

EXPLANATORY MEMORANDUM TO

THE FAMILY PROCEDURE (AMENDMENT NO. 2) RULES 2023

2023 No. 1324 (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 His Majesty.

2. Purpose of the instrument

- 2.1 The Family Procedure (Amendment No. 2) Rules 2023 (“the 2023 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.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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 (“the 2003 Act”). Section 76 of the 2003 Act makes further provision about the scope of the FPR, including stating at sub-section (8) that the FPR “may, instead of providing for any matter, refer to provision made or to be made about that matter by directions”. The FPR are formally allowed by the Lord Chancellor under section 79 of the 2003 Act. Section 79(1) of the 2003 Act requires the FPR Committee before making rules to meet (unless inexpedient to do so) and to consult such persons as they consider appropriate. The FPR Committee meets nine times a year and, except in very rare circumstances, considers any proposed matters for inclusion in the FPR in at least one meeting or in correspondence out of the FPR Committee. 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 and decisions of the courts or to improve the efficiency of the procedure and practice in family

proceedings within the family court and High Court. The 2023 Rules amend the FPR in the following ways:

- 7.2 References in the FPR to “domestic violence” are amended to “domestic abuse”, and a definition of “domestic abuse” is added to rule 2.3(1) FPR. This is being done to align the FPR terminology and definition with that in the Domestic Abuse Act 2021.
- 7.3 A new provision is added (in rule 2.5 FPR) to enable a new Practice Direction to make provision for specified staff of the High Court to undertake functions of the court. This will enable appropriately qualified members of staff in the Family Division of the High Court to take specified steps to ensure that a case can progress efficiently and effectively, which will ease the pressure on the judiciary.
- 7.4 Part 3 FPR (which makes provision about non-court dispute resolution) and Part 28 FPR (which makes provision about orders for one party to pay the costs of another) are both amended to strengthen the provisions in order to further encourage the consideration of and engagement with non-court dispute resolution (NCDR), including after a case has proceeded to court.

What did the law do before the changes made by this instrument?

- 7.5 The FPR used the term “domestic violence” in various provisions,
- 7.6 Rule 2.5 FPR made provision for, amongst other things, a Practice Direction to set out when a Justices’ Legal Adviser may undertake functions of the court.
- 7.7 There is a legal requirement for a prospective applicant to attend a family mediation information and assessment meeting (referred to in the FPR as a “MIAM”) before making an application to court for an order in specified types of family proceedings. This is provided for in section 10 Children and Families Act 2014. Part 3 of the FPR set out various exemptions this requirement, for example in those cases where there is evidence of domestic abuse or a specific type of urgency. The FPR provided for sixteen “MIAM exemptions” and three “mediator’s exemptions” (the latter needed to be certified as applying by a mediator). Part 3 FPR also made procedural provision in relation to attendance at MIAMs. This included provision about the point in time at which the evidence for certain MIAM exemptions must be provided to the court, and the point at which the court first considers whether an exemption was validly claimed. The court has the power to require parties to attend a MIAM if it considers that an exemption was not validly claimed.
- 7.8 In addition, Part 3 FPR provided for judicial discretion in relation to encouraging engagement with NCDR during the course of proceedings. Part 28 FPR makes provision in relation to when the court may consider making an order for one party to pay the legal costs of another. In financial remedy proceedings, for example where a court is determining how parties’ finances should be divided on a divorce, the FPR start with a general rule that the court will not make an order for one party to pay the legal costs of another. However, the FPR go on to provide that the court may make such an order where it considers it appropriate to do so because of the “conduct” of a party in relation to the proceedings. The court is required to have regard to certain factors set out in the FPR when considering such “conduct”, such as the manner in which a party has pursued or responded to the application.

Why is it being changed?

- 7.9 The FPR are being amended to use, and define, the term “domestic abuse” in light of the use and definition of that term in the Domestic Abuse Act 2021.
- 7.10 Rule 2.5 FPR is being changed as the FPR Committee considers there is a need to ease pressure on the High Court judiciary by enabling some functions to be undertaken by appropriately qualified court staff.
- 7.11 The amendments to Parts 3 and 28 FPR (and consequential changes to other rules in the FPR) are being made to further encourage parties to learn about and engage with NCDR, including after a case has progressed to court. These changes are being made as NCDR has been shown to help separating parents and others to resolve their family law disputes faster, more effectively and (where applicable) in the best interests of any child of the family, ensuring that only those cases which require the protection and intervention of the courts go through the court process.
- 7.12 The FPR Committee considers that these amendments will further encourage the court to consider whether NCDR is appropriate at any stage in proceedings, and to encourage engagement with NCDR during the natural gaps in proceedings, so as to not increase delays.

What will it do now?

- 7.13 The term “domestic abuse” will use used in the FPR, in place of “domestic violence”, and will be defined in the FPR in the same way as in the Domestic Abuse Act 2021.
- 7.14 The rule 2.5 FPR amendment will enable a Practice Direction to make provision for appropriately qualified court officers in the court office of the Family Division of the High Court to undertake specified court functions.
- 7.15 The amendments to Part 3 FPR will achieve various ends. They will remove some MIAM exemptions which the FPR Committee has concluded are no longer appropriate, and will adjust some others. For example, there is a current exemption which applies where the prospective applicant does not have sufficient contact details for the prospective respondent to enable a mediator to contact them to schedule a MIAM. This exemption is being removed, as the FPR Committee considers that there is merit in a prospective applicant attending a “standalone” MIAM even if the prospective respondent cannot be located.
- 7.16 In addition, the amendments will bring forward the point in time in which any required evidence supporting a claimed MIAM exemption has to be provided to the court: it will now need to be provided with the application, rather than at the first hearing.
- 7.17 The amendments will also mean that the court will consider whether a MIAM exemption was validly claimed at an earlier point in the proceedings than was previously the case, and will need to consider whether a previously valid MIAM exemption claim remains valid.
- 7.18 The amendments will strengthen the provision supporting judicial discretion to further encourage engagement NCDR at any stage of proceedings, where it deems this is

appropriate, including provision for each party to file and serve a form with the court, when required by the court, indicating their views in relation to NCDR.

- 7.19 In relation to orders for costs in financial remedy cases, the amendment will state that “conduct” includes any failure by a party, without good reason, to attend a MIAM or attend NCDR.

8. European Union Withdrawal and Future Relationship

- 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 this instrument will be published on the Family Procedure Rules website at the link set out in the footnote¹.

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 Committee consults, as it considers appropriate to the rules or amendments to rules in question, in a number of ways of differing degrees of formality, including specific correspondence with bodies considered appropriate to be consulted; involving representatives of interested organisations in reviewing particular aspects of the FPR; inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn; and inviting and reviewing suggestions from relevant Government Departments and other authorities affected by rules of family procedure.
- 10.3 In relation to the provision for High Court staff to exercise powers of the court, the FPR Committee proposes that the new Practice Direction provision should largely reflect provision already in place in the Civil Procedure Rules 1998, and are ensuring that relevant court staff, His Majesty’s Courts and Tribunals Service and the Ministry of Justice are involved in the development of the detail to be included in the new Practice Direction.
- 10.4 In relation to the provisions in the 2023 Rules relating to MIAMs, NCDR and costs orders, the FPR Committee established an expert Working Group to consider these issues. The Working Group included senior members of the judiciary, legal practitioners and mediators. The FPR Committee also consulted key stakeholders via a formal consultation exercise in the Spring of 2023. Consultees included the Family Mediation Council, Cafcass, Resolution, the Association of District Judges, individual mediators and other family justice professionals. The results of the consultation were analysed by the Ministry of Justice and considered in detail by the FPR Committee. The responses informed the final proposals to amend the FPR.

¹ https://www.justice.gov.uk/courts/procedure-rules/family/rules_pd_menu

11. Guidance

- 11.1 Amendments to the FPR are drawn to the attention to members of the judiciary and 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 His 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 A full Impact Assessment has not been submitted with this memorandum 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.
- 14.2 The instrument does not include a statutory review clause.

15. Contact

- 15.1 Joy Teddy-Jimoh, Senior Policy Advisor at the Ministry of Justice: Telephone: 07759700008 or email: joy.teddy-jimoh1@Justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Luke Taylor, Deputy Director for Family Justice System Improvement, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Lord Bellamy, Parliamentary Under Secretary of State in the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.