



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 November 2019

Present:

Sir Andrew McFarlane	President of the Family Division
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
District Judge Suh	District Judge
Michael Seath	Justices Clerk
Michael Horton	Barrister
Fiona James JP	Lay Magistrate
William Tyler QC	Barrister
Dylan Jones	Solicitor
Rob Edwards	Cafcass Cymru

ANNOUNCEMENTS AND APOLOGIES

1. Apologies were received from HHJ Waller and HHJ Hickman.

MINUTES OF THE LAST MEETING: 7 OCTOBER 2019

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

UPDATE ON THE COURTS AND TRIBUNALS (JUDICIARY AND FUNCTIONS OF STAFF) ACT 2018

3. There was discussion regarding the next steps for the implementation of the CATJAFS Act and it was agreed that the draft rules and practice direction should mirror what is currently set out in the current 2014 Rules and to retain the approach in relation to the qualifications of authorised persons.
4. The committee agreed to form a working group to start a more detailed review of the functions. Members expressed concern over various areas; namely that any decision taken by an Authorised Person must only be on the Allocation of a case or in respect of cases allocated to the Magistrates (Tier 1); that the delegation provisions are subject to the Allocation directions (in public and private law); that when Authorised Persons make Orders of the

Court's initiative, the rubric at Rule 4.3 in respect of the right of a party to apply for review must be included; at whilst supporting the extension of the right to have Cilex included in the qualification provisions clarification is needed as to whether this is all members or fellows.

5. Michael Seath confirmed that he would speak to colleagues including the Chair of the Justices Clerks Society to see if the re-draft of the guidance could be done and as part of this exercise would consider the aforementioned issues.
6. MoJ Policy said that the third point relates to details of current guidance to Justice's Clerks/Assistants which are contained in two documents, the Justice's Clerks Society Guidance on the Law Relating to the Exercise and Extent of Justices' Clerk's Powers and the Recommended Scheme of Delegation; and the Guide to the Code of Conduct of Justices' Clerks and Assistant Justices' Clerks.
7. President of the Family Division agreed that a working group will need to be established and suggested that HHJ Raeside, HHJ Godwin and DJ Suh continue in this role to add to the work they have already contributed to. The President of the Family Division proposed that Fiona James, Dylan Jones and Michael Seath also be added to this working group

ACTION

8. **To establish a working group to meet in the New Year**
9. **Michael Seath to provide a re-draft of the guidance for the February FPRC meeting.**

MATTERS ARISING

Enforcement; amending Part 33 FPR following the Government's response to the Law Commission report and the work undertaken by Michael Horton

10. Michael Horton updated the Committee to say a working group meeting would be held in late November.

ACTION

11. **The FPRC Enforcement Working Group to meet by the end of November with a view to a paper being presented at the December Committee meeting setting out how it was proposed to take forward this work.**
12. **Secretary to confirm the membership of the Working Group**

Update on Female Genital Mutilation Protection Orders and Forced Marriage Protection Orders

13. MoJ Policy reported that that there is nothing substantive to report for this meeting.

ACTION

14. **MoJ Policy to provide a further update in due course.**

Matters raised by the Welsh Language Commissioner

15. HHJ Godwin referred to an issue raised by the Welsh Language Commissioner, who has a statutory right to intervene in proceedings such as when an issue has arisen as to the child's cultural or linguistic needs and where a litigant needs to be able to disclose papers from family proceedings to the Welsh Language Commissioner. With the support of the Children's Commissioner for Wales, the Welsh Language Commissioner is asking for his name to be added to the tables in PD12G and PD14E (circumstances in which information can be disclosed from family proceedings without being a potential contempt of court).
16. The Committee agreed in principle with the proposal and HHJ Godwin suggested that the table entries for the Welsh Language Commissioner could mirror those for the Children's Commissioner for Wales.
17. It was agreed that more needed to be known about the functions of the Commissioner before final wording could be agreed upon. MoJ agreed to contact the Welsh Language Commissioner as necessary and to return to the committee in February.

ACTION

18. **MoJ Policy to contact the Welsh Language Commissioner and undertake further research to return in February 2020 with a paper.**

Update on the proposal to hold meetings remotely

19. Skype links will now be available for committee meetings, alongside dial in.

Update on the consultation on High Court Power's to set aside certain children's orders

20. MoJ Policy updated the committee to say the consultation was launched on 28 October and will close on 18 November. No responses had been received at that time.

ACTION

21. **MoJ Policy to return in December with High Court Power's to set aside certain children's orders as a substantive agenda item.**

Care and supervision applications: Statements of truth

22. HMCTS (C110A) digitisation project raised a point via Family Justice Policy as to who in a Local Authority can properly sign a Statement of Truth in a C110A application. Local Authorities consider that only a "duly authorised person" can sign, but this can be impractical as the number of people in a Local Authority able to sign are limited, and those people often do not have personal knowledge of the case in question. They would like the committee to consider that the process allow for a person to sign "on behalf of" a duly authorised person.
23. The President of the Family Division had also recently received correspondence via the Lord Chief Justice from the Chancellor on the Law Commission's recommendation that there be a working group to consider issues around electronic signatures. It was agreed that this letter be copied to MoJ.

ACTION

- 24. The Legal Secretary to the President of the Family Division to send the letter from Chancellor to the Lord Chief to MoJ colleagues.**
- 25. MoJ Policy to return to this item in due course as a substantive agenda item and with an options paper for consideration by the Committee.**

Transparency and Web Page for the FPRC update

- 26.** The committee discussed how open meetings should run and noted that the whole meeting should ideally be held in open.
- 27.** The Head of MoJ's Public Family Justice Policy Team also referred to the timing for publishing the minutes on the website and said that work is currently underway to ensure that this happens in a timelier manner.

ACTION

- 28. To return to the committee with a more detailed paper regarding rule committee transparency.**

PRIORITIES OF THE FAMILY PROCEDURE RULE COMMITTEE

- 29.** MoJ Policy updated the committee on developments in relation to the prioritisation exercise.

ACTION

- 30. MoJ Policy to provide a further update for the Committee in December and to provide the full priorities paper.**

TOXICOLOGY

- 31.** MoJ Policy presented a revised draft of rule and PD amendments intended to provide a measure of safeguarding against both the presentation of unreliable toxicology results, and variability between types of evidence, in family proceedings.
- 32.** The Committee agreed these changes in principle in July. The revised drafting inserts into rule 25.5 a new paragraph (3), which simply introduces a new Practice Direction 25G, with the detail in the new PD. The proposed PD25G addresses (which the previous draft amendment did not) both permission to put the toxicology test evidence before the court; and permission to instruct the provision of toxicology testing for use in children proceedings.
- 33.** William Tyler suggested some wording changes and the draft was approved subject to amendment to cover this point.
- 34.** The Acting Chair asked whether the restrictions being applied which would now require the family court to only admit toxicology evidence if produced by a laboratory accredited to United Kingdom Accreditation Service (UKAS) standards, or suitable international equivalents would narrow the field in delivering sufficient providers. The Acting Chair asked whether the points raised could be resolved in writing and if content, the Committee agreed to the suggested course of action.

ACTION

- 35. MoJ Policy to write to the President and the Acting Chair with proposals to respond to the points raised on the wording in para 1 of PD25G and on the impact on the industry in introducing specific requirements**

COSTS IN FINANCIAL REMEDY

- 36.** Michael Horton noted that responses to the consultations were received from the Family Law Bar Association, the Law Society and the Association of DJs. The consultation was also sent to Resolution but they did not receive the consultation letter when it was issued and it was agreed that they should have until 4 November to respond.
- 37.** Michael Horton noted that the consultees were broadly in favour of the proposals, but that the consultees thought that rules 9.17 and 9.28 FPR and paragraph 6 of PD9A should be amended to provide for open proposals to be made earlier than currently required. He also suggested that current rule 9.28 (filing and serving proposals before a final hearing) should be retained, as there could be a long time between an open offer being made after the FDR and the final hearing taking place.
- 38.** Mostyn J said that there needs to be an obvious way to show what has been spent on behalf of the individual. He was however content with the direction of travel and proposed that the matter be on the agenda for the December meeting.
- 39.** MoJ Legal agreed to draft rule and Practice Direction amendments and send them to the working group with a view to getting comments back before the end of November and then preparing a revised draft which would hopefully receive approval at the December meeting.

ACTION

- 40. MoJ Legal to circulate the draft rule and Practice Direction amendments to the working group with responses back before the end of November with a view to returning with the final rule and Practice Direction amendments for approval at the December meeting.**

MIRRORING CPR PROVISION FOR CORRESPONDENCE, TRANSCRIPTS AND RECORDINGS

- 41.** MoJ Legal referred to the issue of new provisions in the Civil Procedure Rules 1998 relating to copying correspondence to other parties, recording of proceedings, obtaining transcripts and preparing and sharing informal notes of proceedings and the possibility of inserting provisions into the Family Procedure Rules 2010.
- 42.** On the proposed provision about ensuring correspondence is copied to all parties, MoJ Legal said that it may be necessary to add a standard paragraph to the C6 notice of proceedings and standard directions saying to whom parties should copy correspondence. HHJ Godwin agreed with this and proposed that a paragraph be inserted at the beginning of each case to show that this rule exists

43. On the issue of whether the proposed provision about copying correspondence should apply to Cafcass, it was agreed that it should not do so unless Cafcass had party status in proceedings.
44. The issue of whether there would need to be “compelling” reasons for not copying correspondence to all parties, or whether a different threshold should apply, was discussed. It was agreed that “compelling reasons” should be the relevant test.
45. It was agreed that the draft rule should include a requirement for parties to indicate on correspondence to whom it has been copied. It was acknowledged that this would be an additional burden on parties, but without this information the court would not know what had been copied to others.
46. On the draft provision relating to correspondence being returned to parties (where it has not been copied to them, without a compelling reason having been given), it was agreed that there should be national guidance to court staff on when to return correspondence and when to refer matters to a judge. It was agreed that the rule should allow for the court to transmit correspondence onwards, as an alternative to returning it to the sender for them to transmit onwards.
47. It was agreed that the draft rule should include provision for the court to exercise its case management powers if the requirement to copy correspondence to all parties had not been followed (without compelling reason). It was also agreed that there should not be included provision about the court being able to impose sanctions. This is included in the CPR provision, but it was agreed that this is not appropriate for the FPR.
48. HHJ Godwin said that in relation to the time factor, some staff are too busy to attain the proposed turn over period and that he has known instances where material hasn’t been opened or sent on for several days. DJ Suh said that the policy intent is to reduce the volume of correspondence, if copied within a timely fashion.
49. In relation to the proposed provision that the requirement to copy correspondence does not apply if authorised by a rule or practice direction, the Committee was asked what provision might be included in such a Practice Direction. Will Tyler noted that it would be important not to have an overlap between any such provision and the “compelling reasons” provision in the draft rule. MoJ Legal suggested that the Practice Direction provision could be of general application, whereas an individual could make out compelling reasons on the specific facts of their case. MoJ Legal agreed to consider further what a draft PD might contain.
50. On the issue of recording, transcription and informal notes of proceedings, MoJ Legal noted that current r27.9 FPR is rather outdated. It was agreed that that rule should be replaced with a new provision, and that no key elements of the current r27.9 would be lost in the draft new r27.9.
51. HHJ Raeside suggested that in relation to the position in relation to transcript requests and that these cannot be provided unless the court gives permission and the fee is paid, should there be reference to “charges authorised by any schemes”?

52. It was agreed that the new provision about who can “automatically” receive a transcript (subject to payment of any fee) should be made “subject to any direction of the court”, as it might not be appropriate on the facts for transcripts to automatically be made available to any party.
53. It was agreed that the current provision in r27.9 which allows any person who has intervened in the proceedings to “automatically” receive a transcript should not be mirrored into the new rule, as a person may have only intervened for a limited purpose. Instead, such a person would need permission of the court to obtain a transcript.
54. Michael Horton noted that the starting point in the CPR provision is that anyone can seek a transcript from proceedings heard in open court (subject to fee payment). There are some open hearings in family proceedings. The draft new FPR provision would mean that non-parties in open hearings in such cases would need permission to receive a transcript.
55. The Acting Chair noted that she would be concerned at the prospect of the FPR providing for anyone to be able to receive a transcript of family proceedings heard in open court, as it may be that in the course of a hearing the court moves in and out of open court and the system may not be robust enough to identify when the proceedings were open and when they were in private. Will Tyler noted that a non-party could apply for permission for a transcript in any event. HHJ Raeside said that, in principle, if proceedings were in open court then a transcript ought to be available to anyone, but she agreed that it is not always clear whether proceedings are in open court or not, so she could see the reason for requiring a permission application for non-parties to obtain transcripts.
56. It was agreed that the draft rule should not at this stage make provision for non-parties to be able to require transcripts in relation to proceedings in open court. But this point should be flagged in the next draft of the rules, for a final decision at the December meeting.
57. The draft provision about the court being able to give directions for the compilation and sharing of a note made by another party was agreed, albeit this could mean incurring additional costs for the represented party. It was agreed that a party concerned about such costs could raise the matter before the court.
58. HHJ Raeside noted that there are concerns about people not being able to afford transcripts such that the making of informal recordings could be considered by the court, for example, where a party has dyslexia or learning difficulties. The President of the Family Division suggested that these were more matters for the “special measures” (Part 3A FPR).

ACTION

- 59. MoJ to return with an amended version of the Statutory Instrument in December**

DRAFT RULE PROVISION RELATING TO ONLINE PROCEDURES

60. MoJ Policy and the Digitisation sub-committee have proposed a new enabling rule to allow for online procedures for specific types of proceedings to be set out in Practice Directions. Such

Practice Directions would only be put in place where an online scheme had reached a “steady state” and was no longer being assessed via piloting.

61. MoJ presented the proposed draft rule for agreement. Specifically, if they were content with the proposed signposts in Part 5 (forms), Part 7 (matrimonial and civil partnership proceedings), Part 9 (financial remedy), Part 12 (children) and Part 14 (adoption etc) which would help to show that a given Part is subject to any provision made about online procedures. The Committee agreed with the suggested signpost regime and noted that such signposts should also be included in Parts 18 and 19.
62. MoJ Legal asked the Committee to consider the wording in draft r41.1 FPR which had been drafted in reference to terms already used in the FPR, but also to the wording of the CPR (in particular r7.12) and of the Courts and Tribunals (Online Procedures) Bill (CATOP Bill). The committee agreed with some amendments.
63. Michael Horton noted that the current pilot PDs do not clearly set out the procedure to be followed, as they sometimes refer to having to do what the online system tells you to do rather than setting out the procedure. MoJ Legal acknowledged the need for PDs made under the new Part 41 to be clearer in terms of the procedures to be followed but noted that this has to be balanced with allowing for changes to be made the online scheme IT without that requiring further PD amendments. The President of the Family Division suggested a possible ‘youtube’ user guide and Michael Horton said that it will be worthwhile showing situations when you need to know what ought to have happened
64. HHJ Godwin noted that the Welsh Language needed to be considered in online schemes.

ACTION

65. MoJ Legal to redraft the new rule provision for the December meeting.
66. MoJ to do further work on the position in relation to providing a Welsh Language version of the FPR 2010.

DIGITAL SCHEMES BEING AVAILABLE IN WELSH LANGUAGE

67. HHJ Godwin reported that he met with the Deputy Director of the HMCTS’ Family Team and the Welsh Language Association and said that two platforms existed for developing online platforms. The Acting Chair proposed that this be raised as an agenda item for February and for further discussion on progress.

ACTION

68. HHJ Godwin to provide an update paper for the February meeting

UPDATE ON THE PILOT PRACTICE DIRECTION 36J – “LEGAL BLOGGERS”

69. In July 2019, the committee agreed at the July 2019 meeting to consult widely on whether legal bloggers should permanently be allowed into certain family cases. The committee

suggested certain wording changes. There was discussion of consultation timings during the pre-election period, and MoJ Policy agreed to find out more and inform the committee.

ACTION

- 70. MoJ Policy to consider timings on a wider consultation.**
- 71. MoJ Policy to update FPRC in December in Matters Arising on advice in undertaking consultations in the election period.**

CHILD PROTECTION BLOG

- 72.** The President of the Family Division raised the issue of a letter he had received from 77 co-signatories suggesting a proposed an amendment to Practice Direction 25B so that no person may be permitted to submit an expert report involving the assessment of any child unless that person meets minimum standards of professional practice, proposals for which were set out in the letter.
- 73.** The Committee agreed that the best course would be to reply to the letter asking for further examples so as more can be done to understand the issue.

ACTION

- 74. The President of the Family Division's office to write back to the co-correspondents for further information on their concerns. Matter to be returned to the February meeting.**

ANY OTHER BUSINESS

Reasons for decision

- 75.** A Legal Adviser at Plymouth Magistrates Court raised the questions as to why Legal Advisers are required to type up reasons for decisions following every hearing, given all courts now have recording facilities.
- 76.** The committee recognised that this could be viewed as a burdensome task but said that there are real reasons for this practice, particularly given that most benches had three lay justices hearing a case and reasons provide a written agreement. The lay justice member and the representative for legal advisers echoed this.
- 77.** The President of the Family Division indicated that his office would raise this matter with the Magistrates' Association and that the discussion should return to the February meeting.

ACTION

- 78. President's office to raise with the Magistrates' Association.**

Forging documents to be filed with the court

- 79.** MoJ Policy raised an issue which had been sent from DJ Devlin. which concerned experiences of forged PDFs when filing documents with the court. The committee recognised that this is concerning given that it can be used as a form of coercive control in certain circumstances.

ACTION

- 80. MoJ Policy to write back to DJ Devlin confirming that this issue will be discussed at the February FPRC meeting.**
- 81. MoJ Policy to discuss with HMCTS concerns about parties forging documents.**

CPR – contempt procedures

- 82.** Mr Justice Mostyn referred to a letter from Lord Justice Coulson which proposes a major overhaul of CPR Part 81. As FPR Part 37 is closely modelled on CPR Part 81, Mr Justice Mostyn proposed that a closer working relationship be established with the Civil Procedure Rule Committee so that there is no divergence between the two sets of rules when dealing with the same subject.
- 83.** The committee agreed that a standing item of civil committee business would help to ensure issues are shared.
- 84.** On the specific issue of reforming procedures relating to contempt, HHJ Raeside noted that the rules need to be clear as contempt will need codification across the board. Provision on relief from sanctions in the Family Procedure Rules ought to mirror that in the Civil Procedure Rules and it was not clear why the Family Procedure Rules on this were not amended when the Civil Procedure Rules were amended in 2013 (as part of the Jackson reforms).
- 85.** The committee agreed that greater examination is needed rather than mirroring the Civil Procedure Rules automatically, but that there would need to be a good reason for the Family Procedure Rules position to differ from the Civil.

ACTION

- 86. MoJ to provide for the December meeting a plan about how to achieve wider commonality with the Civil Procedure Rule Committee and to include current plans on contempt.**

FPRC Members

- 87.** HHJ Raeside asked about the appointment of a new DJ member of the Committee. MoJ Policy noted that this process has begun, but new appointments cannot be progressed during the pre-election period.

DATE OF NEXT MEETING

- 14.1** The next meeting will be held on Monday 9 December at 11.00a.m. at the Royal Courts of Justice.

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November 2019
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