

EXPLANATORY MEMORANDUM TO
THE FAMILY PROCEDURE (AMENDMENT NO. 3) RULES 2014

2014 No. 843 (L. 15)

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 When these Rules come into force, the Family Procedure Rules ("the 2010 Rules") will set out the practice and procedure to be followed in family proceedings in the High Court and the family court instead of as, at present, in the High Court, county courts and magistrates' courts. Other instruments amend the 2010 Rules to reflect the creation of the family court. The main purpose of this instrument is to make amendments to the 2010 Rules as a result of provisions in the Children and Families Act 2014 (c.6) (the "2014 Act") relating to family mediation information and assessment meetings ("MIAMs"), child arrangement orders, removing the requirement for the court to consider arrangements for children on divorce or dissolution, imposing a time limit on the resolution of care and supervision proceedings, post adoption contact and experts. The amendments in this instrument also create a new duty on a court to serve an application and related documents in proceedings for child arrangement orders and certain other private law children proceedings.

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

- 3.1 The Committee's attention is drawn to the two matters set out below.
- 3.2 The first matter is that these Rules are being made in part under section 10 of the 2014 Act and reliance is therefore placed on section 13 of the Interpretation Act 1978 in this regard. It is considered that the provision being made in Part 3 of these Rules under section 10 is necessary for the purpose both of bringing fully into force and of giving full effect to the new requirement in section 10 of the 2014 Act. Specifically, the new requirement in section 10 of the 2014 Act to attend a MIAM cannot operate without rules being made under this section, since the rules specify, inter alia, the 'relevant family applications' to which the new requirement applies and also specify the exemptions that may be claimed from the requirement. Section 10 of the 2014 Act will come into force on 22 April by virtue of the Children and Families Act 2014 (Commencement No. 1) Order 2014 (S.I. 2014/793) but could not operate for the reasons given without the rules included in Part 3 of this instrument. The anticipatory exercise of the section 10 power is therefore necessary and expedient for the purpose of bringing section 10 into force.

- 3.3 In the light of comments on the use in rules of court of the expression ‘will’ in the Committee’s 31st and 41st reports of the 2010-2012 session of Parliament, the second matter drawn to the Committee’s attention is the fact that there are various amendments to the 2010 Rules made by these Rules which, following the drafting convention adopted by the Family Procedure Rule Committee, include reference to things that the court ‘will’ do. As these Rules make largely consequential amendments to the 2010 Rules and, as the 2010 Rules already include numerous references to things which the court ‘will’ do in this context, it was not considered appropriate to alter the drafting approach for the purposes of these Rules. In addition, as explained to the Committee on past occasions, it is considered by the Family Procedure Rule Committee that the use of ‘will’ remains appropriate in the contexts in which it is used in the 2010 Rules (and therefore in the amendments made to them by these Rules).

4. Legislative Context

- 4.1 Family Procedure Rules are made by the Family Procedure Rule Committee and allowed by the Lord Chancellor in accordance with section 79 of the Courts Act 2003. The Family Procedure (Amendment No. 3) Rules 2014 are one of three sets of Rules amending the 2010 Rules with all of the amendments coming into force on 22 April 2014. The Family Procedure (Amendment No. 3) Rules 2013 (S.I. 2013/3204) and the Family Procedure (Amendment No. 2) Rules 2014 (S.I.2014/667) contain the rule amendments consequential upon the creation of the family court. On the creation of the family court, county courts and magistrates’ courts will cease to have jurisdiction to deal with family proceedings which will instead be dealt with in the family court and the High Court. The Family Procedure (Amendment No. 3) Rules 2014 are being made under or in consequence of and to support sections 9, 10, 12 to 14 and 17 of the 2014 Act.

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 The Family Justice Review, chaired by David Norgrove, was set up by the Government in 2010 to look at the family justice system and make recommendations as to how the system could be changed for the benefit of children and families. An interim report was published in March 2011 and the Family Justice Review Final Report was published in November 2011. The report is available on the Ministry of Justice website at www.justice.gov.uk/publications/policy/moj/family-justice-review-response.

- 7.2 In its response to the Family Justice Review, published in February 2012, the Government accepted a number of recommendations requiring legislative change, which form Part 2 of the 2014 Act. Section 9 (which is in Part 1 of the 2014 Act) relates to post adoption contact, which was not part of the Family Justice Review but gives effect to proposals following the call for views: 'Birth-parent contact and siblings in care' was published 20 July 2012 and the Government response in 'Adoption reform: Summary of feedback received following the call for views on sibling placements and contact arrangements for children in care and adopted children' published on 5 February 2013.
- 7.3 In respect of private law proceedings, these Rules amend Part 3 of the 2010 Family Procedure Rules to add new provisions relating to the new requirement in section 10 of the 2014 Act for prospective applicants who wish to start certain family proceedings to first attend a MIAM. The meeting will provide information about mediation, and other forms of non-court dispute resolution, and how these can assist people in settling disputes outside of the formal court process. The mediator who conducts the meeting will also assess the suitability of the dispute for mediation.
- 7.4 In essence, the Rules in Part 3 set out: the types of family proceedings to which the MIAM requirement applies and the process for making an application; the grounds for exemption from the requirement to attend a MIAM; the process for the court inquiring into the validity of any MIAM exemption claimed by the applicant and power for the court to direct the applicant or both parties to attend a MIAM where an exemption has not been validly claimed. These Rules also consequentially amend the existing general duty in Part 3 on the court to consider the use of non-court dispute resolution at all stages of proceedings, and the power for the court to adjourn proceedings in order for such dispute resolution to be considered or attempted. In line with a recommendation of the Family Justice Review, the new and amended Part 3 Rules no longer use the term 'Alternative Dispute Resolution'. This has now been changed to 'non-court dispute resolution'.
- 7.5 The Part 3 Rules provide for a supporting Practice Direction to set out in more detail: the list of relevant family proceedings to which the MIAM requirement applies; forms of evidence required for specific exemptions (including detailed exemptions for domestic violence); and practical information for how an applicant is to arrange for a mediator to conduct a MIAM, including establishing the willingness of the prospective respondent to attend.
- 7.6 Part 7 and other provisions of the 2010 Rules are amended by these Rules in consequence of the repeal by section 17 of the 2014 Act of the statutory provisions requiring the court to consider arrangements for children and to consider exercising its powers under the Children Act 1989 when considering a divorce or the dissolution of a civil partnership. Freestanding Children Act 1989 proceedings remain available at any time to settle any dispute about the arrangements for a child.
- 7.7 These Rules also amend Part 12 of the 2010 Rules in consequence of the new provision made by section 12 of the 2014 Act for child arrangements orders. These orders replace the current residence and contact orders under section 8 of the Children Act 1989 with

one order which can define arrangements for with whom the child is to live with and when and with whom the child is to spend time or otherwise have contact with and when. Consequential amendments are also made to other parts of the 2010 Rules where the terms 'contact' and 'residence' are used.

- 7.8 These rules also change the service rule relating to private law applications for child arrangements orders and other orders under section 8, by requiring the court office to serve the application and certain other documents on the respondents unless the applicant requests to do so.
- 7.9 In respect of public family law proceedings, these Rules amend Part 12 of 2010 Rules to reflect the requirement in the amendments to section 32 of the Children Act 1989 (c.41) (made by section 14 of the 2014 Act) for care, supervision proceedings and other proceedings under Part 4 of the 1989 Act to be resolved within 26 weeks and to facilitate resolution of proceedings within that period. Provision is also made in the Rules for applications for the court to exercise its power in section 32(5) of the 1989 Act to extend the 26 week period, for the court to announce its decision and to give specific justification for refusing or granting an extension of the period together with a short explanation of the impact which the decision would have on the welfare of the child.
- 7.10 The rule changes also apply insofar as practicable to public law proceedings other than Part 4 proceedings which are listed in the adjusted rule 12.2, for example, proceedings for a secure accommodation order under section 25 of the 1989 Act. Insofar as is practicable, a timetable for resolving these proceedings within a 26 week period is to be drawn up.
- 7.11 In addition, these Rules amend Part 14 of the 2010 Rules to provide for a court process relating to contact post adoption. From the point an adoption order is made the adoptive parents have full parental responsibility for their child and the child is treated in law as if born to the adopters. The Government was concerned that adoptive parents had no effective and enforceable way to prevent disruptive, unwanted and unsolicited contact by the child's birth family post adoption, especially in cases where there might have been a history of such contact occurring previously or where, for example, the child had suffered past abuse at the hands of their birth parents. New orders that could be made pre-emptively and to which conditions could be attached against the adoptive child's birth family or former guardians were therefore needed.
- 7.12 The 2014 Act inserts two new sections, 51A and 51B, into the Adoption and Children Act 2002 to deal with contact arrangements between adopted children and their birth family, former guardians and certain others from the point of the adoption order onwards. Orders under the new section 51A will replace, in relation to cases for which that section applies, orders dealing with contact under section 8 of the 1989 Act. The new legislation provides for two types of order:

(1) orders requiring the adoptive parent to allow the child to stay or visit with the person named in the order, or otherwise have contact with them – a 'contact order'; and

(2) orders prohibiting the person named in the order from having contact with the child - a 'no contact' order. Importantly, these may be pre-emptive in nature and will be enforceable against the child's birth family (and former guardians/certain others) through conditions which can be attached to the order.

There is also provision for orders varying and revoking these two types of order.

- 7.13 Part 14 of the 2010 Rules is also adjusted to extend the provision of the serial number functionality to the new post adoption contact orders so that adoptive parents can, if they so wish, have a serial number assigned to them to protect their identity.
- 7.14 The Family Justice Review raised concerns that expert evidence was being commissioned too frequently, including when it added little to the court's understanding of the case, and that this was contributing to delay. The Government accepted the following recommendations requiring legislative change: primary legislation should reinforce that, in commissioning an expert's report, regard must be had to the impact of delay on the welfare of the child. It should also assert that expert testimony should be commissioned only where necessary to resolve the case; the court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved, and judges should direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management. Judges should set out in the order giving permission for the commissioning of the expert witness the questions on which the expert witness should focus.
- 7.15 Ministers decided that there needed to be early changes to give effect to the Family Justice Review recommendations in order to help bring down the average length of proceedings and support the family justice system to prepare for the 26 week time limit being introduced in care and supervision proceedings. As a consequence, changes to court rules ahead of the primary legislation to give effect to the recommendations relating to expert evidence and applying to all family proceedings came into force on 31 January 2013. A new Part 25 (Experts and Assessors) of the 2010 Rules was introduced by The Family Procedure (Amendment) (No. 5) Rules 2012 (S.I.2012/3061). In so far as children proceedings are concerned, section 13 of the 2014 Act elevates some of these rule changes to primary legislation. Consequential changes to the rules are being made in these Rules to ensure they align with, and support, the provision in the Act.
- 7.16 Following the report of the judicial led Private Law Working Group, which looked at revisions to the private law process, it has been agreed that, in the majority of section 8 private law cases, the court officer, and not the applicant, should serve the application and accompanying document to the respondent.

Consolidation

- 7.17 The 2010 Rules provide a consolidated unified set of rules for all types of family proceedings. These Rules amend the 2010 Rules. There are currently no plans to undertake a consolidation exercise. The 2010 Rules as amended will be published on the

Family Procedure Rules website at the following link:
<http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedurerules/family/index.htm>

8. Consultation outcome

- 8.1 In June 2010, the Family Justice Review panel issued a call for evidence to which over 700 individuals and organisations responded. The Review panel met a wide range of stakeholder groups and undertook visits across the UK and overseas. In March 2011, the Review panel published an Interim Report, in which they sought views on a series of proposals for reform of the family justice system. The consultation closed in June 2011 and received over 600 responses. There was broad support for the proposals and the Family Justice Review issued its final recommendations in November 2011.
- 8.2 In addition, draft Family Procedure Rules to be made under section 10 of the 2014 Act in relation to the new MIAM requirement, as well as a draft supporting Practice Direction, were subject to a targeted consultation by the Family Procedure Rule Committee with key practitioner groups. A number of suggested amendments were incorporated into the final version of the Rules and Practice Direction approved by the Family Procedure Rule Committee.
- 8.3 The rule changes for child arrangements orders, and amendments to the Rules on divorce proceedings to reflect the repeal of the provisions for the court to consider using its powers in respect of arrangements for children when considering a divorce or the dissolution of a civil partnership, are consequential amendments on the passage of these changes in the 2014 Act. The policies underlying these changes, as well as the provisions, were the subject of parliamentary scrutiny including pre-legislative scrutiny.
- 8.4 The changes to rules relating to care and supervision proceedings and other proceedings under Part 4 of the Children Act 1989, together with a revised Practice Direction 12A (containing the table outlining the key stages of the court process known as the Public Law Outline (PLO)), have been piloted throughout courts in England and Wales. The pilot was introduced, using piloting provisions in the court rules, on a phased basis between July and October 2013. Pilot Practice Direction 12A is a practice direction guide to case management for care, supervision and other Part 4 proceedings. The intention was that piloting the proposed rule amendments and Practice Direction would enable local areas to begin to work towards the 26 week time limit in advance of formal introduction in April 2014. A list was placed on <https://www.justice.gov.uk/protecting-the-vulnerable/care-proceedings-reform> detailing when specified courts were implementing the pilot. Independent, qualitative research was also commissioned to explore the perceptions and experiences of local areas in implementing the revised PLO. The pilot is continuing until these Rules and supporting new Practice Direction 12A come into force.
- 8.5 The Family Procedure Rule Committee also conducted a targeted consultation regarding the changes to rules relating to care and supervision proceedings and other proceedings under Part 4 of the Children Act 1989 and the Pilot Practice Direction 12A with

representative bodies from the legal professions, expert witnesses, Cafcass and the judiciary in November and December 2013. Eight responses were received. Most were broadly supportive of the proposed amendments and commented only on matters of detail. However, there was wide support for a further revision of the PLO to introduce a time window for conducting an effective case management hearing, as well as clarifying how urgent issues which might arise should be dealt with. As a result of the pilot and feedback from the consultation, no significant amendments were made to the pilot rule amendments before they were inserted into these Rules. The scope of the pilot rule amendments were, however, extended to include not only proceedings under Part 4 of the Children Act 1989 but also, insofar as practicable, other public law proceedings, such as proceedings for a secure accommodation order and these Rules impose, insofar as practicable, a time limit for resolution of these other public law proceedings within 26 weeks. Further amendments are being made to Practice Direction 12A, which contains the PLO, to reflect consultation and feedback of the pilot.

- 8.6 The Family Procedure Rule Committee concluded that the changes to rules in respect of post adoption contact did not require to be formally consulted on. The policies underlying these changes, as well as the provisions, were the subject of parliamentary scrutiny.
- 8.7 As the Family Justice Review consulted widely on its interim report, which included a number of recommendations on expert evidence in children proceedings, and in the light of the parliamentary scrutiny of the policies underlying section 13 of the 2014 Act including pre-legislative scrutiny, it was not considered necessary to further specifically consult on these issues.
- 8.8 The change to the rules which gives HMCTS the obligation to serve notice in most section 8 private law cases will be part of the new child arrangements programme (CAP). The CAP was the main recommendation of the judicial led private law working group which provide its first report in November. The report was subject to a focused consultation among family justice professionals and received over 70 responses with general support for the recommendations.

9. Guidance

- 9.1 Guidance to court users about MIAM meetings, child arrangements orders and the arrangements for children on divorce will be made available in amended versions of court leaflets provided by HM Courts and Tribunals Service.
- 9.2 Appropriate training and information will be provided for court staff, justices' clerks and assistant justices' clerks, magistrates, the judiciary, local authorities and Cafcass on all of the changes within the Act.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies, except that the introduction of the MIAM requirement under section 10 of the 2014 Act is intended to increase the

volume of MIAMs attended by prospective applicants (as a primary impact) and this will have a beneficial impact on mediation services authorised to conduct MIAMs who should see an increase in demand for their services. It is anticipated that a secondary impact will be an increase in the number of prospective respondents who attend a MIAM, with the applicant or separately.

10.2 The impact on the public sector is likely to be relatively small and can be accommodated within existing financial provisions. It is assumed that legal services providers will undertake the same amount of work to the same standard but will do so more quickly and that there will be no costs from such case management efficiencies.

10.3 An Impact Assessment for the Children and Families Bill can be found at the following link: <http://www.education.gov.uk/a00221161/children-families-bill>. This includes details covering all the policies covered by this Statutory Instrument. In the light of this, a separate Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 A review of the Government's interventions will take place five years after implementation of the policies. The objective will be to check that they are operating as expected.

13. Contact

Joanna Furlong at the Ministry of Justice (Tel: 020 3334 3123 or email: joanna.furlong@justice.gsi.gov.uk) can answer any queries regarding the instrument.