

**EXPLANATORY MEMORANDUM TO**  
**THE FAMILY PROCEDURE (AMENDMENT) RULES 2020**

**2020 No. 135 L. 7**

**1. Introduction**

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

**2. Purpose of the instrument**

2.1 These Rules amend the Family Procedure Rules 2010 (“the FPR 2010”) with supporting Practice Directions which set out the procedure and practice to be followed in family proceedings in the High Court and the family court.

2.2 These Rules;

- Implement the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 provisions in the family court;
- Make rule amendments that require parties to financial disputes to provide estimates of legal costs to the court at an early stage and at various stages in a case. The aim being to encourage parties to settle early and avoid substantial, and perhaps disproportionately large, legal bills accruing in financial disputes (e.g. on divorce);
- Specify powers and procedure for the High Court to set aside its own orders in certain kinds of children proceedings where no error of the court is alleged;
- Enable provision to be made through a Practice Direction requiring the accreditation of toxicology testing laboratories if evidence based on their testing is to be admitted.
- Clarify that exceptions can be sought to requirements that individuals with foreign parental responsibility be notified of certain proceedings and make related amendments;
- Clarify the requirement that all correspondence sent to the court is copied to all parties (with specified exceptions);
- Set out the rules for recordings and obtaining transcripts of, and sharing of informal notes of, family proceedings;
- Create a new “enabling” rule that will allow permanent provision to be made in Practice Directions for cases ready to proceed by electronic means following successful Her Majesty’s Courts and Tribunals Service’s (HMCTS) Reform pilots.

**3. Matters of special interest to Parliament**

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

3.1 None

***Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)***

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business.

**4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is to England and Wales  
4.2 The territorial application of this instrument is England and Wales.

**5. European Convention on Human Rights**

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

**6. Legislative Context**

- 6.1 The FPR 2010, and amendments to them, are made by the Family Procedure Rule Committee (“the Committee”) and formally allowed by the Lord Chancellor.

**7. Policy background**

***What is being done and why?***

- 7.1 The FPR 2010 are amended from time to time, to reflect legislative changes or to improve the efficiency of the procedure and practice of family proceedings within the family court and High Court: these Rules make amendments for both purposes. Specifically, these Rules make provision in the following areas;

- ***Implementation of the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018:*** Exercise of judicial functions by authorised court staff amendments made by rules 3, 4, 25, 27 and 29

The Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (“the 2018 Act”) amends the Courts Act 2003 to give procedure rule committees the power to provide for the exercise of judicial functions by members of court staff who satisfy any specified requirements as to qualifications or experience. Such staff may only exercise a judicial function if they are authorised to do so by the Lord Chief Justice.

These rules amend the FPR 2010 and put section 67B of the Courts Act 2003 (inserted by the 2018 Act) into effect in two ways. First, they replace references to “justices’ clerk” and “assistant justices’ clerk” with references to “justices’ legal adviser” (defined as a person authorised to exercise functions under section 67B of the Courts Act 2003 who has such qualifications as are prescribed by the Authorised Court Staff (Legal Advice Functions) Qualifications Regulations 2020 (SI No 2010/98)). Second, they provide for the exercise by justices’ legal advisers (as authorised and qualified court staff) of specified judicial functions in the family court by introducing a new Practice Direction 2C which transposes into the FPR 2010 the functions that can currently be carried out by justices’ clerks and their assistants as set out in

Justices' Clerks and Assistants Rules 2014 ("the 2014 Rules"). This maintains the status quo in relation to the exercise of judicial functions by staff.

Section 67C of the Courts Act 2003 (also inserted by the 2018 Act) requires the Committee to consider whether the rules should include a right for the parties to proceedings in which a decision is made by a member of court staff to have that decision reconsidered by a judicial office holder, and to give reasons if it makes rules that do not include such a right. The Committee has considered whether to include such a right in these FPR 2010 amendments and, since the approach taken is to replicate the existing rules within the new Practice Direction 2C, does not consider the rules should include such a right, noting that there is no such right in the 2014 Rules, that the same rights of appeal which attach to a decision of lay justices in the family court apply to justices' legal advisers and the new Practice Direction 2C transposes provision in the 2014 Rules that will allow a justices' legal adviser to refer a matter to the court if they consider it would be inappropriate to carry out a function themselves.

- ***Costs in Financial Remedy Proceedings and making offers to settle:*** amendments made by rules 10, 11, 12, 13 and 14

The Committee is keen to ensure that parties resolving financial remedy disputes, for example in the context of divorce, settle as early as possible and keep their legal costs to a minimum. These Rules include amendments to the FPR 2010 that will ensure parties have to file with the court and exchange with each other estimates of their legal costs at various stages in proceedings. The intention is to ensure that parties and the courts are fully aware of the level of costs that have been, and will be, incurred if cases are not settled. The amendments will also require parties to make open offers to settle their cases as earlier than is currently required. The intention is to encourage early settlement where appropriate and, therefore, reduce legal costs to the parties.

- ***Rules specifying a power and procedure for the High Court to set aside certain children orders:*** amendments made by rules 17 and 18

These rules amend the FPR 2010 to specify powers and procedure for the High Court to set aside certain children orders that it has made where no error of the court is alleged. The rules apply, first, to orders made under the inherent jurisdiction, including, but not limited to, return (or non-return orders) and orders making a child a ward of court; and second, return (or non-return) orders made by the High Court under the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

- ***Provision in relation to toxicology testing:*** amendments made by rule 26

There is currently no regulation for toxicology tests in family proceedings. Rule 26 enables a measure of quality control by way of a requirement on laboratories providing this service to be accredited; the details of which will be set out in an accompanying Practice Direction which is likely to contain provision to the effect that the court is required only to admit toxicology evidence if produced by a laboratory accredited to United Kingdom Accreditation Service (UKAS) standards, or suitable international equivalents. The Practice Direction will be made once an impact assessment concerning the proposed provision has been completed.

As this is a technical rule to enable provision to be made in a Practice Direction in relation to toxicology testing, it was considered by the Committee to be uncontroversial in principle and therefore consultation was not required. An impact assessment will inform the detail of the Practice Direction and communication with the relevant laboratories will take place ahead of coming into force.

- ***Exception to requirements to notify persons with foreign parental responsibility and related amendments:*** amendments made by rules 16, 20, 21 and 24

Rules 12.4 and 14.4 of the Family Procedure Rules contain requirements for applicants in certain children proceedings, including adoption proceedings, to notify individuals who hold or are believed to hold parental responsibility for the child under the law of another country. However, case law is clear that a court can make exceptions to these requirements in very limited circumstances. The amendments to rules 12.4 and 14.4 clarify that an exception can be sought from the court, and that the requirement will not apply if such an exception is granted. An amendment is also made to rule 14.21 to clarify that similar directions can be sought, in adoption proceedings regarding parents without parental responsibility, not just from the High Court but also from the family court, and rule 19.4 is amended in consequence of this change.

- ***Clarifying and updating rules relating to correspondence and transcripts:*** amendments made by rules 5, 7 and 28

The Committee considered recent amendments made to the Civil Procedure Rules 1998 relating to how correspondence with the court is shared between parties and to how to obtain transcripts of proceedings. The Committee agreed that the FPR 2010 needed to be amended to ensure clarity and simplicity for parties. After analysis by the Committee, it was concluded that it was appropriate to make the following changes to the FPR 2010:

*Firstly*, the amendment made by rule 7 clarifies the already existing requirement that any correspondence sent to the court by a party must be copied to the other party, or parties, unless the court accepts that there is a compelling reason not to do so or there is an exception set out in a Practice Direction. This clarification was prompted by the amount of time court staff and the judiciary are using to consider correspondence, only to return it to the sender noting the need to send it to all parties. HMCTS will provide internal guidance to court staff in relation to this rule, including on when to refer correspondence to a judge;

*Secondly*, rule 27.9 of the FPR 2010 is updated to reflect the fact that all family proceedings are now digitally recorded. The updated rule also reflects the fact that no one can make unofficial recordings without the permission of the court.

*Thirdly*, the updated rule makes clear who, upon payment of any relevant charge, can require a transcript of family proceedings. As most family proceedings are heard in private, the starting position of the rule is that only parties, the Queen's Proctor or (in specified cases) the Registrar General can

require a transcript to be provided to them. Others can be provided with a transcript with the permission of the court, and on payment of any relevant charge.

*Finally*, the updated rule also allows the court to give directions for the compilation and sharing of a note of proceedings made by a party.

- **Online procedures:** amendments made by rules 6, 8, 9, 15, 19, 22, 23 and 30: Several HMCTS Reform pilot projects have commenced and are designed to simplify and digitise different court processes, rather than relying on a paper-based application process; this is part of the ongoing HMCTS Reform Project. These have been provided for in pilot Practice Directions. The intention now is to make permanent provision for the procedures to enable specified types of family proceedings to be started and progressed by electronic means, such as via online application systems.

Rule 30 of these Rules inserts a new Part 41 into the FPR 2010 which will allow for Practice Directions to set out the procedure to be followed in cases which are to proceed by electronic means. This accords with section 76(8) of the Courts Act 2003, which states that “Family Procedure Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions”.

The FPR 2010 will continue to make provision for paper-based procedures.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

## **9. Consolidation**

- 9.1 The FPR 2010 provide a unified set of rules for all types of family proceedings. There are currently no plans to undertake a consolidation exercise, instead the FPR 2010 as amended by these Rules will be published on the Family Procedure Rules website at the following link;

[https://www.justice.gov.uk/courts/procedure-rules/family/rules\\_pd\\_menu](https://www.justice.gov.uk/courts/procedure-rules/family/rules_pd_menu)

## **10. Consultation outcome**

- 10.1 The Committee must, before making Family Procedure Rules, consult such persons as they consider appropriate (section 79(1)(a) of the Courts Act 2003). A number of these Rules amendments or new Rules clarify the already existing framework and do not make changes to process, and as such the Committee felt that consultation was not required. For those projects which required some addition or change to process, the Committee consulted with its stakeholders. These include various governing bodies for legal practitioners and the judiciary, social and children’s services, Cafcass and various court groups and charities. Specifically;

- a. **Courts and Tribunals (Judiciary and Functions of Staff) Act 2018:** The Committee consulted with a range of stakeholders on what provision should be made in the FPR 2010 and supporting Practice Directions on the exercise of judicial functions by court staff. Responses were broadly supportive of maintaining the

functions as set out in the 2014 Rules, with certain amendments to functions being suggested. The Committee has created an expert working group to go through the proposed amendments in detail and consider whether future further changes should be made. In the interim, as the 2014 Rules are functioning and to enable implementation of the Courts and Tribunals (Judiciary and Functions of Staff Act) 2018, the Committee has taken the approach of replicating the 2014 rules in new Practice Direction 2C being inserted by this instrument..

- b. ***Costs in Financial Remedy Proceedings and making offers to settle:*** The Committee ran a consultation that lasted 6 weeks, and sought views from legal practitioners and their supervisory bodies such as the Law Society and Bar Council, all of which were broadly supportive of the proposed amendments and the aim of making sure parties are aware of their legal costs from an early stage. The Committee also worked closely with HMCTS to ensure that any requirements put on the court were achievable and practical.
- c. ***Rules applying to the power of the High Court to set aside certain children orders:*** The Committee consulted certain senior judiciary, legal practitioners, and representative bodies such as the Child Abduction Lawyers Association in October – December 2019. Respondents to the consultation were broadly content with the principle of clarifying the High Court’s power to set aside certain orders where no error of the court is alleged. Some changes arising from the consultation responses were made to the associated Practice Directions.

## **11. Guidance**

- 11.1 The FPR 2010 as amended by these Rules will be available to the public and legal practitioners on the website referred to in paragraph 9.1. Guidance to HMCTS staff will be updated to reflect the procedures in the FPR 2010 as amended by these Rules.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies arising from these changes.
- 12.2 There is no significant impact on the public sector, although HMCTS staff need to be aware of the amendments to the FPR 2010 made by these Rules and how to apply them.
- 12.3 An Impact Assessment has not been prepared for this instrument because the number of businesses affected is limited to legal practitioners who will need to make themselves aware of the changes to the FPR 2010 made by these Rules Regulating small business.
- 12.4 This instrument does not apply to activities that are undertaken by small businesses. However, it is possible that the provisions of the proposed practice direction in relation to toxicology testing may have an impact, and an impact assessment will be undertaken in relation to the extent, if any, of the impact on small businesses before the proposed practice direction is considered.

## **13. Regulating small business**

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

**14. Monitoring & review**

- 14.1 The Family Procedure Rule Committee will monitor the effects of these amendments as part of its ongoing consideration of the FPR 2010.

**15. Contact**

- 15.1 Sarah Cross at the Ministry of Justice. Telephone: 07989660623 or email: [sarah.cross@justice.gov.uk](mailto:sarah.cross@justice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Neal Barcoe, Deputy Director for Family Justice Policy at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
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