

EXPLANATORY MEMORANDUM TO
THE COURT OF PROTECTION (AMENDMENT) RULES 2015

2015 No. 548 (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 This instrument amends the Court of Protection Rules 2007, governing practice and procedure in the Court of Protection (CoP) which has the jurisdiction to make decisions regarding individuals who lack mental capacity (commonly referred to as “P”). The changes are based on the recommendations of an *ad hoc* committee established by the President of the Court of Protection and are partly carrying forward, with updating, recommendations made by an earlier committee which reviewed the rules in 2010-11; partly making further changes in relation to the way in which P is able to participate in proceedings; and partly amending provision about routes of appeal from decisions of the Court of Protection, using extended powers conferred by the Criminal Justice and Courts Act 2015.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 There are no matters of special interest to the Committee.
4. **Legislative Context**
 - 4.1 The power to make Court of Protection Rules is contained in section 51 of the Mental Capacity Act 2005 (“the 2005 Act”), with additional provision for such rules to make provision about routes of appeal in section 53, and about costs and fees in section 56. The power in section 52 to make provision about routes of appeal was amended, so as to enable the rules to take account of the wider range of judges able to sit as a judge of the Court of Protection, by section 62 of the Criminal Justice and Courts Act 2015.
 - 4.2 The power is a broad one, similar to the powers to make Civil Procedure Rules and Family Procedure Rules, and as with those Rules, the Court of Protection Rules are supported by practice directions, made under section 52 of the 2005 Act.
 - 4.3 Court of Protection Rules are made in accordance with the procedure in Part 1 of the Schedule 1 to the Constitutional Reform Act 2005, which provides for rules to be made by the Lord Chief Justice or a judicial office holder nominated by the Lord Chief Justice, and approved by the Lord Chancellor. The President of the Family Division (who is also the President of the Court of Protection), is the judicial office holder nominated for this purpose.

- 4.4 Unlike the position for Civil Procedure Rules and Family Procedure Rules, there is no standing rule committee for making Court of Protection Rules. The President nominated an *ad hoc* committee, building on the work of a previous similar committee, and this instrument reflects the recommendations of that committee.
- 4.5 The amendments made by this instrument will, with the exception of the rules on appeals and reconsideration of decisions, come into effect on 1 July 2015, to allow for amendments to forms and for the court and court users to be prepared for the changes. The changes in relation to appeals, however, come into effect on 6 April 2015, since the changes are required urgently; but transitional provision is made to apply the changes only to new appeals.

5. Territorial Extent and Application

- 5.1 This instrument extends to 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

- 7.1 Amendments to the Court of Protection Rules are long overdue: no comprehensive update of rules has been done since they were first introduced in 2007, and there have been only very limited amendments in 2009 and 2011. The changes made by this instrument will simplify the CoP's processes and provide it with greater flexibility to deal with current challenges, in particular those arising from the case of *P v. Cheshire West and Chester Council and another* [2014] UKSC 19.
- 7.2 In March 2014, the Supreme Court's judgement in the *Cheshire West* case widened the scope of what is considered a deprivation of liberty. This has had an impact on the CoP's processes, in particular appeals and the participation of P in proceedings.
- 7.3 As a result of the *Cheshire West* case it is anticipated that there will be a significant increase in the number of applications to the court for Deprivation of Liberty Safeguarding Orders. Arrangements have been made for a wider range of judges to help deal with these additional applications. However, there was no provision in the Mental Capacity Act 2005 for appeals from these judges (unlike appeals from district judges or circuit judges) to lie to a higher judge within the CoP, so the appeals for these largely non-complex applications would by default go to the Court of Appeal. To address this problem, provision enabling Court of Protection Rules to provide for appeals from the wider range of judges to lie within the CoP was included in the Criminal Justice and Courts Act 2015. The changes made by this instrument include the division of those able to sit as a judge of the CoP into three tiers,

with appeals being able to lie from a judge in a lower tier to a judge in a higher tier.

7.4 A further key amendment is a new rule requiring the court in every case to consider whether it should make one of a range of directions to secure the participation of P in the proceedings. The possible directions to be considered include a direction that P should be represented by an Accredited Legal Representative (ALR), which will give the CoP another way of securing P's participation, particularly by allowing the appointment of an appropriate representative in cases where a Litigation Friend for P is not found. This has the potential to reduce delays, and the consequent costs to P and in the CoP and the Office of the Official Solicitor. By addressing these delays the time P has to wait for a resolution will be reduced and the courts will have much more flexibility to ensure that P's voice is heard in proceedings concerning him or her.

7.5 Other main amendments to the rules are intended to:

- clarify the duty to notify P of matters arising in or in relation to proceedings;
- simplify the procedures for applying for permission to proceed where this is needed, and to remove the requirement for permission in some cases;
- update references to the Civil Procedure Rules (CPR) where the CPR have been amended;
- give the court the ability, should it encounter any procedural gaps in the Court of Protection Rules, to refer not only to the CPR but also to the Family Procedure Rules with a view to directions for filling such a gap in the proceedings before it;
- introduce free standing rules on service out of the jurisdiction;
- introduce free standing rules on security for costs, and
- increase the flexibility for information relating to proceedings in the CoP to be shared for appropriate purposes, in a manner similar to that already found in the Family Court.

7.6 Other amendments are minor and consequential, either to align rules with the more significant changes listed above, or update references to repealed legislation or rules.

8. Consultation outcome

8.1 The proposed rule changes are considered to be straightforward and not to require a full public consultation, although they have been fully explored through the representation on the committee and on the earlier committee of which the work forms the basis of much of the changes, and also of a wide range of practitioners, judges and professional bodies with particular expertise in this area of work.

9. Guidance

9.1 The rules will be supported by amendments to relevant practice directions and new and amended forms and guidance for use of the forms, which will be available via the Gov.uk website.

10. Impact

10.1 A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

11. Regulating small business

11.1 The legislation applies to small businesses such as legal practices but impact would not be significant, being limited to familiarisation with the changes.

12. Monitoring and review

12.1 There is no standing Court of Protection Rules Committee (unlike the position for Civil Procedure Rules and Family Procedure Rules). Rules are made by the President of the Family Division with the approval of the Lord Chancellor. However, the *ad hoc* committee appointed to review the current CoP Rules is likely to continue in that task and further changes may be recommended. As part of that process the possibility of consolidation of the rules will be considered.

13. Contact

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