



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 8 April 2019

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
District Judge Hickman	District Judge
Michael Horton	Barrister
Fiona James JP	Lay Magistrate
Dylan Jones	Solicitor
Mr Justice Mostyn	High Court Judge

ANNOUNCEMENTS AND APOLOGIES

- 1.1** Apologies were received from His Honour Judge Godwin, Her Honour Judge Raeside, His Honour Judge Waller, Hannah Perry, Michael Seath and William Tyler QC.
- 1.2** The Acting Chair announced that Mr Justice Mostyn had been invited by the President of the Family Division to take up the role of High Court Judge member of the Committee. Mr Justice Mostyn joins with particular expertise on financial remedy cases, and most recently led the work of the FPRC Costs Working Group.

MINUTES OF THE LAST MEETING: 4 FEBRUARY 2019

- 2.1** Melanie Carew asked that paragraph 3.9 of the March minutes be amended to reflect more accurately the comments made at the meeting. The paragraph now reads:

'Melanie Carew noted that it was not uncommon to list a case for a contested hearing where there were no welfare issues, and that other means of hearing a child might be used. The Acting Chair asked roughly how many cases this occurred in. Michael Seath said that they had various ways of collecting data in some regions and would endeavour to find out more information'.

- 2.2** The Acting Chair asked if paragraph 7.3 of the March minutes could be amended to correct the name of the department. The paragraph now reads

One option, presented by HMCTS Legal as the more straightforward course, would be to retain all the functions currently being carried out by justices' clerks and legal advisers and simply transfer them over to the new authorised officers. It was accepted, however, that even adopting this course would involve consideration of the level of qualifications and experience required for each task. Nevertheless, it was suggested that such a course would not require an extensive process of consultation. The alternative would be to go through the list item by item and either remove or add to the functions currently being delegated to non-judicial staff. In due course, it is conceivable that the government may propose that other functions be transferred to non-judicial staff, whether as part of the current reform programme or otherwise. Another matter to which HMCTS Legal representatives drew attention is that for the first time the Act allows CILEx Fellows to be approved to give legal advice to lay justices. It would equally be open to rules committees to allow certain judicial functions to be delegated to CILEx Fellows.

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

MATTERS ARISING

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

- 3.1** HMCTS Policy reported no more attendees since the update in March but Judges have been emailed for feedback on cases where a legal blogger was present. HMCTS Policy confirmed that the pilot is due to end on 30 June 2019.

Review of the current court process under which applications and orders for female genital mutilation protection orders (FGMPOs) and forced marriage protection orders (FMPO) are made

- 3.2** MoJ Policy said that a questionnaire, designed to assist in evaluating how the pilot was working so far had been sent to 60 individual stakeholders and all 152 Local Authority children services and their legal departments. Around 36 responses had been received and around half of those thought the court should be responsible for informing the police that an order had been made, even before the respondent has been served.
- 3.3** A meeting has been arranged involving the President of the Family Division, MoJ Policy and Police representatives at New Scotland Yard early in May to evaluate the pilot so far and consider next steps.

Hearing of the child – Further update on statistics

- 3.4** Melanie Carew said that further to her update in March she had been unable to collect further data about when the voice of the child is heard, as information about cases they are not involved in is not available to Cafcass. She said that some Committee Members had previously offered to provide information which would reflect a local perspective as a means to collating some data but she hadn't received

anything before this meeting. Fiona James said that she recently dealt with a non-molestation order locally and was concerned that the voice of the child was not considered as part of that piece of work.

- 3.5** Melanie Carew suggested that this area could possibly be better explored through the Private Law Working Group dovetailing with the CAP redesign work. As that Working Group is looking at process, then if there is to be a process around hearing the voice of the child, then might it be best for this to be something for the Private Law Working Group to consider? The President of the Family Division noted that the Private Law Working Group was looking at a possible “fast track” for cases, with no section 7 report. He was concerned that amalgamating that work with work relating to the voice of the child could water down the consideration of issues relating to the voice of the child.
- 3.6** The President of the Family Division said that a way forward would be for the Committee to understand any available statistics, for the Private Law Working Group to propose something in their interim report, and for the Children Working Group to then look at the issue of the voice of the child in that context. Melanie Carew agreed to this.
- 3.7** Melanie Carew noted that we know that around 40% of cases do not go beyond a first hearing. For the rest, the assumption is that there would be a section 7 report on each case, but she heard anecdotally that this is not the case. The principle is whether the voice of the child can or should be inputted before the first hearing. But post-first hearing Cafcass are in difficulties knowing how many cases there are, if not all have section 7 reports. HMCTS noted that they may be able to get statistics on numbers of cases with a local authority section 7 report – but even these would not capture all post-first hearing cases that do not go to Cafcass, as some are adjourned off for SPIP or other intervention. Melanie Carew indicated that she will go back to Cafcass to see if they can breakdown the data they do have about cases with section 7 reports.
- 3.8** The Acting Chair said that the FPRC Children’s Group should meet with Sir Stephen Cobb who chairs the Family Working Group to gain further information. The Acting Chair recommended that this item is returned to in June after consideration of both the Private Law Working Group’s interim report and further gathered data and that Melanie Carew should speak to Judge Raeside before then for her to report back on behalf of the Children’s Working Group at the June meeting, as Melanie Carew cannot attend that meeting.

ACTION

Melanie Carew/Judge Raeside to put together a paper for the June FPRC meeting

FPRC Digitisation sub-committee

- 3.9** Lord Justice Baker said that the initial meeting of the Digitisation sub-committee had recently convened. He set out the membership. He said that the digitisation reforms

to the family justice system fall into four areas, divorce, financial remedies following divorce, private law children's cases and public law children's cases. This work is over-seen by a cross-jurisdictional digitisation group (civil and family) that had been set up by the Master of the Rolls and chaired by a senior HMCTS official.

- 3.10** Lord Justice Baker said that the reforms are being introduced in various pilot schemes, under provisions set out in a series of practice directions under Part 36 of the Family Procedure Rules - "Transitional Arrangements and Pilot Schemes". These are drafted by MoJ and approved by the President of the Family Division. The sub-committee will keep a watching brief and report back every two or three months as and when there are developments.
- 3.11** Mr Justice Mostyn asked whether the online divorce project would prevent applications being made that do not meet the statutory criteria, such as divorces applied for within one year of marriage. The President of the Family Division confirmed that the online system should prevent such applications being made and added that glitches in the online system are being spotted and dealt with.
- 3.12** Lord Justice Baker said that the benefits of the work on the financial remedies element will be obvious in that at present resource issues mean that consent orders can take up to 20 weeks to get before a District Judge and under the new digitised process, this could be reduced to around two weeks. Mr Justice Mostyn recommended speaking to His Honour Judge Hess as part of this process.
- 3.13** Mr Justice Mostyn asked whether he should be a member of the digitisation sub-committee, as he has the expertise from his work on the Financial Remedy Courts, which are reliant on digitisation. Mr Justice Mostyn referred to a project between Financial Remedy Courts and the Law Commission in which data is collated via a mechanism to replace D81 like forms, to help reflect the outcomes of Financial Remedy cases. The intention is that this will produce a "statistically valid sample" with over 5000 pieces of data within a year to establish the principles that are being applied in "normal" Financial Remedy cases, and the outcomes in those cases. This data should then be analysed by researchers. The idea is that ultimately unrepresented court users will be able to know what the likely outcome would be in their case, which should then encourage more cases to settle.
- 3.14** Lord Justice Baker noted that that would be a clear example where digitisation is critical. He said that the digitisation of both the Public and Private Law children's cases is at a very early stage. District Judge Suh is involved in this project and will be able to feed back to the Committee going forward. Lord Justice Baker proposed that the sub-committee meets again in May and reports back in June. He noted that he is impressed with the work that is being done on digitisation by MoJ and the technical teams.
- 3.15** Michael Horton raised a concern about the divorce acknowledgement of service online form in that there is no signature required and, in turn, no verification of that signature on the decree nisi application. He had spoken to a senior HMCTS official

about this separately who informed him that the system monitors the IP addresses for email communications, which might be a better way of identifying fraud than verifying signatures. The Acting Chair suggested Michael Horton might want to speak to Judge Waller if this is an area of ongoing concern. Lord Justice Baker said that this is useful to know although not specifically for this sub-committee as they were not monitoring individual practice directions. The President of the Family Division suggested this might be more an issue for Mr Justice Cobb and the Judicial Engagement Group. Mr Justice Baker noted that the sub-committee does envisage looking at eventual rule changes when the current pilots end and move to permanent systems.

ACTION

Lord Justice Baker to report back in June

Update on the appointment of a lay member to the FPRC

- 3.16** Ministry of Justice Policy said that the sift took place on 21 March with three candidates identified, and interviews are due to take place towards the end of April although a Ministerial submission is still required as part of the process and so a further update will be provided by May.

Transparency: Update on the amended draft template order which is required to enable the new Practice Direction 30B to be made (Practice Direction 30B is the Practice Direction envisaged by the new rule 30.12A(4))

- 3.17** Ministry of Justice Legal referred to the request made on 18 March to Committee Members to comment on the amended draft template order which is required to enable the new Practice Direction 30B to be made (Practice Direction 30B is the Practice Direction envisaged by the new rule 30.12A(4)).
- 3.18** Lord Justice Baker asked if comments could still be submitted within a week and Ministry of Justice Legal confirmed that this would still be acceptable. It was agreed that comments should be sent by email with a view to a final resolution of this issue at the May Committee meeting.
- 3.19** Mr Justice Mostyn noted that rule 30.12A is not yet on the Justice website despite coming into force on 10th December 2018. He noted too that the rule itself needs amending as paragraph (3) should cross-refer to paragraph (2), not paragraph (1). Lord Justice Baker suggested the same problem arises in paragraph (4)(a).

ACTION

Committee members to consider the request of 18 March and respond direct to Ministry of Justice Legal by Monday 15 April at the latest

Courts and Tribunals (Judicial and Functions of Staff) Act implementation

- 3.20** Ministry of Justice Policy noted that this issue had been discussed in February and March and that this was another opportunity to discuss and to identify next steps. Lord Justice Baker referred the Committee to Paragraph 7.10 of the March minutes and the President of the Family Division's view that it was important engage with a number of groups about how best to take this work forward. The Acting Chair suggested that an initial consultation would be a proactive way in which to start discussion. Lord Justice Baker asked if the President of the Family Division would consider sending out a letter (to those organisations mentioned at Paragraph 7.10 of the March FPRC minutes) quickly, and raise the issue at the President's conference in May. The President of the Family Division noted that the Committee would be consulting on three matters – what work could be allocated to authorised officers, what qualifications authorised officers should have, and when there should be the right to reconsideration of a decision made by an authorised officer.
- 3.21** Lord Justice Baker asked for clarity on the suggestion that all the functions currently being carried out by justices' clerks and legal advisers would simply be transferred over to the new authorised officers. Ministry of Justice Policy said that this is a decision for the Rule Committee themselves, but that is certainly is an option for the Committee to mirror the current provisions for Justices' Clerks and Assistants into new rules. They noted that when the provisions are implemented HMCTS might ask the Committee if it wants to make any changes, but at this stage it might well just be a question of replicating where we are at now. The decision is the Committee's.
- 3.22** Ministry of Justice Policy said that they can re-circulate papers provided previously if necessary as they contain the information relating to various points, including the qualifications currently needed to be a Justices' Clerk or Assistant (which could be mirrored across for authorised officers in the new scheme, if that is what the Committee considers appropriate).
- 3.23** Ministry of Justice Policy asked whether the Committee might want to progress this issue through the formation of a working group. The Committee thought this might be a way forward by that it was currently too soon to set up such a group. The Acting Chair said that it would be useful to know who sat on similar working groups in other jurisdictions.
- 3.24** Ministry of Justice noted that in 2013/14 the Committee, via a Working Group, had looked in detail into the issue of which court functions should be capable of being carried out by a Justices' Clerk or Assistant in the family court. The Committee might, therefore, consider the resulting 2014 Rules a safe foundation on which to build this new project.
- 3.25** Lord Justice Baker noted that there are reports of varying practice across the country in terms of the types of functions legal advisers are carrying out. Ministry of Justice Legal emphasised that, as is the case with the current power, the new power is an enabling one, so new rules would not mean that a given function *has* to be

performed by an authorised officer in all cases – rather that it *could* be. In any given case the court could, for example, determine that all decisions should be taken by a judge even if potentially some could be taken by an authorised officer.

- 3.26** Lord Justice Baker and the Acting Chair agreed that they would draft a consultation letter for the President of the Family Division and share this draft with Ministry of Justice Policy. There will be a report back to the Committee in July, following the consultation and the President’s conference. The Acting Chair noted that the policy owners will need to be prepared to provide a paper ahead of the President’s Conference which is scheduled for the beginning of May.

ACTION

Lord Justice Baker/Acting Chair to draft a consultation letter/ paper for the President of the Family Division, and share the draft with MoJ Policy.

Post-consultation report to be given to the July FPRC meeting

Ministry of Justice Policy to draft a paper for the President of the Family Division ahead of the President’s Conference, if requested.

Closed Material Proceedings

- 3.27** Ministry of Justice Policy explained that this issue is a joint Home Office/Ministry of Justice piece of work. Lord Justice Baker explained the need to bring this area under a statutory umbrella. Rules have been drafted but there are technical issues within them which have been going back and forth between MoJ and the Home Office. Progress has slipped as officials have had to give priority to EU Exit work.
- 3.28** Ministry of Justice Policy advised that the project would return to the Committee once it has been possible to make progress with Home Office. Lord Justice Baker proposed that the Working Group considering this project have an update meeting by phone in May and report back to the Committee in June.

ACTION

Ministry of Justice Policy to arrange a teleconference meeting of the working group in May with a view to reporting back to the Committee in June

Costs Working Group

- 3.29** This issue was not on the agenda under ‘matters arising’ but the Acting Chair asked if it could be raised
- 3.30** Mr Justice Mostyn noted that the Costs Working Group had produced two draft consultation papers, which are now with MoJ officials for checking and for timetabling the project forward. There has been recent interest in this area in Family Law and it is an area in need of urgent reform. He could not see that there would be

objections to the proposals in the first draft consultation paper, which the Working Group proposes be sent out for limited consultation on a relatively short turnaround. The proposals around Calderbank offers in the second draft consultation paper may prove more controversial.

- 3.31** Mr Justice Mostyn reminded the Committee that there was one Practice Direction amendment that it had been agreed need not be consulted upon. He would like an update on when that would be likely to be made.

ACTION

MoJ Officials to report back to the May Committee meeting with an update on the timing for the stand-alone Practice Direction amendment, and on the shorter proposed consultation paper. MoJ Officials to also prepare for the May Committee meeting a timetable for progressing the fuller proposed consultation on Calderbank reforms.

PRIORITIES OF THE FAMILY PROCEDURE RULE COMMITTEE

- 4.1** The Acting Chair asked whether Line 20 of the priorities table in reference to ‘set-aside’ could be included on the agenda for the next meeting of the Family Procedure Rules Committee on Tuesday 7 May.

REGISTRATION OF ORDERS UNDER BIIA AND 1996 HAGUE

- 5.1** Ministry of Justice Policy noted that this was first raised by the Acting Chair in December in respect of the shortage of Judges of the Principal Registry of the Family Division (PRFD) to undertake the required work to register incoming orders under Brussels IIa (BIIA) and the 1996 Hague Convention. The Acting Chair had requested that MoJ policy and legal consider this concern and potential solutions, including whether and how registrations might be transferred to the family court
- 5.2** MoJ Policy noted that there are two options to address this issue: the appointment of a further DJ to the PRFD, or legislation to move the location for registration of such orders away from the PRFD and to the family court.
- 5.3** Any decision to switch registrations to the family court would be for the Lord Chancellor, in consultation with the President of the Family Division, as the jurisdiction for 1996 Hague registrations is currently conferred on the PRFD in Regulations, and for BIIa registrations by a notification to the Commission. Rule changes would be needed to reflect this decision and the amendments required but would not of themselves create the change.
- 5.4** Changes to UK legislation could require between 3 and 5 negative-resolution statutory instruments to transfer jurisdiction on the family court. This would require parliamentary time, with national legislation unlikely to be in force until late 2019 or

even 2020. Furthermore, the coming into force of such legislation would need to be linked to notification to the European Commission under Articles 29/68. Currently, the process for UK notification to the EU of any changes is dependent on the outcome of EU Exit negotiation, but past experience of making the required change to the Official Journal of the European Union suggests the process could take years. MoJ policy noted that any such change would have a significant impact on policy and legal capacity

- 5.5** Michael Horton asked whether appointing more DJs to the PRFD would be more cost effective. The President of the Family Division said that currently the only difference between DJs of the PRFD and those of the family court was an extra week's holiday and they have looked at the possibility of this as a solution but would need to make a case under the recruitment exercise.
- 5.6** The President of the Family Division thanked the Ministry of Justice Policy and said that it would be difficult to justify the time and work needed to overhaul legislation to enable this issue. The Acting Chair proposed that this should now be returned to as a matter arising, once they have a chance to respond to the points raised.

GUARDIANSHIP (MISSING PERSONS) ACT 2017

- 6.1** Ministry of Justice Policy introduced the issue of the Guardian (Missing Persons) Act 2017 which creates a legal framework for those left behind to secure the appointment of a trusted person to use and manage the property and financial affairs of the person who is missing. They presented papers to help familiarity and asked the Committee to consider the approval of the adoption into the Family Division rules of proposed amendments to Part 57 of the Civil Procedure Rules and for a new Practice Direction 57C with related and consequential amendments.
- 6.2** Ministry of Justice Policy said that they spoke to this item at the Civil Procedure Rule Committee's (CPRC) meeting on 8th April and that their intention is to set up a sub-committee to undertake some redrafting to integrate Guardianship provisions as far as possible within the existing rules, with the aim of streamlining and reducing the number of new provisions required.
- 6.3** The Acting Chair recognised the risk of the Family Procedure Rules being out of sync with that of Civil and proposed that a sensible way forward would be for one or two members of this Committee to sit on the Civil sub-committee.

ACTION

The Secretary to the Family Procedure Rules Committee to arrange for a full Committee Member to sit on the Civil sub-committee before 12 April 2019

Notification of parents without parental responsibility under Practice Direction 12C

- 7.1** The Deputy Director of the Ministry of Justice's Family team said that progress has been made and a draft paper has been produced. However, as the two Committee

Members, Judge Godwin and District Judge Suh, who sit on the working group and have been key contributors to the paper were not able to attend the meeting, he proposed that this issue be returned to in May.

7.2 The President and the Acting Chair agreed.

ANY OTHER BUSINESS

8.1 Mr Justice Mostyn referred to the March meeting when he indicated he would prepare a document noting errors he had identified in the FPR, and areas where the FPR are out of line with the CPR. He confirmed his intention to prepare this paper in due course.

DATE OF NEXT MEETING

9.1 The next meeting will be held on Tuesday 7 May at 10.30a.m. at the Royal Courts of Justice. It was agreed that the earlier start time be convened to allow for officials attending the Family Justice Board meeting at the Palace of Westminster (which is taking place on the same day) time to move between both locations.

Simon Qasim – Secretary
April 2019
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