questionnaire to ascertain what information is actually being sought. Melanie Carew said that she is aware of this practice and proposed that rather than submit a paper for the FPRC, she will instead speak to the Young People's Board about work currently being undertaken and potentially report back to Committee Members in due course.

MATTERS ARISING

Update on Pilot Practice Direction 36J – “Legal Bloggers”

- 4.1** HMCTS Policy said that only three more updates had been received in January although reported that one was very positive in praising the Court Clerk and the process.

Update on clear language following meeting between Mrs Justice Theis and the Chief Executive of the Personal Support Unit.

- 4.2** The Acting Chair said that she had a useful meeting with Eileen Pereira, Chief Executive of the Personal Support Unit (PSU) following contact made at the open meeting of the FPRC in October 2018. It was suggested that one of the PSU who sits on the Civil Procedure Rule Committee could build on forming closer links with this Committee, possibly through taking up the vacant lay member role. The Acting Chair encouraged Committee Members to propose useful candidates for this role and to promote the vacancy when it goes live on gov.uk.
- 4.3** The Acting Chair proposed that further discussion on this item be brought forward as an agenda item for the June meeting of the FPRC, when the lay member should be in post.

Standardisation of orders

- 4.4** Ministry of Justice Policy referred to the previous guidance issued by the former President of the Family Division but noted a concern that the simplified orders would not offer enough information to update the CMS system. The correct representative within HMCTS would also need to be identified whether either public law, private law or both areas to take this forward.

Registration of orders under Brussels IIa and Hague

- 4.5** The Acting Chair spoke about the issue raised previously in the Family Procedure Rule Committee regarding the reduction in Principal Registry of the Family Division District Judges and how their work was to be managed, specifically in relation to their current role in the procedure for registration of orders under Brussels IIa and the 1996 Hague Convention. Ministry of Justice Policy said that they were currently unable to dedicate resource to this issue as the same team was dealing directly with work on EU Exit. However, the intention was that this would be highlighted with that

team again with the hope that it could be brought forward as an agenda item in April. The solution might be just to change the place at which such orders can be registered.

Deed poll name changes

- 4.6** The Acting Chair said that she had been contacted by the Senior Master of the Queen's Bench Division with reference to the growing numbers of those applying for name changes which has risen from 640 in 2014 to 7521 in 2017 and 6879 by November 2018. The QB Master pointed out that the complex nature of some cases would make it more appropriate for the enrolment of Deed Polls evidencing the change of name of a child to be dealt with by Judges of the appropriate level of the Family Court. The Acting Chair said that she had spoken with the President of the Family Division and he supported this proposal with a view that there should be paper based but with a short hearing.
- 4.7** The Acting Chair proposed that this issue be brought back before the Committee in April.

Update on communicating the work of the FPRC

- 4.8** Ministry of Justice Policy said that they had considered the possibility of establishing an FPRC Twitter feed to address any of the points raised at Committee meetings. They said that the maintenance of such an account would be labour intensive and that no precedent for this exists within any of the other rule committees. However, the Ministry of Justice Communications Team did offer their generic Twitter feed (or the Judicial Office account) as a means to collate and publish communication of this kind. Judge Raeside said that she was disappointed with this message and thought that this would build a strong vehicle with which to reach out to stakeholders. She noted that it was possible to create accounts which do not 'reply' to messages, and that this should not have huge resource implications. The Acting Chair accepted this view but pointed to the fact that it was important that this medium would need to be both current and live. However, she did not think that this subject was closed and thought that it should be re-visited again in the future.

UPDATE FROM THE EU EXIT WORKING GROUP

- 5.1** The Acting Chair confirmed that the EU Exit working group had met on three occasions and during that time had worked hard to make enormous progress in what has proven to be an incredibly fast paced environment. The Acting Chair therefore commended Mr Justice MacDonald; Mr Justice Williams; His Honour Judge Waller; Daniel Eames; Rob George and Eleri Jones for their sterling work and said that she would take back the thanks of this Committee to the next meeting of the EU Exit working group on 7 February. Tribute was also paid to Alasdair Wallace (MoJ Legal) who has been extraordinarily helpful and turns around queries in record speed.

- 5.2** Ministry of Justice Legal stated that the Statutory Instrument covering the rules was on course to be laid on 11 February. However, practice directions run to a different timetable as they are outside of the *vires* of the EU Withdrawal Act and therefore more time will be allowed to ensure that these are drafted effectively.
- 5.3** District Judge Suh thanked both the EU Exit Working Group and Ministry of Justice Legal for their work. She said that she found the explanatory note particularly helpful but had a number of minor drafting changes which she would like to be considered. Ministry of Justice Legal reported that the timetable for amendments to be submitted is tight and District Judge Suh handed over a paper copy of the rules marked up with her amendments.
- 5.4** The Acting Chair proposed that this be brought back before the Committee in March.

UPDATE FROM THE CHILDRENS RULES AND PRACTICE DIRECTION WORKING GROUP

- 6.1** Judge Raeside said that no further progress had been made following the meeting of the working group after the December meeting of the FPRC but restated a point she made previously in respect of funding either through a private organisation or a charity to unlock the necessary resources to look at the issues. Ministry of Justice Policy said that the working group should again be wary of assuming that money could be the answer and pointed towards aspects of participation rather than just views as a way forward. Ministry of Justice Policy also welcomed the fact that the policy lead is due to sit on the Children's Rules and Practice Direction working party in future.
- 6.2** Judge Raeside particularly asked for information on how many children there are in the system who do not have a voice and the groups of children subject to proceedings. Effectively what needs to be established is how many children don't have a voice in proceedings which aren't completed at the FHDRA. Melanie Carew said that she would take this question away and provide figures for the March meeting of the FPRC, however she flagged up that her figures would only reflect those applications with safeguarding measures (where Cafcass have been asked to prepare the s.7 report) so may not include enforcement. HMCTS said that they would check with their Analysis & Performance Team to fill in any of the gaps that Melanie Carew is unable to provide. The Acting Chair thought that a "ball park" figure would help inform the Committee.

ACTION

Melanie Carew and HMCTS Policy to provide a paper including figures providing data as to how many children within the system do not have a voice.

NOTIFICATION OF PARENTS WITHOUT PARENTAL RESPONSIBILITY UNDER PRACTICE DIRECTION 12C

- 7.1** The Deputy Director of the Ministry of Justice’s Family Policy Team introduced this item, following discussion at the previous meeting of the FPRC in December. He said that it remained a high-profile area and that 82 MPs signed up when an Early Day Motion to amend the Children Act 1989 was tabled by Louise Haigh MP on 23 January. He also noted that, a journalist had asked what work the Family Procedure Rules Committee were undertaking on the issue.
- 7.2** Ministry of Justice Policy said that they have applied a light touch approach and asked the Committee to consider the possible amendments to Practice Direction 12C to clarify or better reflect the law regarding notification of parents without parental responsibility in certain proceedings.
- 7.3** Judge Godwin asked whether consideration had been given to amending the application form so that the issue of notification could be referred to the Judge at the beginning of the process for directions to be given. This will provide the opportunity to state (on the form, which could refer to PFD guidance) that exceptions to the requirement to notify parents without PR may be granted in certain circumstances. Otherwise, litigants in person would be required to issue two applications. The Acting Chair agreed with this suggestion but added that greater thought on consistency between private and public law proceedings will also need to be applied.
- 7.4** Melanie Carew said that issues in public law has a far more straightforward method with which to go to the Higher Court as a matter of practice than in private law cases. Melanie Carew said that the Local Government Association recommendation of the need to remind local authorities of the option on parental notification in certain circumstances should also be considered as a matter of course. She said that it could be possible to tap into the work already happening on pre-proceeding measures.
- 7.5** District Judge Suh asked whether the information distributed to the Committee was intended to lead to a staggered approach to service of the C6A. If so, amendments to PD12A would be needed. This would get around the difficulty of the mother not knowing the position and she suggested that an amendment be made to make this clear and for provision to be made for the Local Authority to send out the documents on day 2. The Acting Chair said that she was not unsympathetic to the proposals but greater thought is still needed on guidance especially around the allocation and gatekeeping process at 1st hearing stage. The Deputy Director of the Ministry of Justice’s Family Policy Team welcomed this stance and indicated that they intend to proceed but with more detailed guidance. Judge Raeside was concerned that any delay in service would have an adverse impact on the timetable, which starts to run from issue of the application.
- 7.6** The Acting Chair suggested that the Policy Team should liaise with Judge Godwin and District Judge Suh to filter further ideas and to help move matters along, and the matter should be returned to the March meeting.

COURTS AND TRIBUNALS (JUDICIAL AND FUNCTIONS OF STAFF) ACT IMPLEMENTATION

- 8.1** Ministry of Justice Policy introduced this item and said that the CAT (JAFS) Act received Royal Assent on 20 December 2018 and that they were targeting a commencement date of October 2019. They said that the intention is to bring this before all rule committees for consideration over the next few months. Where new rules are needed under these new powers, they must come into effect on the date of commencement across all jurisdictions.
- 8.2** The Act gives new or wider powers to jurisdictional procedure rule committees (and others who are responsible for making certain rules of court), to provide for HMCTS staff to exercise judicial functions in the courts and tribunals. A number of these functions are already undertaken by Justices' Clerks and Committees are being asked to determine which judicial functions staff may or may not carry out in their jurisdiction, as well the qualifications and experience they will need to do so.
- 8.3** Ministry of Justice Policy drew the Committee's attention to the short timescale needed for October commencement, although they recognised that some Members may welcome the opportunity to reconsider powers generally across the family jurisdiction. The Family Procedure Rule Committee are the first of the rule committees to look at this exercise. Crime are operating on a different timescale but those covering Civil and Tribunals are looking to include discussion at their next meetings. It would be legally possible to commence the Act for different jurisdictions at different times but operationally, it would be preferable for commencement to take place at the same time in all jurisdictions.
- 8.4** HMCTS legal operations pointed to the criminal rules and that they may need overhaul as they have not kept up with current practice and if the FPRC were to follow a similar route then she proposed that the Committee consider three elements; what functions may be exercised, who may exercise them and whether there ought to be a right of reconsideration.
- 8.5** Michael Seath stated that he thought that there would be very little issue in making adjustments in family courts and thought that this would just need HMCTS to re-align working practices to reflect proposals. He said that currently those suitably qualified are armed with the relevant powers in the family court. However, Judge Raeside thought that it would be useful to look carefully at everything on a step-by-step basis.
- 8.6** Judge Godwin voiced concern on moving judicial powers to the Executive. He thought that the lack of an equivalent to the "Justices Clerk" at District and Circuit Bench level would, if powers currently reserved to judges were devolved it would create a new breed of "Executive Judiciary", potentially trespassing upon the case management responsibilities of the salaried judges and blurring the essential Constitutional distinction of the Judiciary and the Executive. As an aside, Judge

Godwin wondered whether any consideration had been given to the pension implications of devolving such powers. HMCTS legal operations thought that the functions of Justices' Clerks exercised in family proceedings since the introduction of the Children Act 1989 already created this situation. Judge Raeside expressed unease with the descriptor "lay-justices" used in the Act.

8.7 DJ Suh asked for clarification in relation to the scope of the Act. Her understanding was that although the committee were being asked to confer functions on justices' clerks using the new powers, the Act had a wider scope and could be used to for a more widespread delegation of judicial functions to court staff. MOJ confirmed that this was correct. DJ Suh also noted that where the committee did not consider that there should be a right of consideration in relation to the exercise of judicial functions by an authorised person they had to inform the Lord Chancellor of this decision and give reasons for it.

8.8 The Acting Chair said that an 'at a glance' table containing essential core material needs to be constructed before the Committee can consider proposals. This would need to contain an up to date list of those affected and covered under the new Act (including legal advisers/lay justices); and a covering paper on what the Committee needs to do including next steps, a timetable and the implications if an October commencement is not possible. Given that the Committee is likely to want a full consultation, the Acting Chair warned that an October implementation is ambitious.

ACTION

Ministry of Justice Policy and HMCTS legal operations to put together a full package with a table reflecting who does what and a paper detailing next steps for consideration by the Committee ahead of the next meeting in March

MANCHESTER PILOT

9.1 Ministry of Justice Policy presented the findings from the MoJ and Cafcass pilot which ran in Manchester courts between January and July 2018. During the pilot, Cafcass assessed whether a dispute between parents relating to arrangements for their children was suitable for out-of-court dispute resolution. The challenge in encouraging people to come out of the system at such a late stage was presented as a significant barrier and timing was seen as an important tool in encouraging progress. The cost savings associated with withdrawal from the triaging process (around £2800) was seen as quite substantial and the intention is to now present options to the Minister. As part of this package the process of signposting at an early stage will be put forward.

9.2 Judge Raeside said that once people have paid their application fee, it can be difficult to persuade them to exit the system, especially if they feel that they will receive an inferior service. She suggested that a fee grading system could be introduced and noted that the problem is that the removal of legal aid means people are coming to court without having received proper advice.

CHANGE TO THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 2008: ABILITY OF SOLE APPLICANT TO APPLY FOR A PARENTAL ORDER

- 10.1** Ministry of Justice Policy explained that Section 54 of the Human Fertilisation and Embryology Act 2008 (HFEA) previously only provided for a couple, and not a single person, to be able to apply for a Parental Order to transfer legal parenthood where a child is born as the result of a surrogacy arrangement, providing that the gametes of at least one of them were used to bring about the creation of the embryo. This was found by the court to be incompatible with the ECHR.
- 10.2** Ministry of Justice Policy said that they had been made aware, quite late in the process, that a Remedial Order had been laid, using powers in the Human Rights Act 1998, to remedy the ECHR incompatibility by introducing the new section 54A (parental orders: one applicant) into the Act, and to make the necessary consequential amendments to the FPR 2010. Action was taken immediately and Ministry of Justice Policy worked with DHSC to identify urgently what steps needed to be taken, including to prevent any applications made by sole applicants on the existing form being rejected by family courts and to update explanatory content on GOV.UK.
- 10.3** Ministry of Justice Policy tabled this item to update the Committee on the rule changes already made in the Remedial Order and to draw attention to additional, very minor consequential amendments also thought necessary, which could be incorporated in the next updating SI in Spring. The Acting Chair proposed that these be revisited in either March or depending on the timetable, April.
- 10.4** Ministry of Justice Legal advised the minor additional changes had already been identified and were shown in tracked changes in the paper. They asked that any drafting comments be submitted to them direct for consideration. Legal also asked whether, drawing on their experience of parental order applications, the Committee thought there might be a need for the spouse or civil partner of a sole applicant to be added to the list of automatic respondents in Part 13, or whether the court's power to add respondents is sufficient. The Acting Chair and Melanie Carew confirmed the court's power can be relied on if necessary.

ANY OTHER BUSINESS

- 11.1** The Family Procedure (Amendment No 2 Rules) 2018 inserted Rule 30.12 A – A question was raised on the need for a supplementary Practice Direction, as provided for in sub-paragraph 4 in relation to where an Appeal court's power to order that hearing of appeal be held in public. Ministry of Justice Legal said that liaison between this and work being undertaken in the Civil Procedure Rule Committee should be dovetailed and that the possibility that this could mean a Fees Order will require that it is important to feed into the various Project Boards.

Action

Ministry of Justice Policy and Legal to gather information for the March meeting.

- 11.2** Judge Waller had raised an issue about some of the wording in the new PD36L, relating to the next phase of the on-line divorce project out of Committee. Judge Waller said that he had not had an opportunity to consider this in detail, but offered to work with HMCTS and the President's Office to consider this further. The Acting Chair proposed that this item be brought back for consideration in March and for Judge Waller to be contacted beforehand so that he is aware of the position.
- 11.3** The Acting Chair announced that it was Hannah Perry's last meeting before taking a period of maternity leave. The Committee sent their best wishes.
- 11.4** The Acting Chair asked Committee Members to be aware that the next meeting of the FPRC in March is due to be held the day before the Family Justice Board National Conference and that this might have implications for the Ministry of Justice Policy team's capacity.

DATE OF NEXT MEETING

- 12.1** The next meeting will be held on Monday 4 March at 11.00 a.m. at the Royal Courts of Justice.

Simon Qasim – Secretary
February 2019
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