



# Ministry of Justice

FAMILY PROCEDURE RULE COMMITTEE  
In the Conference Suite, 2<sup>nd</sup> Floor Mezzanine,  
Queen's Building, Royal Courts of Justice  
At 10.30 a.m. on Monday 6 March 2017

## Members

<b>Mrs Justice Pauffley</b>	Acting Chair of the Family Procedure Rule Committee
<b>Richard Burton</b>	Justices' Clerk
<b>District Judge Carr</b>	District Judge (Magistrates' Court)
<b>District Judge Darbyshire</b>	District Judge (County Court)
<b>Jane Harris</b>	Lay Member
<b>Michael Horton</b>	Barrister
<b>Dylan Jones</b>	Solicitor
<b>Lord Justice McFarlane</b>	Judge of the Court of Appeal
<b>Hannah Perry</b>	Solicitor
<b>Her Honour Judge Raeside</b>	Circuit Judge
<b>Mrs Justice Theis</b>	High Court Judge
<b>William Tyler QC</b>	Barrister
<b>His Honour Judge Waller</b>	Circuit Judge

## ANNOUNCEMENTS AND APOLOGIES

- 1.1 The Chair welcomed all members to the meeting.
- 1.2 Members acknowledged the sad death of Sir Nicholas Wall, former President of the Family Division and Chairman of the Family Procedure Rule Committee. Members noted his contributions not only to the work of the Committee but also to family justice.
- 1.3 Judge Waller shared the following tribute with the meeting:

### ***Sir Nicholas Wall – an appreciation***

*Sir Nicholas served as President of the Family Division from 2010 until 2012, when ill-health tragically caused his early retirement.*

*His comparatively short period in office belies the immense contribution which he made during his life to the growth and understanding of family justice or the significant part which he played in the life and work of this Committee during his term as Chairman.*

*I had the privilege of working closely with Sir Nicholas before and during his time as President, especially on Committee business and witnessed at first hand his dedication and commitment to the cause of family justice and to the welfare of all those – especially children – caught up in relationship breakdown. There is a certain symmetry between the current discussions about safeguarding those*

*affected by domestic abuse and the hugely important work which he undertook in that field. If he were with us, he would certainly be in the forefront of the debate now.*

*Sir Nicholas first attended the Committee on 17 May 2010, when the members graciously (and unanimously) agreed to his appointment as Chairman.*

*That first meeting was largely occupied with deliberations over forms and it was a measure of his commitment that he assiduously attended every meeting from then until his health began to fail.*

*This was a critical time in the introduction of the FPR. Although much of the basic drafting had been completed by mid-2010, there was a great deal to be done to ensure effective implementation. A major issue arose over the funding of IT changes required to support the modernisation of language envisaged by the new rules and consequent form changes. Sir Nicholas' concern was such that In October 2010, the then Under-Secretary of State for Justice, Jonathan Djanogly, was invited to attend a meeting of the Committee to explain funding decisions and to hear the concerns of members.*

*Sir Nicholas was, as one would expect, respectful and courteous, but the Minister can have been left in no doubt about his views and his dismay.*

*He was also vocal in expressing his concerns about the proposal of the Ministry for a Pre-application Protocol on Mediation Information and Assessment (the pre-cursor of FPR Part 3) – not because he did not support the principle (which he firmly did), but because he did not think it went far enough. This was also, of course, the era of the Family Justice Review, which foreshadowed the major changes of recent years, including most importantly the creation the single Family Court, a cause which was always dear to Sir Nicholas' heart. Although he lived to see the realisation of the unified court it was a great sadness that he was not himself able to see through the reforms for which he had advocated and worked so hard.*

*Sir Nicholas was a man of great warmth and humanity who inspired and enthused all of us who worked with him on the Committee and elsewhere. It is a tragedy that his contribution to family justice was so cruelly cut short and we owe him an immense debt of gratitude for the legacy which he has left. May his memory continue to inspire and guide us all.*

PAW

March 2017

**1.4** Apologies have been received from Marie Brock and Melanie Carew.

## **MINUTES OF THE LAST MEETING: 6 FEBRUARY 2017**

**2.1** The minutes of the meeting of 6 February 2017 were circulated on 1 March 2017.

**2.2** District Judge Darbyshire raised one amendment to paragraph 9.20 of the minutes to ensure clarity that the "he" in line 5 and 8 refers in fact to MoJ Policy. Paragraph 9.20 now reads:

*"District Judge Darbyshire questioned whether Parliament intends to reverse the statutory presumption in section 1(2A) Children Act 1989. MoJ Policy noted that there had been much debate in Parliament around the parental involvement provision. The resulting provision did not give any new rights to parents but made clearer the approach to be followed by the courts in deciding these matters through, in effect, codifying case law. He [MoJ Policy] further noted the importance of the provision in addressing the perception by many fathers that the family courts are biased against them. The issue that remains is how the statutory presumption is applied within the court procedure. He [MoJ Policy] informed members that there are no plans to revisit the statutory provision in the immediate future as it is a rebuttable*

*presumption to be considered alongside the welfare considerations identified in the Children Act 1989 and that meets the policy intention.”*

- 2.3** Hannah Perry also raised two amendments to the minutes relating to the role of legal aid agencies in the discussions relating to the revised Practice Direction 12J. The last sentence of paragraph 9.9 of the minutes now reads:  
*“She noted that the threshold for the granting of legal aid is quite different; for example a letter from a GP that would not particularise the violence, however whether a fact-finding hearing is required by the court will depend on the nature of the allegations made and the extent to which they are disputed.”*  
The opening sentences of paragraph 9.33 of the minutes now reads:  
*“Judge Waller questioned whether it is possible for the legal aid agency to fund a risk assessment of an unrepresented party on the alleged victim’s legal aid certificate. Hannah Perry noted that there would be difficulties with this in practice as the legal aid agency often refuse payments in such circumstances, as there is case law on the division of funding. She observed that many agencies or experts request payment first before undertaking the work required if there is an unrepresented party. There will always be a charge for a risk assessment, but they may be means tested; for example, DVIP fees vary for people earning less than £40,000 and those earning above £40,000. Hannah Perry advising there is LAA expert’s guidance and to seek a risk assessment over the risk assessment rate would require prior authority applications.”*
- 2.5** Hannah Perry proposed a further amendment relating to the ability to communicate with the court. The last two sentences in paragraph 9.49 of the minutes now reads:  
*“Hannah Perry observed that the real difficulty often lies in the communication from the court prior to the hearing to confirm that the special measures have been implemented. She believed there needed to be better communication facilities between the court and court users to enable measures to be effectively implemented, particularly if both parties are unrepresented.”*
- 2.6** Subject to these amendments, the minutes were agreed as a correct and accurate record of the meeting.

## **MATTERS ARISING**

- ***Vulnerable Witnesses Practice Direction consultation***

- 3.1** The consultation on the Vulnerable Witnesses Practice Direction was launched on 23 February 2017. Members and those stakeholders identified within those documents were sent the consultation documents by email. The consultation documents are also available on the Family Procedure Rule Committee’s website for any other interested person and / or organisation who wishes to respond.

- ***Administrative de-linking of divorce and financial remedy proceedings***

- 3.2** HMCTS are awaiting confirmation of the final costings to implement administrative de-linking. Members will be provided with a further update at the April 2017 meeting.
- ***Online Divorce Reforms***
- 3.3** HMCTS provided an update on the progress of reforms and a response to members' questions from the meeting on 6 February 2017.
- 3.4** The Welsh Language Unit are members of the national implementation group which is responsible for considering the wider national roll out of the online divorce programme. The Welsh Language Unit attends bi-weekly implementations with officials involved in this project. The Welsh Language Unit have been provided with prototypes of the programme to consider in advance the most appropriate way to facilitate implementation in Wales. HMCTS are currently assessing when it is most appropriate for work to commence on implementing the project in Wales. There is consensus that implementation will only commence when the product is more stable and less likely to change.
- 3.5** HMCTS acknowledged members' concerns about requesting information through court forms to identify children whose parents are involved in divorce proceedings. HMCTS assured members this information is collated purely for data on behalf of the Office of National Statistics. MoJ Policy have indicated that this data collation must continue at this time. However, the Office of National Statistics is responsible for monitoring the quality of the information. HMCTS and MoJ Policy expect the quality of the information to fall as this section of the form is optional. If the Office of National Statistics also forms this view, there may be a decision in the future to re-consider the need to collect this data.
- ***Practice Direction 12J***
- 3.6** Comments from members and officials have been sent to the President of the Family Division since the last meeting. The President of the Family Division is currently considering these comments.
- 3.7** Will Tyler informed members that he has received a request from Cyrus Larizadeh QC, who sits on the Family Law Bar Association Committee, for an update on the progress of the Family Procedure Rule Committee in implementing the revised Practice Direction 12J so that he might update the Family Law Bar Association at its next meeting. He requested the Committee's permission to disclose the relevant section from the minutes of the meeting held on 6 February 2017 and to also disclose the table of current work to explain how the Committee was taking this forward. Members agreed that these documents could be shared with Cyrus Larizadeh QC.
- 3.8** Judge Waller questioned whether the revised Practice Direction 12J and its implementation would be affected by the Prisons and Courts Bill. He questioned

whether this would be done in the immediate future with further amendments being made as necessary following the passing of the Bill or whether any revision would be delayed and implemented together with the Bill. MoJ Legal noted that it can take many months for a bill to pass through Parliament. The President of the Family Division will be aware of the Bill's introduction. His view on the comments raised by officials and the proposed implementation timescales will be sought. MoJ Legal further noted that once the revised Practice Direction 12J has been submitted, officials will need to prepare advice for Ministers and the Secretary of State prior to any approval of the revised Practice Direction.

- 3.9** The Chair noted that the President of the Family Division is keen to implement a revised Practice Direction 12J as soon as possible and questioned whether making two amendments to the Practice Direction (one in the more immediate future and a second amendment if necessary after the Bill's passage through Parliament) would cause difficulties. MoJ Legal confirmed this could be done taking into account the length of time it may take for the Bill to pass through Parliament.

#### **SIGNING OF THE FAMILY PROCEDURE (AMENDMENT) RULES 2017**

- 4.1** The statutory instrument which amends the Family Procedure Rules in relation to the service of protective orders had been circulated to all members. Members were invited to sign the statutory instrument at the meeting.

- 4.2** The statutory instrument was signed by:

Lord Justice McFarlane  
Mrs Justice Theis  
HHJ Raeside  
District Judge Carr  
District Judge Darbyshire  
Richard Burton  
Will Tyler  
Dylan Jones  
Hannah Perry  
Jane Harris

#### **WORK OF THE FAMILY PROCEDURE RULE COMMITTEE**

- 5.1** Paper 5 and its annexes (papers 5a to 5e) were considered by members.
- 5.2** Priorities have been allocated to outstanding work by officials. These are indicative priority allocations taking into account the available resources to facilitate the work of the Committee whilst also meeting other competing priorities within the Ministry of Justice.
- 5.3** The Secretary to the Family Procedure Rule Committee drew members' attention to Paper 5a which sets out the current list of outstanding work before the Committee. The Secretary to the Family Procedure Rule Committee noted that there are a total

of 32 items outstanding – a combination of current, immediate future, and yet to be commenced future work.

- 5.4** Members agreed to the item relating to amendments to the constitution of the Family Procedure Rule Committee being removed. The Secretary to the Family Procedure Rule Committee updated members that the Order (The Courts Act 2003 (Amendment) Order 2017) enabling the changes to the Committee's membership has been laid in Parliament and are due to come into effect on 27 March 2017. No further involvement of the Committee is required and officials will progress the appointments of the new members. It is hoped this could be completed before the April 2017 meeting but may be delayed as Ministerial approval is required.
- 5.5** The Secretary to the Family Procedure Rule Committee drew members' attention to the table of outstanding future work yet to be commenced. She noted that many of the items were historical and no longer relevant. She sought members' approval to the removal of some items.
- 5.6** Members considered the outstanding work in relation to amendments to Rule 29.8 of the Family Procedure Rules. This questioned whether the rule's reference to the "opinion of the court" was sufficiently clear in light of the statutory wording of Sections 8 and 9 of the Child Support Act 1991 (Paper 5c). Members agreed to the removal of this item of work.
- 5.7** Members considered the outstanding work in relation to delegating certain functions to Justices' Clerks and Assistant Justices' Clerks in divorce proceedings, plus a function linked to amendments made in December 2015 on child support appeals. The Secretary to the Family Procedure Rule Committee noted that members agreed these proposed delegations in December 2015. MoJ Legal noted that HMCTS consider this to be high priority and a draft statutory instrument has been prepared. MoJ Legal further noted that there is no further work for the Committee save for being consulted on the draft amending Rules which could be undertaken swiftly. Members agreed to these Rules being brought into force at the same time as the Vulnerable Witnesses Rules and Practice Direction to enable officials to prepare the supporting documents for the Minister's simultaneous consideration.
- 5.8** Members considered the outstanding work in relation to extradition in crime and family proceedings. Mrs Justice Theis acknowledged that this issue arose following a judgment in a recent case given by Mr Justice Green. She noted that there is a lack of clarity in this area and recommended a protocol between the two jurisdictions to facilitate disclosure. This was endorsed by Hannah Perry. District Judge Carr questioned the interplay between family and immigration proceedings. He noted that this is already a complex area further complicated by the extradition jurisdiction. He noted that there is a protocol for disclosure in relation to immigration which may not always be followed in practice if it is not sufficiently known to practitioners and court users.

- 5.9** The Secretary to the Family Procedure Rule Committee noted that this item of work is currently being considered by the Criminal Procedure Rule Committee and the authors of the report have been requested to provide additional information for their next meeting on 17 March 2017. Mrs Justice Theis noted that it would be helpful to consider any progress after further information is available about the proposals of the Criminal Procedure Rule Committee. The Secretary to the Family Procedure Rule Committee agreed to liaise with the Criminal Procedure Rule Secretariat to determine what information, if any, can be shared with the next Family Procedure Rule Committee meeting on 3 April 2017.
- 5.10** Members considered the item of outstanding work relating to the hearing of family appeals in the Family Division of the High Court in public. Will Tyler noted that the amendments made by the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) (Amendment) Order 2016 has led to a reduction in transparency in appeal proceedings previously heard in public. Mrs Justice Theis endorsed this as an issue and informed members that the practice of Mr Justice Baker and the President of the Family Division has been to sit in open court, subject to reporting restriction directions. Will Tyler noted that an order has to be made in each individual case disapplying the provisions for the hearing to be heard in private. The Secretary of the Family Procedure Rule Committee explained that officials were aware of the importance of this work and were exploring the policy rationales. Will Tyler requested whether policy officials could resource the amendment in relation to the types of appeal recently moved from the Court of Appeal to the Family Division of the High Court with further amendments at a later date after more detailed policy consideration of the transparency provisions in the family courts generally. The Secretary of the Family Procedure Rule Committee responded that officials will need to discuss timescales to progress this work in line with the other priorities of the Committee. Members agreed this should remain on the list but amend its priority allocation to medium.
- 5.11** Members considered the outstanding work in relation to enforcement. Judge Raeside acknowledged that there has been no government response to the Law Commission's report on enforcement of family financial orders but considered it imperative to make progress as the Law Commission had made strong recommendations in its report. Judge Waller endorsed this, noting that the recommendations for simplification of the Family Procedure Rules and a supporting Practice Direction do not necessarily require a government response. Michael Horton also endorsed this observing there are some reforms that can be implemented on a shorter timescale whilst awaiting Ministerial decisions. All members acknowledged that while this work was important, it could not be effectively progressed without resources from MoJ officials. Members agreed that this should remain on the list of outstanding work and be given a medium priority allocation.
- 5.12** Members considered the outstanding work in relation to amending the list of possible applicants for a financial remedy order in respect of children to include a local authority holding a placement order. Judge Waller questioned how much of an

issue this actually was in practice. Michael Horton agreed, noting that there are other legislative provisions which provide a remedy to local authorities. Judge Raeside noted that if there are alternative statutory options for local authorities then there is no need to proceed with this work item. Members agreed to its removal from the list of future work.

- 5.13** Members considered the outstanding work items in relation to amendments to Practice Direction 12E and the representation of protected parties. The Secretary of the Family Procedure Rule noted that the working party chaired by Lord Justice Moore-Bick is no longer in operation and questioned whether this work item needed to remain. The Chair noted that she had been part of this working group and that it did not lead to recommendations or proposals for the Committee's consideration. She also observed that other jurisdictions applauded the procedure for dealing with urgent business within the family sphere. Members also took into account that in addition to there being no proposals or recommendations the Chair of the working party, Lord Justice Moore-Bick has since retired. Members agreed to the removal of both these items of work.
- 5.14** Members considered the item of outstanding future work in relation to the need for reasons before a lay justice or justices. Judge Raeside questioned whether this could be removed as it is not an item being actively considered by the Committee. Richard Burton noted that the issue arose with the creation of the single family court and questioned the circumstances in which justices would need to give reasons. However, he further observed that justices have adapted to the requirement to give reasons and this poses little difficulty in practice. MoJ Legal endorsed this noting the concern was considered at the time of the creation of the single family court. The question had been whether the requirement to give reasons should be extended beyond justices to include all judges of the family court. The Chair noted that since the creation of the family court there has been a change in culture. Judges do provide reasons for their decisions, there is greater transparency and judgments are published, especially when important decisions are made. Members agreed to the removal of this item of work.
- 5.15** Members considered the items of outstanding future work relating to costs in financial remedy cases. Judge Waller noted that in 2010, the Committee agreed to progress a review of the costs provisions within the Family Procedure Rules. He considered it appropriate for members to make a decision now as to whether this work should be followed through or whether there is no requirement for action in the immediate future. He noted that there are some aspects of the recommendations from the Financial Remedies Working Group that are quite complex but some may be implemented more easily. He noted that as there was other ongoing work in respect of implementing the Financial Remedies Working Group's recommendations, it may be advisable to review when it is most appropriate to commence the work in relation to costs. He further noted that if this work were to be pursued, there would need to be a new "costs working party" to discuss recommendations and consider the appropriate way forward. District Judge Darbyshire noted that this would be a substantial piece of work which would require

consultation. Members agreed this item should remain on the list of outstanding work as low priority and reviewed annually.

- 5.16** Will Tyler questioned how the priorities were initially allocated. The Secretary to the Family Procedure Rule Committee responded that those items marked high priority relate to items that are either currently on-going before the Committee or items where work had been undertaken by officials and could be concluded relatively swiftly despite other competing priorities within the Ministry of Justice. Items of work marked as medium priority are those that have been considered desirable to achieve but officials have not had the resources to support progressing this work. Items marked as low priority are those that have been deferred previously by the Committee but not actively pursued. Lord Justice McFarlane noted that items of low priority may never be actively considered as there will always be higher priority items of work to complete. MoJ Policy questioned whether it would assist members to have a plan of work for each year which is reviewed annually. Members agreed that the outstanding work of the Committee should be considered annually.
- 5.17** Judge Raeside questioned the status of work in relation to the Voice of the Child in family proceedings. She considered that a lot of time had been spent on the Children and Vulnerable Witnesses Practice Directions but little progress has been made to date. She noted that the “View” published by the President of the Family Division in January 2017 emphasised his concerns in this area and she recommended that progress on this work be prioritised. The Deputy Director, MoJ Policy responded that officials are faced with competing demands on their time and it has been imperative to ensure that work is prioritised. Officials recognise the priority accorded to the Children Practice Direction and the Voice of the Child but in recent months work on the Prisons and Courts Bill has had to take priority. The Chair acknowledged the competing demands on officials’ times and observed that the work undertaken to date by the working party has not been wasted as it will be considered when this work is taken forward.
- 5.18** Hannah Perry noted that the concerns relating to costs that may also arise in relation to the Bill which may have an impact on how the Practice Direction progresses. MoJ Policy noted that officials will need to consider a revised draft of the Practice Direction taking into account the available resources.
- 5.19** Judge Raeside questioned whether there is a timetable for progressing this Practice Direction. She considered it imperative to make progress in this area given the high priority accorded to it by the President of the Family Division. MoJ Legal confirmed that a meeting with Cafcass, CAFCASS Cymru and HMCTS had taken place in November 2016, however, a revised draft is yet to be completed due to other competing work demands. The Chair acknowledged that this remains a very high priority item of work for the Committee and should be taken forward in the immediate future.

## **FINANCIAL REMEDIES WORKING GROUP UPDATE**

- 6.1** Members considered paper 6 which sets out proposed timetables for implementation of work recommended by the Financial Remedies Proceedings Working Party.
- 6.2** Judge Waller updated members that he has discussed the proposed way forward with MoJ Policy and endorses the timetables proposed in the paper. He considered that it may be possible to complete this work before December 2017. However, this would be subject to the competing priorities of officials.
- 6.3** Judge Waller informed members that there needs to be a full scoping of what forms amendments are required to support this work. MoJ Policy noted that in relation to the proposed amalgamation of forms, draft versions would need to be provided to officials to enable officials to determine whether any amendments to FamilyMan are required.
- 6.4** Michael Horton referred members to paragraphs 5 and 7 of the paper. He noted that if procedural de-linking is to be implemented without a protective application of some description many people may still apply for a financial remedy but ask for it to be stayed on issue. He considered that if the facility in relation to de-linking is not provided for within the Family Procedure Rules it may cause difficulties in practice by leading to varying procedures nationally. Judge Waller and Michael Horton also noted that there may be fee considerations if this approach was adopted by applicants. Michael Horton considered it imperative that any consultation considers whether protective applications should be made. MoJ Policy noted that whilst the issue of whether or not there should be a separate protective application procedure is a decision for policy in principle, the question of fees will fall to be considered by the fees policy team rather than being a matter for consultation.
- 6.5** Members agreed the proposed timetable within the paper for implementation.

#### **ANY OTHER BUSINESS**

- 7.1** No other business was raised at the meeting.

#### **DATE OF NEXT MEETING**

- 8.1** The next meeting will be held on Monday 3 April 2017 at 10.30 a.m. at the Royal Courts of Justice.

Secretary

March 2017

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