

EXPLANATORY MEMORANDUM TO
THE FAMILY PROCEEDINGS (AMENDMENT) RULES 2009
2009 No. 636 (L.5)

THE FAMILY PROCEEDINGS COURTS (CHILDREN ACT 1989) (AMENDMENT)
RULES 2009
2009 No. 637 (L.6)

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 instruments make changes to rules of court which are needed as a consequence of—
 - The commencement of provisions of
 - the Childcare Act 2006;
 - the Children and Young Persons Act 2008; and
 - the Human Fertilisation and Embryology Act 2008, and
 - Decisions to rationalise provisions relating to appeals in family proceedings and to re-route certain appeals.

In relation to the Childcare Act 2006

- 2.2 The changes in these instruments are to enable the Chief Inspector to apply without notice for a warrant to enter premises if he believes that a person is providing childcare there without being registered, or to conduct certain inspections, or to determine whether conditions or requirements imposed on the provider are being complied with.

In relation to the Children and Young Persons Act 2008

- 2.3 Currently parents whose child has been removed because the court made an Emergency Protection Order can only challenge the decision at court after 72 hours have passed. This 72-hour restriction is removed by the Children and Young Persons Act 2008 so that a challenge can be made earlier, and these instruments amend the relevant court forms annexed to the rules to remove references to the 72-hour restriction.

In relation to the Human Fertilisation and Embryology Act 2008

- 2.4 The Family Proceedings (Amendment) Rules 2009 amend the Family Proceedings Rules 1991 to take into account the fact that under Part 2 of the Human Fertilisation and Embryology Act 2008 (the 2008 Act) concerning parenthood in cases involving assisted reproduction a civil partner of a woman or a woman treated with another woman may become in law the second parent of a child under the provisions of the 2008 Act and may apply for a declaration of parentage.

In relation to appeals

- 2.5 The Family Proceedings (Amendment) Rules 2009 amend the Family Proceedings Rules 1991 to rationalise and modernise the existing rules relating to appeals in family proceedings by providing for appeals to be brought by a common form of notice of appeal and to bring provisions relating to appeals into one Part of the rules. The amended rules will also be able to accommodate the proposed re-routing of appeals from decisions of a magistrates' court in

family proceedings from the High Court to a county court in accordance with the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2009 (“the draft Order”) which has been laid in draft before Parliament and which includes provision for an appeal to be brought on the ground that a decision is wrong in law or in excess of jurisdiction, replacing the existing “case stated” procedure.

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

3.1 None.

4. Legislative Context

4.1 Different rules of court apply in family proceedings, depending on whether they are in county courts or the High Court, or in family proceedings courts (magistrates’ courts). For county courts and the High Court, the relevant rules are the Family Proceedings Rules 1991 (“FPR 1991”); and for family proceedings courts, the relevant rules are the Family Proceedings Courts (Children Act 1989) Rules 1991 (“the FPC(CA)R 1991”). It is frequently necessary to make amendments to both sets of rules at the same time, as is done with the two present instruments.

4.2 The Family Proceedings (Amendment) Rules 2009 amend the FPR 1991 on account of the commencement of the three Acts (or parts of Acts) outlined above; and in relation to appeals.

4.3 The Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2009 (“the FPC(CA)(A) R 2009”) amend the Family Proceedings Courts (Children Act 1989) Rules 1991 (“the FPC(CA)R 1991”) on account of the commencement of the Childcare Act 2006 and the Children and Young Persons Act 2008; but amendments to those rules are not required on account of the commencement of the provisions of the Human Fertilisation and Embryology Act 2008, or in relation to appeals.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

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*

In relation to the Childcare Act 2006

7.1 The Childcare Act 2006 (the 2006 Act) introduced a new system of registration for childcare providers in England, replacing the registration regime provided for by the Children Act 1989 (the 1989 Act). The 2006 Act requires the Chief Inspector of Education, Children’s Services and Skills (the Chief Inspector) to maintain two registers: the early years register and the general childcare register, which is divided into two parts. Persons providing “early years provision” for

children aged 0-5 are required to register on the early years register. Those providing “later years provision” for children aged 5 to 8 are required to register on Part A of the general childcare register. These registers came into force on 1 September 2008. Part B of the general childcare register is a voluntary register for providers who are not required to be registered, and it came into force on 6 April 2007.

- 7.2 Chapter 5 of Part 3 of the 2006 Act deals with the regulation of provision of childcare in England, and sets out common provisions which apply to all childcare providers. In particular, sections 77 and 79 deal with powers of entry.
- 7.3 Section 77 of the 2006 Act gives the Chief Inspector powers of entry if he has reasonable cause to believe that a person is providing early years provision or later years provision without being registered, and also for the purpose of conducting certain inspections or determining whether conditions or requirements imposed on the provider are being complied with. Section 79 of the 2006 Act allows the Chief Inspector to apply to a court for a warrant, and the court may issue the warrant if it appears to the court that the Chief Inspector has attempted to exercise a power conferred on him by section 77 but has been prevented from doing so, or is likely to be so prevented.
- 7.4 Paragraphs 2 and 3 of Schedule 2 to the 2006 Act amend the Magistrates Court Act 1980 (MCA 1980) and the Supreme Court Act 1981 (SCA 1981). The MCA 1980 is amended so that proceedings under section 79 are family proceedings. The SCA 1981 is amended so that proceedings under section 79 are assigned to the Family Division in the High Court. Applications for a warrant are therefore family proceedings, and have to be specifically provided for in the relevant rules: that is the purposes of the amendments made in this regard to the FPR 1991 and FPC(CA)R 1991.

Court application form C19

- 7.5 The court application form, C19, which is currently used for an application under section 102 of the 1989 Act, is suitable for an application under section 79 of the Childcare Act 2006. The form has been amended to make provision for applications under section 79. The form has also been updated to make provision for an application under section 102 of the 1989 Act in relation to the exercise of powers, in Wales, under section 79U of that Act.

In relation to the Children and Young Persons Act 2008

- 7.6 Section 45(9) of the Children Act 1989 provided that no application for the discharge of an Emergency Protection Order could be heard by the court before the expiry of the period of 72 hours beginning with the making of the order, meaning that the parents were not only unable to be heard by the court on the making of the order, but were also unable to challenge the decision for 72 hours. There was no right of appeal in relation to an Emergency Protection Order.
- 7.7 Section 45(9) was repealed by section 30 of the Children and Young Person Act 2008 which received Royal Assent on 13 November 2008. As a consequence the C23 order form has been required to be amended to remove the reference to the 72 hour provision.
- 7.8 The change occurs in the Notes on the second page of the order. In the section ‘What you may do’, the second paragraph, which referred to the court only

hearing an application when 72 hours had passed from the making of the order, has been removed.

- 7.9 The revised C23 now replaces the form currently contained in Appendix 1 of the FPR 1991 and in Schedule 1 to the FPC(CA 1989)R 1991.

In relation to the Human Fertilisation and Embryology Act 2008

- 7.10 The Human Fertilisation and Embryology Act 2008, which received Royal Assent on 13 November 2008, extends to civil partners the scope of the current provisions for the husband of a woman treated with donor sperm to be the father of any child conceived (unless he did not agree to the treatment) and for a man who is not the husband of the woman concerned but is treated with her in an authorised clinic similarly to be the father of any child conceived.
- 7.11 **Section 42** of the 2008 Act provides that where a female civil partner gives birth to a child conceived as a result of donor insemination (anywhere in the world), she is the mother of the child and her civil partner will automatically be the other parent, unless the other civil partner did not consent to the mother's treatment. Thus both women become the child's parents, so that the terminology is different and references to the child's father will not reflect the legal position.
- 7.12 **Sections 43 and 44** of the 2008 Act make provision (similar to that about opposite-sex unmarried couples in sections 36 and 37) about same-sex female couples who are not civil partners. Where one of the women has a child as a result of insemination in a UK licensed clinic and the couple have in place, at the time of the transfer of the sperm or embryo which results in conception, current notices of consent to the other woman being treated as a parent, then she will be a legal parent. Two persons who are within the prohibited degrees of relationship to each other cannot give notice. A notice of consent to treatment under section 44 must be in writing and signed by the person giving their consent. The requirement for a signature is waived, however, if any of the parties involved are unable to sign because of illness, injury or physical disability.
- 7.13 These provisions necessitate a limited number of amendments to the FPR 1991 to ensure that the terminology works appropriately, and also that where a woman has previously been a party to a civil partnership, that is taken into account as appropriate in any application for an order determining parentage.

In relation to appeals

- 7.14 The Family Proceedings (Amendment) Rules 2009 implement policy proposals that were consulted upon and agreed following a twelve week public consultation conducted by Her Majesty's Courts Service (HMCS). Rules relating to appeals from magistrates' courts in family proceedings are complex and appeals are currently required to be commenced in a variety of ways (e.g. by way of case stated, notice of appeal, notice of motion) with a variety of time limits within which an appeal may be brought. The amendments aim to clarify and simplify the appeals process by providing for a single form of notice of appeal.
- 7.15 Appeals from a decision of a magistrates' court in family proceedings presently lie to the High Court; but the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order, a draft of which was laid before

Parliament on 25 February 2009, provides for such appeals to be re-routed to a county court. The amendments have been drafted so that the rules as amended will accommodate that re-routing, but will also operate satisfactorily without it.

- **Consolidation**

7.16 The statutory instruments referred to in this Memorandum amend existing Rules. Work is currently ongoing to produce a new, single set of Family Procedure Rules which will apply to all levels of family courts. This is a large-scale project which is currently projected for completion and implementation not before October 2010.

8. Consultation outcome

In relation to the Childcare Act 2006

8.1 There has been extensive public consultation on the new arrangements for the new regulatory framework for childcare. In summer 2005 the Government consulted widely on the proposed provisions within the Childcare Bill which became the Childcare Act 2006; this set the broad legislative framework for the new registration arrangements. The consultation period ended on 7 October 2005. The majority of respondents agreed with the first part of the consultation on the duty to secure sufficient places and to secure children's centres. The main issues raised related to how well the proposals would encourage diversity of provision and the need also to retain focus on quality and the needs of the child. We received 354 responses on the formal consultation. Most (140) were from local authorities but we also received responses from national organisations, providers in the voluntary or community sector, private providers and parents. The Government consulted on the more detailed requirements and arrangements for the new registers during summer 2006. Responses were received from individuals, childcare providers, national childcare organisations and local authorities. In addition, the Department held meetings with national organisations and around 50 childcare providers. The consultations showed that many respondents thought that the proposed arrangements struck the right balance between providing reassurance that the provision will safeguard children and being proportionate and manageable. The consultation report can be found at <http://www.dfes.gov.uk/consultations/downloadableDocs/Gvt%20response%20to%20Childcare%20Bill%20Consultation%20-%20Results%20of%20Consultation.doc>

8.2 In view of the fact that the rule amendments in respect of section 79 of the 2006 Act simply carry through, for the purposes of applications under section 79 of the 2006 Act, the provisions in the rules which already apply to applications under section 102 of the 1989 Act, it was considered that a full public consultation on the amendments themselves was not required.

In relation to the Children and Young Persons Act 2008

8.3 The Children and Young Person Act 2008 aimed to reform the statutory framework for the care system in England and Wales by implementing proposals in the White Paper, Care Matters: Time for Change. The White Paper built on proposals of the Green Paper Care Matters: Transforming the Lives of Children and Young People in Care which was published for consultation in November 2006, as well as the conclusions of four working groups established to investigate best practice in making provisions for looked after children. The

Green Paper and a summary of responses can be found at www.dfes.gov.uk/consultations.

- 8.4 In view of the fact that the rule amendments in respect of the 2008 Act are limited it was considered that a full public consultation on the amendments themselves was not required on this occasion.

In relation to the Human Fertilisation and Embryology Act 2008

- 8.5 The Government conducted an extensive consultation on the policy underlying the Human Fertilisation and Embryology Act 2008. The Human Fertilisation and Embryology Act 2008 was subject to considerable public scrutiny. The Science and Technology Select Committee carried out an inquiry into reproductive technologies and the law and made recommendations many of which were reflected in the Bill. In addition, the draft Bill was scrutinised by a Committee of both Houses prior to introduction.
- 8.6 A public consultation on the key policies in the Bill and how they may be updated ran from August to November 2005. A total of 535 responses were received from a wide range of stakeholders and individuals. The consultation and response document are available from the Department of Health on the following link: http://www.dh.gov.uk/en/Healthcare/Fertility/DH_080475
- 8.7 In view of the fact that the rule amendments in respect of the 2008 Act are limited and are purely consequential it was considered that a full public consultation on the amendments themselves was not required on this occasion. The Government intends to hold a public consultation on the more significant rule changes required for implementation of the provisions of the 2008 Act in respect of parental orders.

In relation to appeals

- 8.8 Policy proposals (i) to introduce a single form of appeal notice to initiate all appeals from decisions of magistrates' courts in family proceedings; (ii) to re-route appeals from decisions of magistrates' courts in family proceedings from the High Court to a county court; and (iii) to abolish appeal by way of case stated in family proceedings were subject to a 12 week public consultation from August 2006.
- 8.9 Copies of the consultation paper were sent to judicial and legal bodies, consumer bodies, business organisations and Government Departments and agencies. Responses were invited from anyone with an interest or views on the proposals. Percentage approval from respondents to the three proposals set out in paragraph 8.8 above were 97%, 94% and 90% respectively.
- 8.10 A copy of the consultation paper and response document are at: <http://www.justice.gov.uk/publications/cp1906htm>

9. Guidance

In relation to the Childcare Act 2006 and the Children and Young Persons Act 2008

- 9.1 Guidance will be issued as to the new application which can be made and completion of the amended form C19 and about the revised C23 form.

In relation to the Human Fertilisation and Embryology Act 2008

- 9.2 Guidance will be issued in relation to the rule changes included in the FP (A) R 2009.

10. Impact

In relation to the Childcare Act 2006

- 10.1 The amendments are not anticipated to have any significant impact on the sector as they are not new but instead carry through, for the purposes of applications under section 79 of the 2006 Act, the provisions in the rules which already apply to applications under section 102 of the 1989 Act.

In relation to the Human Fertilisation and Embryology Act 2008

- 10.2 A regulatory impact assessment was completed for the Human Fertilisation and Embryology Bill when it was first introduced into Parliament and a link to the assessment is attached below:
http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Regulatoryimpactassessment/DH_080209

In relation to appeals

- 10.3 There is no impact on the public sector.
- 10.4 It is not anticipated that the consequential amendments included in the FP (A) R 2009 will have a significant impact on any single group or will have any significant impact on public expenditure. It is not anticipated that any large number of additional applications to court will arise from the implementation of these provisions of the 2008 Act.

11. Regulating small business

- 11.1 The legislation does not apply to small business.

12. Monitoring & review

- 12.1 None in relation to the rules but the number of appeals brought in the county court from the magistrates' courts will be monitored to ensure there is no significant increase in their workload. The Family Law Allocation and Transfer of Proceedings Order 2008 is designed to reduce the current workload of the county courts. This should provide additional capacity to hear appeals from the magistrates' courts. Recent statistics suggest that the number of appeals currently made from the magistrates' court in family proceedings to the High Court is low.

13. Contact

- 13.1 In relation to the Childcare Act 2006 and the Children and Young Persons Act 2008 the contact is Kevin Rose at the Ministry of Justice (tel: 020 3334 3121 or email: kevin.rose@justice.gsi.gov.uk), who can answer any queries regarding the instrument.
- 13.2 In relation to the Human Fertilisation and Embryology Act 2008 please contact Philip Dear, Family Relationships Branch 2, Family Law and Justice, 2.07,

102 Petty France London SW1H 9AJ; tel: 020 3334 3125; e-mail: philip.dear@justice.gsi.gov.uk.

- 13.3 In relation to appeals please contact Meg Oghoetuoma, Civil and Family Jurisdiction, Civil Law and Justice Division, Ministry of Justice, 2nd floor (Post Point 2.15), 102 Petty France, London SW1H 9AH; tel: 0203 334 3195; or e-mail magdalene.oghoetuoma@justice.gov.uk .