

EXPLANATORY MEMORANDUM TO

THE FAMILY PROCEDURE (AMENDMENT No. 2) RULES 2016

2016 No. 901 (L. 14)

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”), which set out the practice and procedure to be followed in family proceedings in the High Court and in the family court. These Rules amend the FPR 2010:

- to remove the automatic party status of a child (other than a child applicant) in an application for a declaration of parentage, leaving the court discretion over whether to make such a child a party or not;
- to make new provision about when a child who is made a party to an application for a declaration of parentage should have a children’s guardian, or should have a litigation friend, or may proceed without either;
- by inserting new Rules for applications to set aside a financial remedy order of the court where no error of the court is alleged.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The FPR 2010, and amendments to them, are made by the Family Procedure Rule Committee (“the Committee”) and formally allowed by the Lord Chancellor.
- 4.2 Rule 8.20 of the FPR 2010 identifies who the respondents are in an application for a declaration of parentage made pursuant to section 55A of the Family Law Act 1986. Rule 8.20 (1) of the FPR 2010 currently provides that a person whose parentage is in dispute, and a person who is alleged to be a parent of a such a person, is automatically a respondent to the application, including when such a person is a child.
- 4.3 There is no provision in the Family Law Act 1986 or in section 20 of the Family Law Reform Act 1969 (this being the provision the court would use to direct DNA testing in relation to a case under section 55A of the Family Law Act 1986) which would require a child to have automatic party status in proceedings of this type.

- 4.4 The Committee is of the view that, particularly given the lack of any primary legislation requiring a child to be a party to proceedings of this nature, that the FPR 2010 should be amended so that the child whose parentage is in dispute, or a child who is alleged to be a parent, is no longer automatically a party to the proceedings, unless that child is the applicant. However, the court retains a discretion as to whether to make such a child a party to the proceedings in accordance with Rule 16.2 FPR 2010.
- 4.5 The FPR 2010 also makes provision for when a child party should have a children's guardian appointed, or should have a litigation friend appointed, or when a child party can proceed in the case without either a children's guardian or litigation friend. The Committee recognised the Rules on these matters required amendment to make it clear how they should apply where the court exercises its discretion to join a child as a party to proceedings for a declaration of parentage.
- 4.6 These Rules also make amendments to the FPR 2010 to set out the procedure for applications to set aside financial remedy orders of the court where no error of the court is alleged, and to provide that such applications will be made to the High Court if they relate to High Court orders, and otherwise to the family court. The new Rules are set out principally by insertion of new Rule 9.9A, as well as an amendment to Rule 28.3 relating to costs in such proceedings.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is 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

What is being done and why

- 7.1 The Committee amends the FPR 2010 periodically in light of legislative and other changes.
- 7.2 As explained in paragraphs 4.1 to 4.4 above, the amendments to Rule 8.20 and Part 16 of the FPR 2010 are made so that children (other than child applicants) are not automatically parties to applications for declarations of parentage, but so that the court retains a discretion to make children parties. These changes are made as it is considered that it may not always be appropriate for a child to be a party to such an application where it is of a straight-forward, factual nature and the court is satisfied that it is in the child's interests for this matter to be resolved; for example is a given person a parent or not?
- 7.3 It is important, however, that the court retains the discretion to make a child whose parentage is in dispute, or a child who is alleged to be a parent, a party to an application for a declaration of parentage. Where a child is made a party to such proceedings, it is also important that their interests are protected by the involvement of a children's guardian or litigation friend, unless the court is satisfied that it is appropriate for the child to be party to the proceedings without such a person being

involved. For example, the court can allow a child to proceed without a children's guardian or litigation friend where it considers that the child has sufficient understanding to conduct the proceedings without such a person being involved.

- 7.4 New Rule 9.9A provides that a party may apply to set aside a financial remedy order where no error of the court is alleged. These amendments follow the cases of *Sharland v Sharland [2015] UKSC 60* and *Gohil v Gohil [2015] UKSC 61* in which the Supreme Court addressed questions of whether the High Court had jurisdiction to set aside a financial remedy order due to one party's non-disclosure. These amendments now clarify the procedure for setting aside orders where no error of the court is alleged by the parties.
- 7.5 The application is to be made to the High Court where the order is from the High Court, or to the family court where the order was made by the family court. The Part 18 procedure for applications is to be applied, subject to the modifications contained in these Rules.
- 7.6 The original orders which are the subject of setting aside applications under Rule 9.9A may have been made in family proceedings courts, county courts or the High Court before the family court came into existence on 22 April 2014. The effect of the transition arrangements for the family court (Crime and Courts Act 2013 (Family Court: Transitional and Savings Provision) Order 2014 (S.I. 2014/956), together with these Rules, is that orders made before 22 April 2014 are considered orders of the family court and applications to set aside such orders will therefore be brought to the family court. The intention is that a new Practice Direction 9A will be made to highlight this and other effects of the new Rules in combination with other Rules and law.

Consolidation

- 7.7 The FPR 2010 provide a consolidated unified set of Rules for all types of family proceedings. These Rules amend the FPR 2010. There are currently no plans to undertake a consolidation exercise. The FPR 2010 as amended 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

8. Consultation outcome

- 8.1 The Committee must, before making Family Procedure Rules, consult such persons as they consider appropriate (section 79(1)(a) of the Courts Act 2003).
- 8.2 As the amendments to Part 8 and Part 16 are largely technical the Committee did not undertake formal consultation in relation to these amendments. Ministry of Justice officials did liaise closely with the office of the Official Solicitor and Public Trustee, and the Children and Family Court Advisory Support Service (known as Cafcass) and CAF/CASS Cymru when developing these amendments.
- 8.3 As the amendments to Part 9 involve the creation of a new procedure based on a significant point of law of substantial importance, the Family Procedure Rule Committee considered it important to consult on how the new procedure could work in practice. The consultation was from 21 December 2015 to 4 February 2016. The consultation was targeted to key stakeholders. 2 responses were received from Resolution and the Family Law Bar Association which were taken into account when the Committee made its final decision.

8.4 In preparing these Rules for the Committee, Ministry of Justice officials did liaise closely with HMCTS and court staff expert in enforcement of financial orders made in family proceedings, as well as members of the Committee (legal practitioners and judges) with long-standing experience of dealing with such applications. Their views were taken into account in the drafting of these Rules.

9. Guidance

9.1 The FPR 2010 as amended by these Rules will be available to the public and legal practitioners on the website referred to at paragraph 7.9. Guidance to HMCTS staff will be updated to reflect the procedures in the FPR 2010 as amended by these Rules.

10. Impact

10.1 These Rules will have a small impact on business, charities or voluntary bodies, in that those providing legal advice, such as solicitors and barristers, will need to be aware of the amendments made by these Rules and how to apply them.

10.2 These Rules have no impact on the public sector, save that HMCTS staff will need to be aware of the amendments made by these Rules and how to apply them.

10.3 An Impact Assessment has therefore not been prepared for this instrument.

11. Regulating small business

11.1 These Rules do not apply to activities that are undertaken by small businesses, save as outlined at paragraph 10.1 above.

12. Monitoring & review

12.1 The Committee will monitor the effects of these amendments as part of its ongoing consideration of the FPR 2010.

13. Contact

13.1 Please contact Joanne Thambyrajah, Secretary to the Family Procedure Rule Committee, Ministry of Justice, (telephone: 0203 334 3181 or e-mail: joanne.thambyrajah1@justice.gsi.gov.uk) who can answer any queries regarding the instrument.