

**EXPLANATORY MEMORANDUM TO
THE FAMILY PROCEDURE (ADOPTION) (AMENDMENT) RULES 2008**

2008 No. 2447 (L.12)

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Description

2.1. These rules make minor amendments to the Family Procedure (Adoption) Rules 2005.

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

3.1. None

4. Legislative Background

4.1. These rules are made under section 75(2) and (4) of the Courts Act 2003, which provide for the Family Procedure Rule Committee to make rules in relation to family proceedings. The Rules amend the Family Procedure (Adoption) Rules 2005 (“the Adoption Rules”).

5. Extent

5.1. This statutory instrument applies to England and Wales.

6. European Convention on Human Rights

6.1. As this statutory instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1. The amendments are intended to remedy two operational difficulties that became apparent after the Adoption Rules were implemented in December 2005.

Policy Aims

Amendment to rule 55(1) of the Adoption Rules - how a person becomes a litigation friend

7.2. This amendment adds to rule 55 of the Adoption Rules a requirement to obtain the Official Solicitor’s consent when the court appoints the Official Solicitor as a litigation friend. The current position, where the Official Solicitor could be appointed as a litigation friend from the outset without the

ability to refuse to consent, has proved unworkable for the Official Solicitor. Although it is highly unlikely that the Official Solicitor would refuse an appointment, his office regards a consent requirement as essential for the reasons set out below.

- 7.3. Firstly, the Official Solicitor needs to have satisfactory evidence that a person lacks capacity to conduct the proceedings before accepting appointment and may need to undertake further investigation. An application under the Adoption and Children Act 2002 may be brought some considerable time after the determination of care proceedings, and the protected party's capacity may have changed in the interim, but the invitation from the court be based on the fact that the person acted by a litigation friend in the care proceedings. Imposition of appointment where the Official Solicitor considers the evidence inadequate for the appointment would give rise to human rights issues in relation to the supposed protected party.
- 7.4. Secondly imposition of appointment has funding implications. For example, funding for representation in adoption proceedings (and placement proceedings if not concurrent with care proceedings) is both means and merit tested by the Legal Services Commission. The application under the Adoption and Children Act 2002 may be brought some considerable time after the determination of care proceedings, in respect of which funding for representation for a parent is non-means tested. Within the earlier proceedings or in the interim the protected party /non subject child may have disengaged, or may if contact is made with them refuse to co-operate with an application for public funding, thus making it impossible for the litigation friend to obtain security for the costs of legal representation. As the Official Solicitor is not funded to meet the costs of representation, save in a very limited number of cases, this would be problematic.
- 7.5. Thirdly all other comparative rules dealing with the appointment of the Official Solicitor as a litigation friend require consent.
- 7.6. The question of whether consent is required on appointment has not been fully tested. No court has yet appointed the Official Solicitor without consent and in practice the Official Solicitor has operated as if consent is required.
- 7.7. The Family Procedure Rule Committee considered the Official Solicitor's concerns and on balance agreed with them.

Amendment to rule 95 of the Adoption Rules– power of the court to proceed in the absence of a party

- 7.8. Rule 95(2) of the Adoption Rules makes provision in respect of the court re-listing applications in given circumstances.
- 7.9. This amendment ensures that rule 95 no longer applies to family proceedings courts. It effectively corrects an oversight in the rule as first drafted. Although rule 95 currently applies to family proceedings courts it is without effect as the family proceedings courts do not have the power to restore a hearing.

Guidance

- 7.10. No additional guidance has been issued. Both amendments make no change to current practice. However the Official Solicitor has informed stakeholders of the amendment to rule 55 of the Adoption Rules on the OS web site and both amendments will be carried through to the MOJ hosted Family Procedure (Adoption) Rules website.

Consultation

- 7.11. Given the minor and largely corrective nature of both changes public consultation was not carried out.

8. Impact

- 8.1. The proposed amendments will not affect any specific groups or lead to additional costs or savings for businesses, charities, the public sector or the voluntary sector. The amendments bring the rules into accordance with current practice rather than changing them.

9. Contact

- 9.1. Daniel Webb at the Ministry of Justice (Tel: 020 7210 8737 or e-mail: daniel.webb@hmcourts-service.gsi.gov.uk) can answer any queries regarding the instrument.

Ministry of Justice