

EXPLANATORY MEMORANDUM TO
THE FAMILY COURT (COMPOSITION AND DISTRIBUTION OF BUSINESS) RULES
2014

2014 No. 840 (L. 13)

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

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

2. **Purpose of the instrument**

- 2.1 The purpose of this instrument is to establish the framework for how the family court will be composed and on what basis applications for family proceedings will be allocated to different levels of judge within it. It provides for certain types of cases (including appeals) to be allocated to certain levels of judge, prohibits certain levels of judge of the family court from dealing with certain remedies and makes provision for the authorisation of judges to conduct specified types of proceedings.

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

- 3.1 The Committee's attention is drawn to the three matters set out below.
- 3.2 The first matter is that in making these Rules, reliance is placed on section 13 of the Interpretation Act 1978. There are two reasons for this.
- 3.3 The first reason is that it is considered that the provision made by these Rules will all be necessary for the purpose both of bringing into force, and of giving full effect to, section 31A of the Matrimonial and Family Proceedings Act 1984, as inserted by section 17(3) of the Crime and Courts Act 2013 when that section comes fully into force. In essence, without the provision made by these Rules, the family court will not be able to be brought practically into operation.
- 3.4 The second reason for placing reliance on section 13 of the Interpretation Act 1978 is that there is a concern that if the approach were taken to commence the provisions in the Crime and Courts Act 2013 which amend the powers to make these Rules, the ability to make provision under the current powers conferred by those provisions as unamended would be lost. This could be avoided by the inclusion in any commencement order of some complex savings provisions, but it is considered expedient to avoid this additional complexity by anticipatory exercise of the relevant powers.

- 3.5 The second matter drawn to the attention of the Committee is that these Rules form only part of a package of statutory instruments which will be needed for the purposes of the family court. The intention is that all of these associated statutory instruments will come into force on the same date.
- 3.6 Despite the links outlined above, there is no intention to lay any negative statutory instrument which includes any provision which is dependent on the approval by Parliament of an affirmative statutory instrument, until that approval has been given. For example, rules 5 to 7 and 20 are dependent on the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2014 (S.I.2014/602)(“ the 2014 Order”) which has been approved by Parliament..

4. Legislative Context

- 4.1 The Crime and Courts Act 2013 establishes a family court for England and Wales, and replaces the existing legislation governing where applications for family proceedings can be submitted and which courts can deal with different types of cases or remedies, so that any judge of the family court will be able to hear any type of case or remedy sought, subject to provision made in Rules.
- 4.2 The Allocation and Transfer of Proceedings Order 2008 that sets out the allocation criteria for all the different levels of courts will be repealed by an Order made under powers contained in the Crime and Courts Act 2013. Establishing the family court requires new Rules to be made about the composition and distribution of business in the family court. These Rules are made by the President of the Family Division as the Lord Chief Justice’s nominee after consulting the Family Procedure Rule Committee and with the agreement of the Lord Chancellor.
- 4.3 In relation to appeals, the 2014 Order referred to in paragraph 3.6 above provides for the route of appeal from decisions (including those relating to punishment for contempt) of certain judges and office holders of the family court. to be to within the family court rather than to the Court of Appeal. It is these Rules, however, which provide for who will hear appeals in the family court. These Rules also contain provision for a form of “leapfrog” appeal within the family court (in addition to the existing “leapfrogging” provision to the Court of Appeal provided for by section 57 of the Access to Justice Act 1999) whereby a judge of High Court level sitting in the family court may hear an appeal which would otherwise be heard by a judge of district judge level or of circuit judge level sitting in the family court where the Designated Family Judge or a judge of High Court level considers that the appeal would raise an important point of principle or practice. .

4.4 As noted in paragraph 3.5 above the Rules will form part of a package of statutory instruments needed to bring the family court into practical operation. This instrument is referred to in the Justices' Clerks and Assistants (Amendments) Rules 2014 which authorises justices' clerks and their assistants to be able to perform the gate-keeping allocation function and the Crime and Courts Act 2013 (Family Court: Consequential Provision) (No. 2) Order 2014 which amends the Justices of the Peace (Training and Development Committee) Rules 2007.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

7.1 In its response to the Family Justice Review, published in February 2012, the Government accepted the recommendation that a single family court should be created to deal with family proceedings, replacing the current three tiers of court structure, with the High Court retaining exclusive jurisdiction in just a limited number of areas. In order to achieve this, primary legislation was required and provision for the establishment of a family court for England and Wales was enacted in the Crime and Courts Act 2013.

7.2 When the new family court is implemented, the county courts will become the single County Court and will no longer deal with family proceedings. Magistrates' courts will also no longer deal with family proceedings. The intention is that, in practice, all family business will be conducted in the family court, save for those cases reserved exclusively to the High Court. The new court therefore needs rules setting out how the court will be composed for hearing family proceedings, appeals within the court and making allocation decisions. It also needs rules about the chairmanship of a bench of lay magistrates. It also needs rules on how applications will be allocated to the appropriate level of judge within the family court.

7.3 The instrument sets out in Part 2 how the family court should be composed. It provides that the family court should be composed of one of the following: (a) a judge of district judge level (see paragraph 7.4 below); (b) a judge of circuit judge level; (c) a judge of High Court judge level; or (d) two or three lay justices. It also makes provision (in Part 4) about chairmanship of lay justices in the family court.

7.4 The Family Justice Review recommended that the powers of District Judges in the family court should be harmonised. The policy intention is that a District Judge (Magistrates' Courts) should no longer sit with the bench of magistrates, but instead sit alone in line with other district judges; therefore a District Judge (Magistrates' Courts) can no longer chair a bench of magistrates.

- 7.5 The Rules also set out, in Part 3, provision in relation to authorisations. Provision about the categories of cases in which certain judges will need to be authorised to conduct proceedings will be contained in directions made by the President of the Family Division. Lay justices will not be able to conduct any business in the family court unless authorised by the Lord Chief Justice.
- 7.6 The Rules make provision in Part 5 for the distribution of business in the family court among judges so that cases are allocated according to whether they are: (i) types of proceedings in schedule 1; (ii) emergency applications; (iii) ongoing proceedings or (iv) “gate kept” applications (which include the bulk of public and private law Children Act 1989 cases). “Gate kept” proceedings may be heard by any level of judge, including lay magistrates. Individual cases will be allocated to a particular level of judge by the “gate keeping” team which can consist of district judges, justices’ clerks, and assistant justices’ clerks and will be led by the Designated Family Judge.
- 7.7 In regard to appeals which are routed within the family court, the general approach contained in rule 6 of these Rules is that appeals from decisions made by a judge of district judge level and below in the family court will lie to a judge of circuit judge level sitting in the family court. A judge of district judge level may hear certain appeals from the decision of the Secretary of State relating to child support and may hear applications in the course of certain appeal proceedings . A judge of High Court judge level may also hear certain appeals such as those referred to below from a district judge of the Principal Registry of the Family Division in financial remedy proceedings. This will ensure that appeals are dealt with at the most appropriate level largely replicating the current arrangements.
- 7.8 The first key change regarding the level of judge who may hear an appeal is that the route of appeal from the decision of the Senior District Judge of the Family Division or a district judge of the Principal Registry of the Family Division in proceedings other than those for a financial remedy is to a judge of circuit judge level sitting in the family court instead of to a High Court judge as at present. Appeals from decisions of these judges in financial remedy proceedings are routed to a judge of High Court level sitting in the family court. The policy behind this change is to align the position of district judges as much as possible while acknowledging the specialist expertise of these judges in financial remedy proceedings which justifies appeals against decisions in those matters only being routed to a judge of High Court level. The second key change is that a judge of High Court level sitting in the family court can hear an appeal which would otherwise be heard by a judge of district judge level or a judge of circuit judge level where the Designated Family Judge or judge of High Court level considers that the appeal would raise an important point of principle or practice.
- 7.9 The instrument also identifies particular remedies that specific levels of judges will be prohibited from making. This largely replicates the situation under the current court structure. However, the range of remedies District Judges (magistrates’ courts) may grant will be increased given the policy to align their powers with other district judges.

7.10 Finally, rule 21 makes provision (pursuant to subsection (5) of section 31D), for the President of the Family Division to have power to issue guidance on the application or interpretation of Part 5 of the Rules. Guidance may be issued after consulting the Lord Chancellor, except where the Lord Chancellor determines that the guidance has significant implications for resources, in which case the guidance may only be issued with the Lord Chancellor's agreement. Should the Lord Chancellor not agree guidance which has such implications and accordingly requires agreement, the Lord Chancellor is required to give written reasons to the President of the Family Division why the guidance is not agreed.

- ***Consolidation***

7.11 This is the first instrument made under section 31D of the Matrimonial and Family Proceedings Act 1984 and so no question of consolidation arises.

8. Consultation outcome

8.1 The Family Procedure Rule Committee was consulted on the new Rules and is content.

9. Guidance

9.1 These Rules and all the other instruments related to the setting up of the family court will be published on www.legislation.gov.uk.

9.2 Training for court staff, the judiciary, magistrates and their legal advisers will be provided in the run up to implementation.

10. Impact

10.1 There may be a secondary impact on legal professionals, who will need to familiarise themselves with the legislative changes. The impact on charities or voluntary bodies who support individuals when going to court and assist in other legal matters is that they may also need to familiarise themselves with the legislative changes.

10.2 The impact on the public sector is that the Ministry of Justice would face certain costs associated with judicial training and changes to the family court computer systems. Her Majesty's Courts and Tribunals Service may also face certain costs associated with handling in the family court the registration and enforcement of maintenance orders which are currently handled in magistrates' courts.

10.3 An Impact Assessment is attached to this memorandum and has already been published on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The implementation of the new family court will be reviewed within five years of implementation as stated in the Impact Assessment.

13. Contact

Stella Francoise, Policy Officer, Family Policy Unit, Ministry of Justice Tel: 020 3334 4715 or email: stella.francoise@justice.gsi.gov.uk; can answer any queries regarding the instrument.