

**EXPLANATORY MEMORANDUM TO THE
FAMILY PROCEEDINGS (AMENDMENT NO.3) RULES
2005 No. 559 L. 11**

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

- 2.1. These rules amend the Family Proceedings Rules 1991 (“the 1991 Rules”), in order to make changes to the procedure governing family proceedings following the implementation of the Gender Recognition Act 2004 (“the GRA 2004”), to make changes consequent on the introduction of Welsh family proceedings officers and to make other minor amendments.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1. None.

4. **Legislative Background**

Changes consequent on the implementation of the GRA 2004

- 4.1 The GRA 2004, for the first time, enables transsexual persons to obtain legal recognition in their acquired gender. It provides for proceedings to be brought in court in a number of instances (either directly or through amendment of the Matrimonial Causes Act 1973). A number of such proceedings are family proceedings either by definition, or because they have been assigned to the Family Division by order (the High Court (Distribution of Business) Order, which came into force 21st January 2005, assigns to the Family Division of the High Court all proceedings under sections 6 and 8 of the 2004 Act). Paragraph 3 of Schedule 1 to the Supreme Court Act 1981 (c. 54) is amended accordingly. Section 40 of the Matrimonial and Family Proceedings Act 1984 allows the Lord Chancellor, acting with others, to make rules of court governing family proceedings. The 1991 Rules were made under this power. These rules amend the 1991 Rules to make provision about the new proceedings.

Changes consequent on the introduction of Welsh family proceedings officers

- 4.2 The Children Act 2004 (“the CA 2004”) was given Royal Assent on 15th November 2004. Part 4 of that Act relates to advisory and support services for family proceedings and transfers to the National Assembly for Wales those functions of the Children and Family Court Advisory and Support Service (“CAFCASS”) which relate to children ordinarily resident in Wales. In addition section 35 of the Act provides for the creation of “Welsh family proceedings officers”. They will perform, on behalf of the National Assembly for Wales,

those functions currently performed by officers of the Service for CAFCASS. At present the 1991 Rules confer a number of obligations on officers of the Service. In order to fully implement the CA 2004 it was therefore necessary to extend those obligations to Welsh family proceedings officers and this new provision is contained in these rules.

Other minor changes

4.3 In 2002 the out-going Senior District Judge at the Principal Registry provided the Family Business Branch of the Court Service with a list of suggested amendments to the 1991 Rules. He had identified a number of omissions or inconsistencies in the existing version of those rules arising out of the introduction of other legislation. There had, however, been limited scope in the preceding years to rectify these errors.

4.4 Since 2002, a phased approach to the integration of the identified rules changes has been adopted, making use of the next available (and related) legislative instrument, wherever possible. There are no other changes planned to Part 3 of the 1991 Rules in the foreseeable future and it has therefore been decided to utilise the April 2005 instrument to this end.

5. Extent

5.1. This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1. Not applicable.

7. Policy background

The GRA 2004

7.1. These rules make provision for four principal types of proceedings arising as a result of the GRA 2004. They are as follows.

7.2. The new grounds of nullity. The Matrimonial Causes Act 1973 is amended by way of the GRA 2004 to add two new grounds of voidable annulment where an interim or full gender recognition certificate has been issued to a party to the marriage. Under the GRA 2004 legal recognition occurs following the issue of a full gender recognition certificate.

7.3. A person wishing to obtain legal recognition must apply to a Gender Recognition Panel. The application is then determined in accordance with criteria set out in the GRA 2004. Where a Gender Recognition Panel grants an unmarried applicant's application, it issues a full certificate. Where it grants a married applicant's application, it issues an interim gender recognition certificate. An interim certificate only allows an applicant to seek the annulment of his marriage ("the first new ground of nullity"). Where the court makes a decree absolute on such a petition, the court must issue the full certificate. A further ground of nullity is provided where the other party to the marriage was at the time of the marriage a person whose gender had become the acquired gender (that is, someone to whom a full certificate had been issued)

and that fact was unknown to the other party to the marriage at the time of the marriage (“the second new ground of nullity”).

- 7.4. **Rules 4 to 7** make provision about the new grounds of nullity. They require a copy of the relevant gender recognition certificate to be attached to the pleadings, which will be the single most important piece of evidence in proceedings under either ground. They also require the Secretary of State to be notified of proceedings brought under the first new ground of nullity by the court manager. This will enable the Secretary of State to be aware of pending proceedings should he intend to bring proceedings for a reference under section 8(5) – application secured by fraud. **Rules 23 and 24** make amendments largely consequential on the amendments made by **rules 4 to 7**.
- 7.5. Corrected certificates. An application may be made to court for a corrected certificate, where the court has issued a full gender recognition certificate containing an error. **Rule 9** makes provision for such applications, normally requiring the application to be made to the court which issued the certificate.
- 7.6. Appeals on points of law. An unsuccessful applicant before a Gender Recognition Panel may appeal to the High Court on points of law. **Rule 20** makes provision for such applications, requiring the Secretary of State to be made a party to such appeals.
- 7.7. References – applications secured by fraud. The Secretary of State may refer to the High Court an application where he considers its grant to have been secured through fraud. **Rule 15** provides for such references. In particular, this rule, together with **Rule 8**, aims to prevent applicants from being able to obtain a decree absolute of nullity on the first new ground (and, in consequence, a full gender recognition certificate), where the Secretary of State is seeking to challenge the grant of the application on which the interim certificate was issued.
- 7.8. **Rule 22** requires documents relating to gender recognition, given their sensitivity to those concerned, to be stored by courts in a place of special security.
- 7.9. Because the Rules are in consequence of the GRA 2004 Act and are technical and specialist in nature, the consultation undertaken was limited to those considered to have particular interest. The consultees were: the Right Honourable Dame Elizabeth Butler-Sloss GBE; Senior District Judge Waller; the Honourable Mrs Justice Bracewell DBE; His Honour Judge Peter Hunt; Mr Christopher Frazer; Mr Godfrey Freeman; District Judge Michael Walker Association of District Judges; His Honour Judge Victor Hall; District Judge Rachel Evans; Miss Claire Jakens; Mr Mark Harper; the Right Honourable Lord Justice Thorpe; Mr Phillip Moore QC Chair Family Law Bar Association; Mrs Jane Craig Solicitors Family Law Association; The Law Society Family Law Committee; the Council on Tribunals; The Gender Trust; Press for Change.
- 7.10. Only three of the above provided feedback on the Rules. Where appropriate, suggestions made were incorporated. Where it was not appropriate, as for example in the instance of a suggestion made by the Association of District

Judges which would have resulted in over complicated drafting and no guarantee of securing the desired outcome in practice, an explanation was given for the reasons for not changing the draft rules.

- 7.11. A draft of the Rules relating to the GRA 2004 were presented to the Family Proceedings Rules Committee for scrutiny on 10th January 2005. No changes to the Rules were required.

Welsh family proceedings officers

- 7.12. **Rules 3(b) and 16 to 19** amend the 1991 Rules to enable a Welsh family proceedings officer to be appointed by the Court and for the functions of an officer of the Service to be performed instead by a Welsh family proceedings officer. **Rules 25 and 26** ensure that, where an officer of the Service has been appointed to act in any proceedings, that appointment will not be affected if they become Welsh family proceedings officers. This ensures that continuity of professional assistance will be available for children and families where proceedings have already been commenced.

- 7.13. In light of the limited changes to the 1991 Rules made by these provisions a formal consultation exercise was not carried out but the Family Procedures Rules Committee were shown a draft of the rules and invited to comment. No changes to the draft were felt necessary by that committee.

Other minor amendments

- 7.14. **Rules 12 and 14** remove redundant references to Form M11 (Notice of Application for Ancillary Relief). This form was revoked by S.I.1999/3491 with effect from 5th June 2000 and replaced by Forms A and B.

- 7.15. **Rule 13** amends a current inconsistency in rule 3.9A (Enforcement of orders made on applications under Part IV of the Family Law Act 1996) so that certain provisions of the Rules of the Supreme Court 1965 and County Court Rules 1981 may apply, with necessary modifications, to the enforcement of orders made on the court's own motion under Part IV of the Family Law Act 1996.

- 7.16. Under the Matrimonial Causes Rules 1977, Form 6 was a combined form of Acknowledgement of Service that could be used for both matrimonial proceedings and other forms of originating process. The revised Form M5/6 introduced by the 1991 Rules was specifically designed for use in divorce proceedings, however, references to the use of the old version of the form were carried over into Part 3 of the 1991 Rules. **Rule 23(d)** resolves this inconsistency by inserting into Appendix 1, a new Form M23A; and **rules 10 and 11** substitute references to this new form where appropriate.

- 7.17. **Rules 23(b) and (c)** make changes to Form M20 and M23 in light of the introduction of Form M23A.

- 7.18. Since these amendments correct existing errors in the rules it was not felt necessary to undertake a formal consultation exercise. However the rules

changes have been discussed with and agreed by the Senior District Judge and the Family Procedure Rules Committee.

8. Impact

- 8.1 A regulatory impact assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies save minor changes to records held.
- 8.2 The impact on the public sector from the rules relating to the GRA 2004 is negligible. For example, it is estimated there are between 100 to 200 married couples where one of the partners is a transsexual person, but perhaps less than half will wish to end that marriage in order to secure a full gender recognition certificate. Costs to Court Service activity and system processes were included in internal project funding. Other Government Departments will make changes to records but again the costs are negligible.
- 8.3 There is no impact on the public sector from the rules relating to Welsh family proceedings officers. These amendments provide for their appointment in cases where an officer of the Service may currently be appointed. No new functions are created.
- 8.4 There is no impact on the public sector from making the minor amendments to the 1991 Rules. These changes merely clarify existing procedures and do not place any new requirements on users of legal services. Electronic versions of the revised Form M20 and Form M23A will be available free of charge from the Court Service website.

9. Contact

- 9.1 For matters relating to the Gender Recognition Act: Ann Holland at the Department for Constitutional Affairs. Tel: 0207 210 1421 or e-mail: Ann.Holland@dca.gsi.gov.uk.
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- 9.3 For matters relating to the other minor amendments: Adrian Donaghey at the Court Service. Tel: 01473 252749 or e-mail: adonaghey@courtservice.gsi.gov.uk.