

EXPLANATORY MEMORANDUM TO
THE NON-CONTENTIOUS PROBATE (AMENDMENT) RULES 2009

2009 No. 1893 (L.18)

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 The purpose of this instrument is to amend Rule 32(1)(a)(i) of the Non-Contentious Probate Rules 1987¹ (NCPR) to enable a second female parent to apply for a grant of letters of administration on behalf of a child in the estate of a deceased person. This amendment reflects the new legal parenthood provisions for same sex female couples who have a child together following assisted reproductive treatment, inserted into Sections 2 and 4 of the Children Act 1989 by the Human Fertilisation and Embryology Act 2008 (the 2008 Act). This instrument amends Rule 32(1)(a)(i) with effect from 1st September 2009.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

The Human Fertilisation and Embryology Act 2008

4.1 The 2008 Act received Royal Assent on 13 November 2008. It amends the law relating to assisted reproductive treatment and embryo research. It also makes changes to the regulatory system and the activities that may be licensed and determines legal parenthood following assisted reproduction using donated gametes.

4.2 The need for the instrument results from the provisions of section 42 and 43 of the 2008 Act (cases in which a mother's female partner to be other parent) and from the insertion of sections 2(1A), 2(2A) and 4ZA into the Children Act 1989 by Schedule 6 to the 2008 Act.

4.3 Section 42 of the 2008 Act provides that where the mother is in a civil partnership with a woman at the time of fertility treatment, then generally the other woman is to be treated as a parent of the child unless she did not consent to treatment taking place. By new subsection (1A) of section 2 of the Children Act 1989, inserted by Schedule 6 to the 2008 Act, in such cases the mother and the second female parent are to have parental responsibility.

4.4 Section 43 of the 2008 Act provides that, where the mother is not in a civil partnership with a woman at the time of fertility treatment but another woman fulfils the 'agreed female parenthood conditions' set out in section 44 (briefly, that both parties consent), then that other woman is to be treated as the parent of the child. By new subsection (2A) of section 2 of the Children Act 1989,

¹ S.I. 1987/2024, as amended.

inserted by Schedule 6 to the 2008 Act, in such cases the mother shall have parental responsibility, and the other woman shall have parental responsibility if she acquires it in accordance with the provisions of the 1989 Act. Section 4ZA of the 1989 Act (also inserted by Schedule 6 of the 2008 Act 2008) sets out how the second female parent may acquire parental responsibility.

- 4.5 If the mother and the other woman are not in a civil partnership at the time of the fertility treatment but enter a civil partnership subsequently, they are treated as if they had been in a civil partnership at the time of treatment for the purpose of section 2(1A) of the 1989 Act: Family Law Reform Act 1987, section 1(3)(bb)(ii). In such cases, the second female parent will also have parental responsibility for the child.

The Non-Contentious Probate Rules 1987

- 4.6 The NCPR govern applications for grants of probate and letters of administration in England and Wales where there is no dispute in the estate of the deceased. The power to make NCPR is set out in section 127(1) of the Supreme Court Act 1981 as amended by Part 1 of Schedule 1 to the Constitutional Reform Act 2005. Under these provisions, it is for the Lord Chief Justice (or his nominated judicial officer) to make probate rules with the agreement of the Lord Chancellor. The Lord Chief Justice has nominated the President of the Family Division of the High Court for this purpose.

- 4.7 Paragraph 4(2) of Part I of Schedule 1 to the Constitutional Reform Act 2005, replacing section 127(3) of the Supreme Court Act 1981 which was repealed by the 2005 Act, provides that a statutory instrument containing designated rules is subject to annulment in pursuance of a resolution of either House of Parliament.

Rule 32 of the Non-Contentious Probate Rules 1987 – Grants on behalf of minors

- 4.8 A child appointed as an executor in a will or who is beneficially entitled to an interest on intestacy cannot obtain a grant of probate or a grant of letters of administration until he or she attains the age of eighteen. However, Rule 32 of the NCPR provides that administration may be granted on behalf of a child to a person who has or is deemed to have parental responsibility for him or her in accordance with the Children Act 1989 or the Adoption and Children Act 2002. The form of grant issued will be letters of administration and is limited until the child attains the age of eighteen.

5. Territorial Extent and Application

- 5.1 This instrument applies to England and Wales. Scotland and Northern Ireland each have their own jurisdiction on succession matters.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to a 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 2008 Act revises and updates the law relating to assisted reproductive treatment and makes changes to the regulation and licensing of embryo use in research and therapy. It also makes provision to determine legal parenthood following assisted reproductive treatment. The 2008 Act results from the Government's review of the Human Fertilisation and Embryology Act 1990 (1990 Act).
- 7.2 The Government announced the review in January 2004 citing developments in reproductive medicine since the passage of the 1990 Act, and conducted a public consultation during the latter half of 2005. The Government followed this by publishing a White Paper in December 2006, *Review of the Human Fertilisation and Embryology Act: Proposals for revised legislation (including establishment of the Regulatory Authority for Tissue and Embryos)* (Cm 6989), and a draft Bill in May 2007. The policy proposals contained in the White Paper were updated following pre-legislative scrutiny of the draft Bill and are implemented in the 2008 Act.

Consequential amendment to Rule 32 of the Non-Contentious Probate Rules 1987 - parenthood issues

- 7.3 The 2008 Act replaces existing provision under the 1990 Act to determine legal parenthood for cases involving assisted reproduction and introduces a new concept of parenthood for a mother's female partner in certain circumstances, making equivalent provision to that for opposite sex couples.
- 7.4 The 2008 Act provisions enabling a second female parent to acquire parental responsibility in certain circumstances come into force on 1st September 2009. The proposed changes to Rule 32 of the NCPR, enabling a second female parent who has or acquires parental responsibility under those provisions to apply for a grant on behalf of a child are amendments resulting from the 2008 Act provisions and accordingly come into force with them on 1st September 2009.

8. Consultation outcome

- 8.1 As this is a minor consequential amendment, the Ministry of Justice has not consulted on this instrument.

9. Guidance

- 9.1 No specific guidance on the effect of this instrument has been provided to stakeholders.

10. Impact

- 10.1 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to small businesses.

12. Monitoring & review

- 12.1 The legislation will be reviewed if a problem is brought to our attention. No formal monitoring or review is necessary.

13. Contact

Kirsty Milliam at the Ministry of Justice can answer any queries regarding the Non-Contentious Probate Rules 1987

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Stephanie Croker at the Department of Health can answer any queries regarding the Human Fertilisation and Embryology Act 2008.

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