



Ministry of Justice

FAMILY PROCEDURE RULE COMMITTEE
In the Conference Suite, 2nd Floor Mezzanine Level
Queen's Building, Royal Courts of Justice
At 10.30 a.m. on Tuesday 7 May 2019

Present:

Sir Andrew McFarlane	President of the Family Division
Mrs Justice Theis	Acting Chair
His Honour Judge Godwin	Circuit Judge
Her Honour Judge Raeside	Circuit Judge
Mr Justice Mostyn	High Court Judge
District Judge Suh	District Judge
Fiona James JP	Lay Magistrate
Michael Seath	Justices Clerk
Melanie Carew	Cafcass
William Tyler QC	Barrister
Rob Edwards	Cafcass Cymru
Michael Horton	Barrister
Dylan Jones	Solicitor

ANNOUNCEMENTS AND APOLOGIES

- 1.1** Apologies were received from Lord Justice Baker, His Honour Judge Waller, District Judge Hickman and Hannah Perry.

MINUTES OF THE LAST MEETING: 8 APRIL 2019

- 2.1** His Honour Judge Godwin asked whether action points from the previous meeting could be circulated in advance of the full minutes to assist those who may have not have been able to attend that meeting.
- 2.2** The minutes were approved as a correct and accurate record of the meeting.
- 2.3** The Acting Chair asked whether the position discussed under Item 5.1 in the April minutes in respect of registration of orders under Brussels IIa (BIIA) and the 1996 Hague Convention could be updated. MoJ Legal reported that if the senior judiciary and the Lord Chancellor were inclined to pursue these changes, the timescales for the necessary statutory instruments would still be as mentioned at the April meeting (ie coming into force date of April 2020), and that the change in notification to the European Commission under Brussels IIa could take effect in the same time frame.

Although publication in the Official Journal of the European Union could still take up to 1-2 years, such publication was not necessary for the notification to take effect.

- 2.4** The Acting Chair asked whether this item could be returned to the June meeting of the Family Procedure Rule Committee for further update, in particular on questions relating to the role of district judges in the PRFD.

ACTION

MoJ officials to progress consideration of the proposal to transfer registrations of BIIa and 1996 Hague orders to the family court from the PRFD, including the question of the role of district judges in the PRFD, with a view to updating the Committee at the June meeting and eventually to providing advice to Ministers.

MATTERS ARISING

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

- 3.1** HMCTS Policy reported no more attendees since the previous update and that the pilot is due to end on 30 June 2019.

Update on the appointment of a lay member to the FPRC made

- 3.2** MoJ Policy said that the dates originally pencilled in for interviews had to be postponed due to a bereavement for one of the interviewers. Interviews were now detailed for 9 May 2019 and a further update will be provided at the June meeting of the Family Procedure Rule Committee.

Update on the amended draft template order required to enable the new Practice Direction 30B to be made

- 3.3** MoJ Legal said that comments had been received from Members of the working group and a final draft of the two template orders prepared accordingly. On timing, MoJ Legal confirmed that Parliamentary time was not an issue because this was a Practice Direction, and so it could move forward relatively quickly although there is still a need to include the web address where the template orders will be published within the text (and therefore a need for an operational decision as to what that address should be).
- 3.4** Judge Mostyn remarked that one significant change to the draft Practice Direction since last seen by the full Committee was the inclusion of provision for allowing court reporters to have sight of skeleton arguments. He wondered whether this was something which might be extended to legal bloggers but accepted that this is a wider issue which although under the transparency umbrella did not need to be addressed now and should not block progress.
- 3.5** The Committee agreed that this matter move forward.

Guardianship (Missing Persons) Act

- 3.6** MoJ Policy reported that good progress had been made with the joint civil and family sub-committee on which District Judge Suh sat and thanks were recorded to those who contributed for reaching the current position. MoJ Policy said that the sub-committee had worked through a number of drafts with the intention of simplifying the rules and after consideration, came to the view that bespoke rules are required in view of the particular provisions of the legislation.
- 3.7** The sub-committee recommended that the Civil Procedure Rule Committee should adopt their proposed draft rules and Practice Direction at their Committee meeting on Friday 10 May following discussion on some minor drafting points. No transitional provisions are required as this is a new statute.
- 3.8** The Committee agreed with the proposal to take the paper back to the Civil Procedure Rule Committee and to indicate to that Committee that the Family Procedure Rule Committee is comfortable with the latest draft rules and Practice Direction.

Costs Working Group update

- 3.9** Ministry of Justice Policy said that a number of points had been raised on the two consultation documents sent through by the Costs Working Group. These were discussed further at a telephone meeting on 1 May 2019 between officials, Mr Justice Mostyn and HH Judge Waller. Officials are to consider the resulting amendments and any policy issues which arise and will provide revised draft consultation papers in time for them to be submitted to the June meeting of the Committee.
- 3.10** In relation to the amendment to PD28A which the Committee had previously agreed should be made without the need for prior consultation, MoJ Legal noted that it was hoped this would be included in a Practice Direction amending document to be submitted to the President and the Minister shortly.

ACTION

MoJ Officials to provide updated copies of the two consultation documents for the June meeting of the Family Procedure Rules Committee

Deed Poll applications for minors

- 3.11** Ministry of Justice Policy said that initial work undertaken from both civil and family law perspectives showed that further consideration was still required on the issues and on whether some or all applications for minors should shift to the family court and/or the High Court Family Division. If changes were to be made, a number of statutory instruments would be required. Ministry of Justice Policy asked for the Committee to consider whether it would be preferable that this item be removed

from the priorities table and considered outside of Committee including referring the matter back to the Queen's Bench Master.

- 3.12** The President of the Family Division said that he had spoken with the Master of the Rolls office when this issue first arose and that they were of the view that this should be considered as family business and dealt with accordingly. However, he accepted the proposal that this be dealt with out of Committee and that it should be removed from the priorities table.

Action

MoJ Policy to provide an update at the FPRC meeting in November

PRIORITIES OF THE FAMILY PROCEDURE RULE COMMITTEE

- 4.1** Ministry of Justice Policy said that in relation to Line 5 of the priorities table concerning Closed Material Proceedings, the intention is to give an update in the July meeting of the FPRC and to amend the table accordingly following that discussion.
- 4.2** Ministry of Justice Policy reported that the columns on the table referring to the financial remedy proceedings work will still need further updating. A revised plan for amalgamating Forms E and E1 has been sent out to members of the working group and is awaiting responses. Judge Raeside asked whether her inclusion on the working group should be reconsidered. Judge Mostyn asked whether it would be more suitable for him to sit on this working group and the Acting Chair proposed that these changes be reflected immediately.
- 4.3** The President of the Family Division referred to Line 11 of the Priorities Table in relation to the pilot to improve communication in relation to Forced Marriage Protection Orders (FMPO) and Female Genital Mutilation Protection Orders (FGMPO) to the police and said that he recently attended a meeting at New Scotland Yard. He said that it was agreed by everyone at the meeting (save MoJ officials, who need time for further consideration) that the police were seen as the most suitable vehicle by which every order is served. The Deputy Director of MoJ's Family Division responded to the Acting Chair by agreeing to provide a decision from MoJ Officials by June. The table will need to be amended to reflect that officials have now been tasked with considering this position with a view to updating Committee Members in June.

ACTION

- (1) Ministry of Justice Policy to recirculate papers relating to the Form E/E1 amalgamation to the revised membership of the Financial Remedies Working Group.**
- (2) On FMPO and FGMPO, Ministry of Justice Policy to report back to the Committee with an update in June including consideration of whether the pilot should be extended.**

NOTIFICATION OF PARENTS WITHOUT PARENTAL RESPONSIBILITY UNDER PRACTICE DIRECTION 12C – PROPOSED PD, RULE AND FORM AMENDMENTS

- 5.1** The Deputy Director of the MoJ’s Family Policy Team introduced this issue, which was originally presented in February. He said that the paper prepared by the Working Group (comprising MoJ Policy and Legal officials as well as Judge Godwin and District Judge Suh) had now been agreed to put before the Committee and he thanked all those concerned for their work on reaching this stage.
- 5.2** MoJ Legal recorded thanks to the judicial working group and presented the draft amendments set out in the paper.
- 5.3** The proposed amendments to Practice Directions 12C and 14A were agreed by the Committee.
- 5.4** The proposed amendments to the pre-proceedings timetables in Practice Directions 12A and 14C were presented. The amendments were agreed subject to removing the references to the thresholds as currently found in case law and to the case law itself. The Acting Chair noted that the conventional approach was not to include any references to case. Judges Godwin and Mostyn agreed that case law should not be referred to; rather the Guidance that the President would issue would cover this. Will Tyler QC agreed and said that for the same reason any mention of applicable thresholds for the directions to be made should also be removed.
- 5.5** The question of possible amendments to Form C110A and other forms was discussed. Melanie Carew asked if amendments were also needed to the C100 and Judge Raeside noted cases in private law proceedings. MoJ Legal clarified that the exception could be sought in private or public law proceedings, but that the Working Group considered that there was no need to amend the C100 because applications to dispense with notification requirements in a private law context would be rare, since such proceedings tend to be brought where there is a dispute between the parents in question, and in any event, the absence of specific mention in the Form did not preclude the application. It was pointed out that such applications are also rare in public law proceedings, and that the absence of specific mention in the Form would not preclude an application there either. A concern was expressed that a specific mention in the Form could lead to an increase in unmeritorious applications. The Acting Chair, Judge Raeside Judge Godwin and Melanie Carew expressed the view that amendments were not needed, in particular because the Practice Direction amendments and guidance would cause local authorities to consider this issue in any event, and the Forms already contained sufficient boxes for without notice/pre-proceedings applications. The Committee concluded that no amendments were necessary.
- 5.6** The proposed amendments to rules 12.4 and 14.4 regarding notice to persons with foreign parental responsibility were also agreed. It was also agreed that no

amendments were needed to rules 12.3 and 14.3 regarding party status, since these rules were already clear that party status could be removed.

- 5.7** MoJ Legal next presented the question of whether the family court had the power to remove party status or to direct an exception to a notification requirement for a parent without parental responsibility, or whether such power was reserved to the High Court. MoJ Legal summarised the discussion in the Working Group's paper, including the terms of section 31E(1) of the Matrimonial and Family Proceedings Act 1984, Guidance issued by then President Sir James Munby on 28 February 2018, the case law cited by such Guidance, the family court case of *Re C* in which a direction was ordered, the fact that the family court currently has the power to remove party status under the current Rules, but also the concern that directions of this nature involved significant ECHR Article 6/8 considerations.
- 5.8** Judge Godwin stated that his principal concern was whether, if the family court could make these decisions, it should be open to any level of judge to make them. Judge Mostyn viewed that the family court clearly had this power and agreed with Judge Godwin that decisions of this nature should be reserved to certain levels of judge within the family such as High Court level. The President and Will Tyler agreed. Judge Raeside wondered whether it should be district judge level or above.
- 5.9** MoJ Legal summarised the framework governing allocation of proceedings to levels of judge within the family court, including the Family Court (Composition and Distribution) Rules 2014 made by the President of the Family Division as nominee of the Lord Chief Justice with the agreement of the Lord Chancellor, and the guidance issued by the President under rule 21 of those Rules with the Lord Chancellor's agreement. The 2014 Rules created a structure whereby some types of proceedings were specifically allocated to certain levels of judge or higher, whilst allocation of others would be decided by a gatekeeping team in line with a number of factors including complexity. The Rules were not generally structured by type of order, though there were types of remedial orders reserved to certain levels of judge. The guidance issued by the President also guided the gatekeeping teams on allocating certain kinds of issues and orders to certain levels of judge or higher, including those involving complexity. MoJ's provisional position, subject to further consideration including with Ministers, was that the Rules and the President's guidance were sufficient to ensure that applications of this nature would be allocated to appropriate levels of judge within the family court, in particular that the family court had had the power since 2014 to remove party status under rules 12.3 and 14.3 and that no issues had been raised that such applications had been dealt with by inappropriate levels of judges within the court.
- 5.10** Judge Mostyn highlighted that the 2014 Rules reserve some kinds of remedial orders to certain levels of judge and said that this demonstrated that a similar approach could be taken to directions of this nature. The President, Judge Raeside and Michael Horton agreed. MoJ said that it would consider the matter further with a view to providing advice to the Lord Chancellor, since any amendments to the Rules were for

the President to make with the agreement of the Lord Chancellor after consultation with the Committee.

- 5.11** On the basis that the Committee agreed that the family court does have the power to direct an exception to requirements to notify parents without parental responsibility, the proposed amendments to rule 14.21 were also agreed.

HIGH COURT'S POWERS TO SET ASIDE RETURN ORDERS

- 6.1** MoJ Policy introduced this item and said that Lord Justice Moylan had requested the Family Procedure Rule Committee consider the recent Court of Appeal decision in *Re W (A Child)* [2018] EWCA Civ 1904 which related to a return order made under the 1980 Hague Convention and in which Lord Justice Moylan made a number of points.
- 6.2** MoJ Policy said Lord Justice Moylan had concluded that the High Court has inherent jurisdiction to review and set aside its own orders, but that he had invited the Committee to consider why the High Court is not included within the scope of section 31F(6) of the Matrimonial and Family Proceedings Act 1984. MoJ Policy advised that the provision in the 1984 Act was inserted in 2014 by the Crime and Courts Act 2013 which related to the establishment of the family court, and therefore consideration was not given to whether it was necessary to create a statutory power for the High Court equivalent to the section 31F(6) power. It is clear that the High Court has inherent jurisdiction to set aside its own orders. To create a statutory power to do so would require primary legislation – the time for which is unlikely to be forthcoming given the High Court has its inherent power already.
- 6.3** Judge Mostyn raised the related issue of whether the FPR 2010 should be amended to include a wider provision (similar to existing rule 9.9A) setting out a procedure for setting aside return orders. MoJ Legal said that the vires to do so exists (section 17(2) of the Senior Courts Act 1981) and if this is a matter the FPRC wishes to take forward, perhaps a Working Group should be established to consider, for example, whether there should be a wider rule on this point, rather than making piecemeal provisions specific to particular matters such as Hague 1980 return orders. He queried whether there were sufficient numbers of applications to set aside Hague return orders to warrant the Committee allocating time to the issue. Judge Mostyn welcomed this and said that although rule 9.9A makes the position clear on the financial side the same could not be applied on the children's side. He proposed that a general set-aside rule be put in place.
- 6.4** Michael Horton noted that there was no need for a set-aside rule in relation to Children Act 1989 proceedings (and others) as the courts already have statutory powers to vary orders. There may not be many areas where there is no statutory power to vary. He queried whether there were sufficient numbers of applications to set aside Hague return orders to warrant the Committee allocating time to the issue. Judge Mostyn noted that applications to set aside are not uncommon in his court. He is concerned that the current position is unclear and should be the subject of rules. Melanie Carew noted that around 30% of private law cases are already return

applications, so care would need to be taken around creating another route to challenge or alter an existing order.

- 6.5** The Acting Chair agreed that a working group be put together to look at this issue. Judge Mostyn, Michael Horton, Melanie Carew and one MoJ lawyer agreed to sit on the group and report back to the July Family Procedure Rule Committee meeting. The Working Group is to look at the specific issue of rules relating to the setting aside of Hague 1980 return orders and to consider the wider question of a more general rule on setting aside. MoJ Policy noted that it would be important to consider prioritisation – this work ought not to move forward at the expense of other projects.

ACTION

Ministry of Justice Policy to respond to Lord Justice Moylan’s query confirming that at present there is no intention to place the High Court’s power to set aside on a statutory footing

A FPRC Working Group be convened to consider set-aside in relation to the 1980 Hague Convention and the wider question of having a more general rule on setting aside.

ANY OTHER BUSINESS

- 7.1** Judge Raeside asked whether any consideration had been given to the expense of sending out hard copy papers such as orders from the court, even where a party has indicated that they are content to be contacted by email. HMCTS Policy said that in not every court posts out every order, but some do. The President said that this issue would be best discussed at the next Family Business Authority Meeting and offered to take it to that forum.
- 7.2** Dylan Jones asked whether clarification could be provided on the new Private Law Standard Directions following correspondence he had received concerning the provision of Welsh language interpreters. There is a concern that the guidance published relating to arranging interpreters is incorrect. The President offered to consider the issue but would need further details, which it was agreed would be sent to the President. It was agreed that this is not a FPRC issue.

ACTION

The President of the Family Division’s Office to ensure that consideration of postal costs incurred by HMCTS be discussed at the next Family Business Authority meeting.

Dylan Jones to send an email to the President of the Family Division providing further information on concerns relating to published guidance on providing for Welsh language interpreters.

DATE OF NEXT MEETING

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

Simon Qasim – Secretariat
May 2019

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