

EXPLANATORY MEMORANDUM TO
THE FAMILY PROCEDURE (AMENDMENT) RULES 2021

2021 No. 155 L. 3

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

2. Purpose of the instrument

- 2.1 These Rules amend the Family Procedure Rules 2010 (“FPR”) which, with supporting Practice Directions, set out the practice and procedure to be followed in family proceedings in the High Court and the family court.
- 2.2 The amendments made to the FPR by these Rules make a correcting change to a rule relating to service and insert a new enabling rule to provide for rules to be temporarily modified by Practice Direction in the case of a public emergency.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Rule 3 of these Rules corrects an error in the amendment made to the FPR by regulation 6(5) of the Family Procedure Rules 2010 and Court of Protection Rules 2017 (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/517) and is being issued free of charge to all recipients of those Rules.

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 at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is 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, and amendments to them, are made by the Family Procedure Rule Committee (“the FPR Committee”) under section 75 of the Courts Act 2003 (section 76 of which makes further provision about the scope of Family Procedure Rules) and

formally allowed by the Lord Chancellor under section 79 of that Act. Section 79(1) of the Court Act 2003 requires the FPR Committee before making rules to meet (unless inexpedient to do so) and consult such persons as they consider appropriate. The FPR Committee meets 9 times a year and except in very rare circumstances considers any proposed matters for inclusion in the rules in at least one meeting or in correspondence out of the FPR Committee (as it did for the matters in these Rules). Consultation is addressed in section 10 of this memorandum.

7. Policy background

What is being done and why?

- 7.1 The FPR 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 by making two amendments to the FPR:
- 7.2 Firstly, an amendment to rule 6.43 FPR. Part 6 of the FPR contains detailed rules about how documents relating to family proceedings should be served on the parties involved in those proceedings. Rule 6.43 FPR contains some cross-references to substantive rules about service on a respondent outside of the United Kingdom.
- 7.3 Rule 6.43 FPR was amended⁽¹⁾ in anticipation of withdrawal of the United Kingdom from the European Union. The intention was to remove from rule 6.43 the cross-reference to rule 6.44 FPR, because rule 6.44 FPR was itself being omitted as it refers to “the Service Regulation”, which is an instrument which no longer applies to the United Kingdom. However, the previous amendment removed a different cross-reference from rule 6.43 FPR – that to rule 6.45 FPR – in error.
- 7.4 It is not considered that the previous amendment will have had a significant impact, beyond a slight lack of clarity, as it was a cross-reference that was amended. The correct substantive provisions were omitted (rule 6.44 FPR) and retained (rule 6.45 FPR).
- 7.5 The amendment made by these Rules omits the cross-reference rule 6.44 FPR and reinserts the previously omitted cross-reference to rule 6.45 FPR.
- 7.6 Secondly, new rule 36.3 is inserted into the FPR. This change will make it possible for practice directions to modify or disapply any provision of the FPR in order to respond to issues for the work of the courts arising from emergencies such as the coronavirus pandemic. This is intended to enable provision which is explicitly temporary but is not of the nature of a pilot scheme (which would be covered by rule 36.2 FPR) following consideration by the Court of Appeal in *Arkin v Marshall* [2020] EWCA Civ 620 of the nature and limits of provision under rule 51.2 of the Civil Procedure Rules 1998, which mirrors rule 36.2 FPR. The Civil Procedure (Amendment) Rules 2021 amend the Civil Procedure Rules 1998 to insert a new rule 51.3, which mirrors new rule 36.3 FPR.
- 7.7 Practice Directions supporting the FPR are made by the President of the Family Division (as nominee of the Lord Chief Justice) and approved by the Lord Chancellor. Each will take the views of others as necessary before formally signing a Practice Direction. For example, the President of the Family Division will routinely discuss

⁽¹⁾ See the Family Procedure Rules 2010 and Court of Protection Rules 2017 (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/517), regulation 6(5).

proposed Practice Directions with the FPR Committee, and the views of Her Majesty's Courts and Tribunals Service on any proposed Practice Direction will be sought.

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 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 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.

10. Consultation outcome

- 10.1 The FPR Committee must, before making Family Procedure Rules, consult such persons as they consider appropriate (section 79(1)(a) of the Courts Act 2003).
- 10.2 The FPR Committee does not always undertake a formal public consultation on proposed amendments to the FPR. In the case of these Rules, the FPR Committee decided not to consult in relation to the proposed amendments, given that the amendment to rule 6.43 of the FPR is a minor, correcting amendment to a cross-reference, and given that the new rule 36.3 of the FPR is an enabling provision, which will allow temporary modifications of rules to be made by Practice Direction, rather than being a provision that will of itself have immediate or direct effect. The FPR Committee liaised with the Civil Procedure Rule Committee regarding new rule 36.3 FPR and, as noted above, a mirroring provision is to be inserted in the Civil Procedure Rules 1998.

11. Guidance

- 11.1 Amendments to the FPR are drawn to the attention of participants, to members of the judiciary, to other relevant representative bodies (for example the Law Society, Bar Council, advice sector) and to the editors of relevant legal publications by the FPR Committee secretariat; as well as by publicity within Her Majesty's Courts and Tribunals Service. News of changes affecting the family jurisdiction are published on the Ministry of Justice website referred to in paragraph 9.1.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for these Rules because no, or no significant, impact on the private, public or voluntary sectors is foreseen.

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 approach to monitoring of this legislation is for the amendments to form part of the FPR which are kept under continuous review by the FPR Committee, and may be subject to amendment accordingly.

15. Contact

- 15.1 Simon Qasim at the Ministry of Justice. Direct email: Simon.Qasim3@justice.gov.uk can answer any queries regarding this 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.
- 15.3 Parliamentary Under-Secretary of State Alex Chalk MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.