

EXPLANATORY MEMORANDUM TO
THE FAMILY PROCEDURE (AMENDMENT) RULES 2018

2018 No. 440 (L. 4)

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”). The FPR 2010 is made up of 40 parts, with supporting Practice Directions, 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 Part 4 of the FPR 2010 to provide an express power to direct proceedings to be heard before a Divisional Court of the High Court;
- amend Part 9 of the FPR 2010 to:
 - rename the two distinct court procedures for making a financial remedy application in family proceedings as the “standard procedure” and the “fast-track procedure”;
 - amend the types of financial remedy applications to which the fast-track procedure will apply, and
 - make amendments to that procedure.

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 The FPR 2010, and amendments to them, are made by the Family Procedure Rule Committee (“the Committee”) and formally allowed by the Lord Chancellor.

5. Extent and Territorial Application

5.1 The extent of this instrument is to the family court in 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

Part 4 FPR 2010

- 7.1 Rule 3.1 (3) FPR 2010 set out the general case management powers to enable judges to manage family proceedings. Judges have interpreted these provisions, particularly Rule 4.1 (3) (o) – “*take any other step or make any other order for the purpose of managing the case and furthering the overriding objective*”, – as enabling them to direct appropriate proceedings to be heard by a Divisional Court.
- 7.2 The Chancellor of the High Court recommended that the Family and Civil Procedure Rule Committees consider an amendment to the Civil Procedure Rules 1998 and Family Procedure Rules 2010 to include an explicit power to require proceedings to be heard in by a Divisional Court in appropriate circumstances. A Divisional Court is one in which two or more High Court judges sit at the same time. Section 66 (1) of the Senior Courts Act 1981 provides for hearings in the High Court to be held, where necessary, before a Divisional Court. It further provides for such hearings to take place as required by legislation or by rules of court. Courts have relied on the case management powers as contained within the various rules of court (such as rule 4.1 of the FPR 2010) to give effect to Section 66 (1). The listing of proceedings before Divisional Courts constituted of judges of different Divisions of the High Court is increasing. This is because proceedings are raising complex issues of law that go beyond the expertise of judges of specific Divisions; for example, matrimonial property issues which engage the expertise of judges in both Family and Chancery jurisdictions.
- 7.3 The Committee has concluded that it would be preferable to include in the FPR 2010 express reference to the possibility of it being directed that proceedings may be heard in a Divisional Court.
- 7.4 The amendments to Part 4 FPR 2010 make it explicit that the court may, under its general case management powers, direct that a hearing may proceed before a Divisional Court of the High Court. Similar amendments to the Civil Procedure Rules 1998 have been made by Civil Procedure (Amendment) Rules 2017 and are available online at: <http://www.legislation.gov.uk/uksi/2017/889/made>.

Part 9 FPR 2010

- 7.5 Part 9 of the FPR 2010 sets out the procedure for financial remedy applications in the family court. Currently, Part 9 has two distinct procedures which apply to applications for different types of financial remedies which can be applied for in family proceedings.
- 7.6 In 2015, the Financial Remedies Working Group (set up by President of the Family Division) published a report (available at <https://www.judiciary.gov.uk/publications/financial-remedies-working-group-report/>) which included a number of recommendations in relation to financial remedy applications.
- 7.7 The Committee’s Financial Proceedings Working Party considered the recommendation that the “short cut” Chapter 5 procedures in Part 9 FPR 2010 should be limited to applying only to international applications under the Maintenance Regulation or The 2007 Hague Convention. They made alternative proposals

regarding the types of cases to which the Chapter 5 procedure should apply, and proposed amendments to that procedure. They also proposed naming the two procedures in Part 9 as “standard” and “fast-track”. Their recommendations were endorsed by the Committee and are reflected in the amendments made by these Rules.

- 7.8 The types of cases which will follow the fast-track procedure are considered by the Committee to be likely to be less complex in nature than other cases, and therefore most likely suitable for a shorter procedure, subject always to the court’s ability on a case by case basis to move a particular case to the standard track, for example if it proves to be complex. The amendments also make slight changes to the timescales for taking certain steps in the fast-track procedure, and set out how the court should approach the first hearing in a case which is following that procedure. The amendments also provide that the court will be able to order that a fast-track application must proceed under the standard procedure, and that the parties to a case can request a case move from the fast-track to the standard procedure, before the first hearing in the case.
- 7.9 The amendments are intended to enable cases to be listed in the most suitable track, as appropriate to the complexity of the issues in the case, to ensure an efficient use of court time and to enable cases to be concluded without unnecessary delay.

Consolidation

- 7.10 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:
http://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 4 FPR 2010 in relation to Divisional Courts are largely technical and intended to clarify and make explicit the court’s case management powers include an ability to direct that a hearing may proceed before a Divisional court of the High Court, the Committee did not undertake formal consultation in relation to these amendments.
- 8.3 In relation to amendments to Part 9 FPR 2010, the Committee consulted with key stakeholders. A consultation document was sent to 18 key stakeholders: Access to Justice Foundation, Advocates’ Gateway, Association of HM District Judges, Association of Lawyers for Children, Chartered Institute of Legal Executives, Citizen’s Advice Bureaux (national organisation), Council of HM Circuit Judges, Council of HM District Judges (magistrates' courts), Family Justice Council, Family Law Bar Association, Judicial College, Justices’ Clerks’ Society, Magistrates’ Association Personal Support Unit, RCJ Citizen’s Advice Bureau, Resolution, The Law Society and the Transparency Project. The consultation document was also published online (<https://www.judiciary.gov.uk/publications/financial-remedies-working-group-report/>) for any other person who wished to submit a response.
- 8.4 There were six questions posed in the consultation document. The first three questions are not relevant to these Rules as the Committee decided, as a result of the

consultation responses, not to take forward the draft amendments to which those questions related.

- 8.5 There were three further questions about the proposed changes to Part 9 FPR 2010 and the responses received helped to finalise the position and assisted in the drafting of the amendments made by these Rules.
- 8.6 In summary, the consultation responses broadly supported the proposal to rename the shortened procedure to “fast-track” and the types of cases that would fall within this procedure.
- 8.7 The consultation document had proposed that another category of case that should fall within the fast-track procedure would be one where the financial remedy being sought was an order for a lump sum payment, where the amount sought did not exceed £25,000. Concerns were raised in various responses to the consultation about the inclusion of this provision. For example, it was considered that the £25,000 figure was arbitrary and that it may lead people to reduce the amount of the claim to fall within the fast-track procedure and then inflate their claim later within the proceedings.
- 8.8 The Committee, taking into account the consultation responses and the views of the Committee’s Financial Proceedings Working Group, concluded that the proposed provision regarding lump sum cases should not be included as a type of case suitable for the fast-track procedure.
- 8.9 Other points raised on the detail of the drafting in consultation responses were also taken on board by the Committee. For example, the draft amendments to rule 9.18A FPR 2010 were recast in light of consultation responses to make clearer when parties can seek a change from the fast-track to the standard track procedure, and how courts should deal with such requests.
- 8.10 In preparing these Rules for the Committee, Ministry of Justice officials also liaised closely with Her Majesty’s Courts and Tribunals Service (“HMCTS”) to ensure the proposed changes are operationally workable and to agree consequential changes needed to various standard court forms. 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 from 4 June 2018 on the website referred to in paragraph 7.7. Guidance to HMCTS staff will be updated to reflect the procedures in the FPR 2010 as amended by these Rules.
- 9.2 In addition, the application forms (known as Form A and Form A1) used to commence an application for a financial remedy have been updated to make clear which form should be used for which procedure (fast-track or standard). The forms will be made available to court users on <https://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do> .

10. Impact

- 10.1 These Rules will have a minimal 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. They will also need to be aware of the amended forms (as noted above). Notification of form

amendments are given to legal stationers and stakeholders groups prior to implementation.

- 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. HMCTS will be issuing guidance and amended job cards to staff to enable them to implement these changes.
- 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.

12. Monitoring & review

- 12.1 The Family Procedure Rule 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, (tel: 0203 334 3181 or e-mail: joanne.thambyrajah1@justice.gov.uk) who can answer any queries regarding the instrument.