



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 July 2019

Present:

Mrs Justice Theis	Acting Chair
Lord Justice Baker	Court of Appeal Judge
Mr Justice Mostyn	High Court Judge
His Honour Judge Godwin	Circuit Judge
Her Honour Judge Raeside	Circuit Judge
His Honour Judge Waller	Circuit Judge
District Judge Suh	District Judge
Michael Seath	Justices Clerk
Fiona James JP	Lay Magistrate
Michael Horton	Barrister

ANNOUNCEMENTS AND APOLOGIES

- 1.1** Apologies were received from The President of the Family Division, District Judge Hickman, William Tyler, Dylan Jones and Rob Edwards.

MINUTES OF THE LAST MEETING: 10 JUNE 2019

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

MATTERS ARISING

Consideration of the Private Law Working Group's interim report. This item will include reference to that previously discussed under the number of children not currently seen by Cafcass

- 3.1** Melanie Carew said that the agenda item conflated two issues. The Working Group interim report is out for consultation. The issue for the Committee was to keep on its agenda a discussion about the voice of the child. She had spoken to Judge Raeside and their view was that they were coming up "against a brick wall" in terms of a potential solution in relation to children not seen by Cafcass and, therefore, not putting their views before the court. Melanie Carew therefore proposed that she should talk to the President of the Family Division about whether there are any ideas about ensuring that the voice of the child is heard within the system. She noted that

Cafcass are doing a huge amount of work about the different ways in which they can take children's views.

- 3.2** Judge Raeside endorsed the need to get a steer from the President of the Family Division. The Acting Chair suggested that this be put back on the agenda in October, noting that there may be some clarity by then through responses to the Working Group consultation.

ACTION

Melanie Carew to liaise with the President of the Family Division's Office with a view to setting up a meeting which would also include Judge Raeside.

Update on the appointment of a lay member to the FPRC

- 3.3** MoJ Policy said that the information on the two candidates for appointment as lay member is now with the Minister for consideration. It is hoped that the appointment will be confirmed for the meeting in October and that they will be able to take on the project dealing with a 'user friendly front-sheet' from then.

ACTION

The Acting Chair asked if the new lay-member could be put in touch with her as soon as their appointment has been confirmed.

Enforcement including consideration of resource to work on amending Part 33 FPR following the Government's response to the Law Commission report and the work undertaken by Michael Horton

- 3.4** Judge Waller said that papers circulated were for information at this meeting. He noted that Michael Horton has made significant progress in proposing draft amendments, which would form a very good basis for some of the "quick fixes" proposed by the Law Commission. Judge Waller recommended that the Enforcement Working Group should convene in either late August or early September, and report back to the October meeting with indications as to how the Group would like this matter to move forwards, noting that he appreciates that officials' time is limited.
- 3.5** Michael Horton thanked the Committee for recognition of the work to date and said that his thinking was to provide for simple rules backed up by an effective Practice Direction which would give guidance on enforcement and provide a set of standard responses for use by the Court. He noted that there are currently variations in practice in relation to the procedure to follow where a "general enforcement application" is made, so the proposal is to have one standard procedure.
- 3.6** Judge Mostyn asked if the Committee had a role if it feels there is a need for changes to primary legislation, such as the sentences for contempt in relation to judgment summonses. MoJ Policy said that the Law Commission had looked at whether primary legislation was needed, as well as identifying changes for rules. They underlined that they did not consider that the Committee would be able to consult on proposals for primary changes, but the Ministry of Justice could put any such proposals with the Law Commission recommendations as issues to be considered.

The Acting Chair suggested that this matter be taken up through the appropriate channels.

- 3.7** As regards the Enforcement Working Group's draft amendments (produced by Michael Horton), the Acting Chair asked whether there could be a paper for the October meeting setting out timescales for rule changes. The Deputy Director of MoJ Family agreed to take this as an action point.

ACTION

(1) Enforcement Working Group to meet in August/ September and to report back to the October meeting with indications of how they would like to move this project forward.

(2) MoJ Policy to provide a paper for the October meeting setting out timescales for rule changes on enforcement.

President's guidance – Short form orders in children's cases

- 3.8** The Legal Secretary to the President of the Family Division noted that this Guidance has now been issued. Judge Waller said that Advocates have expressed their approval following release of the guidance.

Fees payable by adults seeking access to adoption records

- 3.9** HMCTS Policy said that there is an error in previous guidance. The only charge payable is a copying charge. No application is necessary. Revised Guidance will be issued to court staff this week.

ACTION

HMCTS Policy to copy in Judge Theis and Judge Waller on updated guidance, when issued.

Update on the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018

- 3.10** MoJ Policy noted that the Committee has considered the provisions of the Act on a number of occasions and has agreed that there should be a limited consultation. A consultation letter has been drafted, with a view to limited consultation over the summer, ending late August/ early Sept, with a report back to the October FPRC. Given the April 2020 implementation date, time could be tight to make new provision in the FPR. In the Civil and the Tribunals jurisdictions, no changes are being suggested to the existing powers exercisable by staff, so there is not to be any public consultation. The Criminal Procedure Rule Committee has completed its public consultation: an update will be provided on that consultation to the October Family Procedure Rule Committee.
- 3.11** The Acting Chair said that she had seen the draft consultation paper. She proposed that the table presented at an earlier FPRC meeting which provided information on the current position should be issued as an annex to provide the consultees with greater insight. MoJ Policy agreed to this suggestion.

It was agreed that the draft consultation paper should be circulated after the meeting – any comments are to be provided by the end of the week, with a view to the consultation going out the week after, with an end date in mid-September.

ACTION

- (1) Draft consultation paper to be sent to members, with any comments to be provided by the end of the week.**
- (2) Consultation paper then to be issued for responses by mid-September.**
- (3) MoJ policy to report back to the October meeting, with the project to be timetabled from there.**

Web Page for the FPRC update

- 3.12** MoJ Policy confirmed that the “what’s new” page for the FPR on the Justice website has been updated to summarise the most recent PD amending document, and attach that document. It is hoped to backdate that approach for past FPR SIs and PD amending documents.

QUESTIONS TO THE COMMITTEE

- 4.1** District Judge Suh spoke to the item she raised at the June FPRC meeting in which the Committee were asked to consider whether recent amendments to the Civil Procedure Rules should be taken across to the Family Procedure Rules. In particular, District Judge Suh asked for three provisions to be considered. They concerned correspondence with the court, recordings and transcriptions of proceedings and provision of an informal note of proceedings.
- 4.2** District Judge Suh explained that, at present, there appears to be no current general provision in the FPR or supporting Practice Directions on the issue of ensuring correspondence is copied to other parties, in contrast to the position now in the Civil Procedure Rules. The proposal would be that the court could return correspondence, with a brief covering note, if the sender has not confirmed that the correspondence has been copied to all parties. The court would retain a discretion to consider the correspondence which has not been copied to all parties if it was appropriate to do so in particular circumstances senders can cite compelling reasons for not having copied correspondence to other parties.
- 4.3** On the second issue – transcriptions – District Judge Suh noted that the new CPR provision sets out clearly that all proceedings are officially recorded, and that no-one can covertly make unofficial recordings. On the third issue – making and sharing of informal notes – District Judge Suh noted that HMCTS are concerned that courts do not have the resources to produce these. She noted that the provision could be used to ask represented parties’ representatives to prepare notes. In summary, District Judge Suh suggested that these provisions could be helpful, but may need tweaking in the FPR context. The Committee would need to consider whether it wished to consult before making such provisions.

- 4.4** On the first proposal, HMCTS policy noted that they would be concerned that a backlog might mean that a letter is not considered until very close to a hearing, which could cause delays if that correspondence then has to be returned to sender.
- 4.5** Michael Horton noted that the “copying correspondence” step should be happening already and so clearly stating it would be helpful. He agrees with the provisions about transcripts. On the informal notes provision, Michael Horton can see it would be acceptable for the court to say that if a note has been prepared, could it be shared. But he considered that a client who is paying him to be at a hearing would be concerned at the prospect of him then spending time preparing a note for another (unrepresented) party.
- 4.6** On the “copying correspondence” point, the Acting Chair suggested that when applications are issued the court should send a covering note making the position clear about the need to copy correspondence. Judge Godwin suggested that a paragraph could be included on this in standard orders too.
- 4.7** On the issue of “informal notes”, Lord Justice Baker expressed a concern about there being too many versions of a note and then judicial time being taken up seeking to agree a single version. Any notes should be informal, not official.
- 4.8** Judge Waller noted that it is not uncommon for a party to ask for a copy of a Judge’s notes on evidence. This can cause difficulties. The CPR provision might raise an expectation that a note made by the court will be disclosed. Melanie Carew noted that a lot of correspondence is sent by Cafcass to the court. Sometimes it isn’t copied to the parties. If it is to be, then there should be an exception covering safeguarding.
- 4.9** Judge Mostyn noted that if the CPR have promulgated a rule, then the FPRC ought to do so, unless there is a good reason not to. Judge Raeside said that this is a good idea, but sometimes it does not matter how often attention is drawn to something, people still do not do it. This could, therefore, create another hurdle for litigants in person, meaning the Committee should think carefully about who, and how, this would impact. Lord Justice Baker agreed that family should not be a separate island from civil, but noted that the jurisdictions are different, and family needs to be considered in the context of PD12J and domestic abuse.
- 4.10** District Judge Suh noted that the court would retain a discretion to deal with correspondence that has not been copied to all parties. Lord Justice Baker noted that the drafting would be important, and might need to be consulted on. Judge Raeside was concerned that court staff would be returning correspondence as a matter of routine without consulting a judge. Judge Mostyn suggested that the CPRC be asked if they did any research on the possible impact of the “copying correspondence” provision. Judge Waller suggested that the Committee might want to consider softening the “compelling reasons” hurdle for not copying correspondence to all parties.

- 4.11** The general view was that there was no need to consult on possible new FPR provisions, but that careful consideration should be given to the drafting, particularly given the vulnerabilities of some parties in family proceedings. MoJ Legal agreed to work with District Judge Suh on drafting proposed provisions for the FPR, subject to the later planned discussion on timing/ priorities.

ACTIONS

- (1) MoJ officials to establish if the CPRC researched the possible impact of the “copying correspondence” provision.**
- (2) MoJ officials to work with District Judge Suh to produce a first draft of new FPR provisions for consideration at the December meeting.**

DIVORCE BILL UPDATE

- 5.1** MoJ Policy introduced this item and said that they were glad to report that, following consultation last Autumn, the Divorce, Dissolution and Separation Bill was introduced in the Commons on 13 June, completed its second reading on 25 June and committee stage on 2 July. The new Bill retains irretrievable breakdown as the sole legal ground for divorce, replacing the current requirement to evidence irretrievable breakdown through either a conduct or separation ‘fact’ with a statement of irretrievable breakdown of the marriage; removes the possibility of contesting the decision to divorce and introduces a new minimum period of 20 weeks between the start of proceedings and the earliest date that a sole or joint applicant may confirm to the court that the conditional order may be made, as well as retaining the current minimum timeframe of six weeks between conditional order and final order. The Bill also introduces a new option for a joint application for cases where the decision to divorce is a mutual one, and updates the terminology used, replacing terms such as “decree nisi”. Lastly, the Bill adds a specific delegated power for family procedure rules to provide for a process by which a joint application for divorce/dissolution may proceed as if it were a sole-applications.
- 5.2** MoJ Policy said that they are unable to give a timescale for further progress in Parliament but that they intend to provide a further update in the Autumn. Work is currently being undertaken with HMCTS to identify the implementation work required in relation to court forms and online procedures.
- 5.3** Judge Waller asked whether Clause 3 of the Bill required further clarification as it could still be argued that proof was needed. Lord Justice Baker suggested that the headings could do with a minor tweak to clear up any misunderstanding although he accepted that it was not a matter for this Committee. Judge Mostyn said that although it is implicit in the terms of the existing legislation, he thought that the reforming legislation should spell out that the respondent can defend a divorce order application on the grounds that there is no jurisdiction to entertain it whether on the basis that neither party satisfies the residential/domicile criterion, or if the marriage has already been validly dissolved in another jurisdiction , or that a year has not passed since the celebration of the marriage.

- 5.4** Lord Justice Baker asked whether Autumn 2020 would be a best estimate for the Bill coming into force. MoJ Policy said that they could not give an estimate at this time. The Acting Chair suggested that a further update be provided for the Committee in October.

ACTION

MoJ Policy to provide a further update for the Committee in October

PRIORITIES OF THE FAMILY PROCEDURE RULE COMMITTEE

- 6.1** MoJ Policy presented a revised version of the priorities table which now splits the work into three categories. Tier 1 reflects that which Government is committed to do; Tier 2 is where there could be a negative impact if not pursued; and Tier 3 covers matters where there are already systems in place but where improvements could be made in slower time. The paper is intended to open a discussion about what the top priorities should be. There is a need to factor in too work that could stem from the final recommendations of the President's Public and Private Law Working Groups.
- 6.2** The Acting Chair suggested that the work on lines 9 & 10 (enforcement and setting aside) be moved from Tier 3 to Tier 2. This was agreed. The Acting Chair was concerned that enforcement had slipped off the radar. MoJ Policy referred to how the Committee had agreed that work on amalgamating Forms E1 and E2 should be undertaken before enforcement was looked at. Lord Justice Baker acknowledged that this was a positive decision, but that enforcement now needs more priority.
- 6.3** Melanie Carew noted that there are some matters in Tier 1 that require Government action, such as new primary legislation, before the Committee can get involved with rules. Should this be treated as urgent/ Tier 1? MoJ Policy noted that the same officials may be involved in the primary legislation and the rules, so there is a question of legal and policy capacity to be considered.
- 6.4** Melanie Carew noted that from her point of view the work undertaken by President's Private and Public Law Working Groups should be seen as top priority. Lord Justice Baker said that this could be added within Tier 2 after consultation, and if the Government takes up the recommendations, then this could become Tier 1 work.
- 6.5** The Acting Chair said that the Divorce Bill may have a strong bearing on the tiers and further work will be required. The Deputy Director of MoJ's Family Division said that the table is a dynamic process and it is expected that priorities will change.

ACTION

MoJ Policy to update the three-tier table and to reflect these changes on the full spreadsheet table for the October FPRC meeting.

TOXICOLOGY

- 7.1** MoJ Policy spoke to this issue accompanied by an official from United Kingdom Accreditation Service (UKAS). It was explained that hair-strand testing is the toxicology testing method most relied on in court to pick up alcohol or drug misuse if a person is seeking to gain permanent care of or to spend time with a child. However, there have allegedly been instances of manipulation of testing results which have affected at least two testing laboratories, and the Committee are being approached to consider a proposal to amend the Rules so that court in family proceedings will only admit toxicology evidence if the testing was carried out by a laboratory accredited to UKAS-approved standards or suitable international equivalents, specifically to *ISO/IEC 17025* and/or to *ISO 15189*.
- 7.2** Fiona James asked if accreditation would lead to reliable results or would just be a form of indirect regulation. UKAS said that the intention was that this action would identify any weakness and in terms of one of the laboratories involved, considered that their ineffectiveness was down to exceptional circumstances.
- 7.3** Judge Waller asked whether the draft new rule 23.10 would be more appropriately located in Part 25, to sit with rules about expert evidence. MoJ Policy agreed to consider this in consultation with MoJ lawyers. Michael Horton welcomed this work but was sceptical that the mischief has been cured. MoJ Policy said that the inclusion of a base line or minimum standard will be useful as although it won't stop malpractice, it will help with the investigation aftermath. MoJ Policy also recognised that there could be a legitimate reason for a laboratory not being accredited sometime after the toxicology test results have been admitted in court, and therefore agreed to keep the drafted provision regarding exceptional circumstances, as recommended by Committee members.
- 7.4** Michael Horton asked if advance notice will be given before the coming into force so that arrangements can be made to properly accept evidence. UKAS said that this will be publicised on the UKAS website and welcomed suggestions for any other vehicles with which to do so.

ACTION

MoJ Policy to work with lawyers to provide updated legal drafting reflecting the placement of draft new rule 23.10 in Part 25, for inclusion as a full agenda item in October

UPDATE ON THE PILOT PRACTICE DIRECTION 36J - "LEGAL BLOGGERS"

- 8.1** MoJ Policy said that feedback on the existing pilot has been positive. The Committee had agreed that there should be a consultation on whether to make permanent provision. An initial draft of a consultation paper was provided. Views were sought on the paper, on the timetable and on who to consult. It was agreed that this matter should be included on the November agenda, to include a list of stakeholders/possible wider consultees. MoJ Legal noted that if the consultation did not start until

after November 2019 then any permanent provision would probably not be ready in time for inclusion in the FPR amending SI scheduled to come into force in April 2020. The Acting Chair acknowledged this and noted that then it may be necessary to extend the pilot.

ACTION

MoJ Policy to provide a draft consultation paper and list of proposed consultees for the November FPRC meeting

SET ASIDE WORKING GROUP

- 9.1** Judge Mostyn thanked Michael Horton for his work in providing a position for consideration by the Committee. He said that concerns about the standing for the High Court to set aside its own orders in return applications in child abduction cases, wardship/ inherent jurisdiction cases, and withdrawal of medical treatment cases unless rules are made was very much to the fore. Judge Mostyn also said that given the existence of section 17 of the 1981 Act it was very doubtful that the High Court had any power to review a final order in the absence of either a rule or a statutory provision permitting it and he said he had probably been mistaken in saying that the power in the FPR was sufficient. Judge Mostyn said he thought that a set aside rule for the two relatively common scenarios that the working group addressed was urgently needed.
- 9.2** Michael Horton said that the paper had been drafted to be diplomatic about the differing opinions on the law but given the difficulties, particularly with the 1980 Hague Convention, he suggested that the Committee go ahead. The Acting Chair agreed and said that a consultation paper should now be drawn up based on the paper presented for this meeting and with two additional organisations (the Court of Protection Bar Association and the Child Abduction Lawyers Association) added to paragraph 5. MoJ Policy said that this work would need to sit alongside other priorities and as rule changes and a draft SI would be produced, the MoJ International Team would need to participate, subject to other priorities
- 9.3** The Acting Chair suggested that a four-week consultation period be applied to this exercise to run over the late Autumn. The Acting Chair asked whether this could be added to the agenda for the October FPRC with a draft consultation document to be agreed by the Committee.

ACTION

MoJ Policy to prepare a draft consultation paper for the October FPRC meeting

UPDATE ON FEMALE GENITAL MUTILATION PROTECTION ORDERS AND FORCED MARRIAGE PROTECTION ORDERS

- 10.1** MoJ Policy said that the current pilot is due to end towards the end of July 2019. The police have requested new provision for early notification of orders to the police and for police service of interim orders. There was a short survey a few months ago which raised these possibilities. Only 37 out of 137 consultees replied. Most

accepted the idea of early notification to the police. There were some concerns about the prospect of police service. MoJ have been looking at the legal and operational implications. MoJ would like to do more work with stakeholders. It is therefore proposed to extend the current pilot, and MoJ will then be seeking Ministers' views on next steps. MoJ proposed that they report back to the Committee in October in relation to early notification to the police and/or police service.

- 10.2** The Acting Chair passed on that the President of the Family Division was disappointed that the police proposals have been delayed. He would like an update in September with a view to this issue becoming a substantive item. The Acting Chair asked if data sharing by the police is a concern. MoJ Policy agreed that this is something that requires further consideration. Additionally, there is a concern that people may not make applications if there is early police involvement (via service). The issues are complex and there is a need to engage with the right people before making decisions on next steps.
- 10.3** The Acting Chair asked for Committee Members to approve the extension of the pilot for another year. This was agreed.

ACTION

MoJ Policy to update the President of the Family Division with a view to this becoming a substantive item moving forward.

ANY OTHER BUSINESS

- 11.1** Lord Justice Baker noted that the Digital Sub-Committee needs to meet in September and will then provide an update to the October meeting.
- 11.2** The Acting Chair noted that the President's Public Law and Private Law Working Groups need to be agenda items for the next meeting

ACTION

October agenda to include discussion in relation to the President's Public Law and Private Law Working Groups

- 11.3** The Secretary to the Family Procedure Rule Committee reminded Members that the October meeting of the FPRC will be an open event and asked the Committee to propose organisations or individuals who they think would like to attend.

DATE OF NEXT MEETING

- 12.1** The next meeting will be held on Monday 7 October at 11.00a.m. at the Royal Courts of Justice.

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