

EXPLANATORY MEMORANDUM TO

THE JUSTICES' CLERKS AND ASSISTANTS (AMENDMENT) RULES 2017

2017 No. 742 (L. 10)

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 existing Rules to specify additional functions of the family court or of a judge of the family court that may be carried out by justices' clerks and by assistants to a justices' clerk who have been authorised to carry out the functions by a justices' clerk.

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 negative resolution 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 Justices' clerks and assistants to a justices' clerk are employed by Her Majesty's Courts and Tribunals Service (referred to below as "HMCTS") but are not subject to the direction of the Lord Chancellor or any other person when performing their functions: in other words, they act independently.
- 4.2 The Justices' Clerks and Assistants Rules 2014 (referred to below as "the 2014 Rules") list various functions of the family court or of judges of the family court which justices' clerks may undertake. These functions may also be undertaken by assistants to a justices' clerk who have been authorised to perform the functions by a justices' clerk: such authorised assistants are referred to below as "assistants".
- 4.3 These Rules amend the 2014 Rules to specify further functions that may be undertaken by justices' clerks and assistants, by reference to the provisions which set out those functions in the Family Procedure Rules 2010 (referred to below as "FPR 2010") and supporting Practice Directions.
- 4.4 The functions in question are:
- (i) permitting an application form for a matrimonial or civil partnership order to be served on a child or protected party or on another person (rule 6.14(4) FPR 2010);
 - (ii) ordering that an application form for such an order is to be treated as if it has been properly served even when sent to a person other than the one specified in the procedural rules for service (rule 6.14(6) FPR 2010);

- (iii) making a direction that such an application is deemed to have been served, in specified circumstances (rule 6.16(1) FPR 2010);
- (iv) directing that service can be effected by a method or at a place other than as specified in the FPR 2010 (rule 6.19 FPR 2010)
- (v) dispensing with the need for service of such an application where it is impracticable to serve the application by any method allowed for by the FPR 2010 (rule 6.20 FPR 2010);
- (vi) directing that a person named in an application for a divorce or judicial separation as someone with whom the other party to the marriage has committed adultery should not be made a co-respondent to the proceedings (rule 7.10(3)(a) FPR). The justices' clerk or assistant will only be able to perform this function where the petitioner and respondent agree that the named person should not be made a co-respondent;
- (vii) giving permission for a respondent who wishes to make an application for a matrimonial or civil partnership order to do so outside of the usual time limit for making such an application (rule 7.14(1) FPR 2010). Currently the 2014 Rules provide for a justices' clerk or assistant to give such permission where the parties to the case consent: this need for consent is removed by the amendment;
- (viii) directing that a case where an application for a matrimonial or civil partnership order is being defended should be listed for a case management hearing (rule 7.20(4) FPR 2010); and
- (ix) giving directions in relation to disclosure of information from financial remedy proceedings in the family court for purposes relating to appeals under the Child Support Act 1991 (rule 9.46(2) FPR).

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 Currently, justices' clerks and assistants perform a range of functions within family proceedings in the family court. These functions are concerned primarily with matters of practice and procedure; they do not involve making substantive or final judicial decisions. In practice, assistants carry out the majority of the work which is permitted under the 2014 Rules, while justices' clerks perform a largely managerial role.
- 7.2 In addition to performing certain functions of the court and judges of the court, justices' clerks currently provide advice on matters of law to lay judges in the family courts.
- 7.3 These changes are being made to enable the most efficient and effective deployment of judicial and HMCTS resources. In order to assist in realising the objective of

creating an efficient, flexible court to hear family matters, it is considered appropriate that that justices' clerks and their assistants should be able to perform additional functions to those currently provided for under the 2014 Rules.

- 7.4 The 2014 Rules already enable a justices' clerk or assistant to undertake various functions in undefended cases of divorce, judicial separation, dissolution and separation orders. These cases are relatively straight forward matters which, by virtue of the volume of applications, would otherwise take up a significant amount of judicial time. By allowing justices' clerks and assistants to perform the further functions related to divorce (etc.) proceedings provided for by amendments made by these Rules, the judiciary will have additional time to consider more complex matters.
- 7.5 Currently there are eleven "divorce centres" across England and Wales where divorce applications are made and processed to completion, unless they are defended. A key element which enabled this centralisation of divorce work was the fact that a number of functions of the court were capable of being performed by a justices' clerk or assistant, by virtue of the 2014 Rules. Whilst specific cost and time savings cannot be quantified, in practice more justices' clerks and assistants than District Judges now deal with applications for directions for trial, which is the application asking the court to consider making decree nisi in divorce proceedings or a conditional order in civil partnership dissolution proceedings. This enables District Judges to focus on more complex work within the courtroom. As an example of this more efficient use of resources, statistics show that 125, 674 directions for trial applications were processed between June 2015 and May 2016 of which 70% were considered by justices' clerks and assistants. A similar resource efficiency will be provided though the changes in these Rules. The additional functions will be capable of being performed by justices' clerks and assistants, no matter which level of judge the case has been allocated to in the family court. In practice, this means that justices' clerks and assistants will be able to assist all judges (not just lay judges) with matters relating to the practice and procedure of the family court.
- 7.6 The Justices Clerks Society (family and legal training networks) have conducted a training needs analysis. This revealed that justices' clerks and assistants with a family law background would already possess the skills needed to process the work related to the additional functions referred to in these Rules. Guidance is in the process of being created to provide a training guide for justices' clerks and assistants who do not have a family background which can also be used by new assistants. This guidance will be available to staff from the implementation date of these Rules.
- 7.7 In all cases, justices' clerks and assistants will remain under a duty to refer matters back to the court if, when considering carrying out a function authorised to them, they consider that it may be inappropriate for them to carry out that function. In practice this will act as a fail-safe: justices' clerks and assistants will not carry out any function where they consider that it may be more appropriate for a judge to consider the matter.

Consolidation

- 7.8 The Schedule to the 2014 Rules provides a list of functions capable of being performed by justices' clerks and assistants. These Rules amend that list. There are currently no plans to undertake a consolidation exercise. The Justices' Clerks and Assistants (Amendment) Rules 2017 will be published on legislation.gov.uk. These Rules are to be read in conjunction with the 2014 Rules. Specialist online legal

services such as Lexis Nexis and Westlaw will provide consolidated versions, however, these are subscription services. Court staff have access to these online legal services through the judicial intranet which includes an electronic legal library of resources.

8. Consultation outcome

- 8.1 Section 31O(1) of the Matrimonial and Family Proceedings Act 1984 permits these Rules to be made by the Lord Chancellor in agreement with the Lord Chief Justice after consulting the Family Procedure Rule Committee.
- 8.2 These proposals were submitted to the Family Procedure Rule Committee by the Justices' Clerk for family matters in London who is experienced in dealing with divorce work. The Justices' Clerks Society are aware of the proposals and are content with them.
- 8.3 The Family Procedure Rule Committee were consulted on these amendments and endorsed permitting these functions to be performed by justices' clerks and assistants. The President of the Family Division (as nominee of the Lord Chief Justice) has formally agreed the making of these Rules. HMCTS are fully supportive of the amendments made by these Rules.

9. Guidance

- 9.1 HMCTS intend to release an announcement to court staff and will update their "job cards" accordingly to ensure staff are aware of what may be considered by a justices' clerk or assistant. There are no plans to release information to court users at this stage as the proposed changes will not affect the customer service they receive from the court.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 The impact on the public sector is that there may be some costs to HMCTS, including training costs, as a result of the amendments made to the 2014 Rules by these Rules. It is also expected that there will be efficiency savings to HMCTS as a result of this measure.
- 10.3 As the operational impact on HMCTS and court users is expected to be minimal, an Impact Assessment has not been prepared for this instrument.

11. Regulating small business

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

12. Monitoring & review

- 12.1 The day-to-day role played by justices' clerks and assistant justices' clerks will be reviewed on an ongoing basis by HMCTS in order to ensure the most efficient and effective deployment of resources within the provision of the 2014 Rules as amended by these Rules, and that the functions being carried out by justices' clerks and assistants are appropriate.

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.