EXPLANATORY MEMORANDUM TO

THE ACCESS TO JUSTICE ACT 1999 (DESTINATION OF APPEALS) (FAMILY PROCEEDINGS) (AMENDMENT) ORDER 2016

2016 No. 891

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 This instrument amends an existing Order to route appeals against specified decisions of a Circuit Judge or Recorder in the family court to the High Court (instead of the Court of Appeal).

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 This entire instrument applies only to England and Wales.

3.3 This instrument applies only to England and Wales because it relates only to the distribution of business within the courts in England and Wales. It is made under the powers in section 56 of the Access to Justice Act 1999, which section extends only to England and Wales (by virtue of section 109(6) of that Act). The instrument does not have minor or consequential effects outside England and Wales.

3.4 In the view of the Ministry of Justice, for the purposes of House of Commons Standing Order 83P, the subject matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly, if equivalent provisions in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and the Scottish Parliament if equivalent provisions in relation to Scotland were included in an Act of the Scottish Parliament.

3.5 The Ministry of Justice has reached this view because it considers that the primary purpose of the instrument relates to the distribution of business within the court system, which is within the devolved legislative competence of both of the devolved legislatures: the primary purpose of the subject matter of the instrument is not within Schedule 5 to the Scotland Act 1998 and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act); the primary purpose of the subject matter of the instrument is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act).

4. Legislative Context

4.1 Section 31K of the Matrimonial and Family Proceedings Act 1984 provides that if any party to any proceedings in the family court is dissatisfied with the decision of the

court, that party may appeal from it to the Court of Appeal. Subsection (2A) of section 13 of the Administration of Justice Act 1960 provides that the route of appeal against decisions or an order of the family court relating to contempt of court is also to the Court of Appeal. The Access to Justice Act 1999 (Destination of Appeal) (Family Proceedings) Order 2014 ("the 2014 Order") alters these routes of appeal so that appeals from decisions of certain judges or office holders of the family court lie to the family court instead of the Court of Appeal.

4.2 This instrument amends the 2014 Order to further alter routes of appeal, so that appeals from certain decisions of certain other judges of the family court lie to the High Court instead of the Court of Appeal.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary of State for Women, Equalities and Family Justice, Caroline Dinenage MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) (Amendment) Order 2016 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 Family proceedings in England and Wales are primarily dealt with in the family court, with the High Court also having jurisdiction to hear such cases. The default route of appeal from a decision of the family court would be to the Court of Appeal. The 2014 Order already makes provision for appeals against decisions of certain judges in the family court to be routed instead to the family court (where they will be heard by a different level of judge to the judge who made the decision under appeal).

7.2 This instrument amends the 2014 Order to route appeals from certain decisions of a Circuit Judge or Recorder in the family court to the High Court instead of the Court of Appeal.

7.3 Appeals must be dealt with in ways which are proportionate to the grounds of complaint and the subject matter of the dispute whilst ensuring effective access to justice. Ministry of Justice Civil Justice Statistics (published in June 2015) show that family related appeals (from the County Court prior to the creation of the family court in 2014) to the Court of Appeal increased by over 200% between 2008 and 2014. By moving some work to the High Court, the Court of Appeal will be better able to manage cases of appropriate weight for the court.

7.4 Rather than a hearing before a court of up to three Lord Justices of Appeal in the Court of Appeal, appeals routed to the High Court by this instrument will be heard by a single specialist High Court Judge sitting in the Family Division of the High Court. This will reduce the senior judicial resource required for these type of appeals. Re-

routing certain appeals to the High Court instead of the Court of Appeal may also lead to a reduction in the time it takes for these appeals to be heard. By reducing the number of appeals going to the Court of Appeal, this change may also benefit the flow of cases in that court, allowing for more effective and expeditious determination of other appeals, for example, in public law proceedings relating to children.

7.5 There are exceptions to the new provision routing appeals to the High Court. Appeals from decisions of a Circuit Judge or Recorder in the family court will continue to lie to the Court of Appeal in the excepted cases. The proceedings which are excepted are appeals from:

a) decisions made on appeal to the family court,

b) decisions in certain public law proceedings under the Children Act 1989 ("the 1989 Act") (see paragraphs 7.6 to 7.8 below),

c) decisions under the Adoption and Children Act 2002 (for example, in proceedings for adoption or placement orders), and

d) decisions relating to contempt of court linked to those excepted proceedings in b) and c) above.

7.6 Proceedings under Parts 4 and 5 of the 1989 Act are excepted from this new routing provision. These include care and supervision proceedings and proceedings for an emergency protection order. The consequences of the state intervening in a family's life and complexities arising in these proceedings are considered so serious as to merit the appeals continuing to be heard by the Court of Appeal.

7.7 The relationship between parent and child and other family members may be completely severed and the child's status changed by adoption, so it is also the case that appeals in such cases will remain in the Court of Appeal.

7.8 Appeals in relation to proceedings under paragraph 19 of Schedule 2 to the 1989 Act are also excepted from the new routing. These are proceedings relating to arrangements to assist a child in care to live abroad. Applications for these orders are usually heard in the care proceedings and so appeals against a decision granting or refusing the application should follow the same route as care proceedings to the Court of Appeal.

7.9 Other proceedings included in the definition of "public law proceedings" for the purposes of the Family Procedure Rules 2010 are not included in the exceptions. These proceedings do not fall within Parts 4 or 5 of the 1989 Act and do not involve the same degree of state intervention; so the new route of appeal to the High Court should apply to such proceedings.

Consolidation

7.10 There is currently no intention to undertake a consolidation exercise.

8. Consultation outcome

8.1 Under section 56(4) of the Access to Justice Act 1999, there is a requirement to consult with the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division and the Chancellor of the High Court before making this instrument. All have indicated that they are content with the provisions of the instrument. Their views were key in determining its content.

8.2 In addition to the consultation with the senior judiciary required by statute, the Ministry of Justice consulted with key stakeholders in relation to the proposed content of this instrument. A consultation document was sent to ten key stakeholders: the Council of HM Circuit Judges, the Association of District Judges, the Magistrates' Association, the Chief Magistrate, the Bar Council, the Association of Lawyers for Children, the Justices' Clerks Society, the Family Law Bar Association, the Law Society and Resolution. Six questions were posed in the consultation document and the responses received helped to finalise the policy position and assisted in the drafting of this instrument.

8.3 In summary, the consultation responses broadly supported the proposal to route appeals from decisions of Circuit Judges and Recorders sitting in the family court in certain family proceedings to be heard by a High Court Judge in the High Court, rather than being heard by the Court of Appeal. Additionally, consultation responses broadly supported the proposal that appeals against decisions in proceedings under Parts 4 and 5 of, and paragraph 19 of Schedule 2 to, the 1989 Act and under the Adoption and Children Act 2002 should remain with the Court of Appeal.

8.4 Concerns were raised on consultation regarding whether appeals against certain other types of orders, such as special guardianship orders, should remain to the Court of Appeal. Special guardianship orders are orders under Part 2 of the 1989 Act (Part 2 orders are often termed "private law orders"), but can be made in connection with any proceedings relating to a child, including proceedings under Part 4 or 5 of the 1989 Act.

8.5 The Ministry of Justice, taking in to account consultation responses and the views of the Family Procedure Rule Committee, concluded that appeals against any order made by a Circuit Judge or Recorder in the family court in proceedings listed at paragraph 7.5 above should continue to lie to the Court of Appeal.

8.6 This conclusion was reached on the basis that it is the nature of the *proceedings* (for example, whether under Part 2 or Part 4 of the Children Act 1989) which should determine the route of appeal, rather than the nature of the *order* appealed against. This will avoid two different routes of appeal applying, for example, where two different types of order (such as a care order and a special guardianship order) are made in one set of care proceedings relating to two siblings.

8.7 Most consultees supported the idea that an appeal from a decision of a Circuit Judge or Recorder sitting in the family court relating to contempt of court should be routed to the High Court, save that appeals in relation to contempt decisions in, or in connection with, those proceedings that are excepted (see paragraphs 7.6 to 7.8) should remain with the Court of Appeal. However, one consultee considered all appeals relating to contempt should lie to the Court of Appeal and another considered that all appeals relating to contempt should lie to the same court (whether the Court of Appeal or the High Court). This instrument reflects the view supported by most consultees.

8.8 The consultation responses did not raise any objections to the transitional provisions.

9. Guidance

9.1 The Family Procedure Rules 2010 as amended by this instrument will be available to the public and to practitioners on the Ministry of Justice website https://www.justice.gov.uk/courts/procedure-rules/family/rules_pd_menu .

9.2 In addition, amendments will be made to the Practice Direction on appeals which supplements the Family Procedure Rules 2010. These will assist the judiciary and practitioners in understanding the practical implications of the amendments made by this instrument.

9.3 Guidance to court staff will be updated to reflect the procedural changes arising from this instrument. Leaflets published by HMCTS for staff to provide to members of the public to inform them of the correct route of appeal will be updated.

10. Impact

10.1 There will be a small impact on business, charities or voluntary bodies who offer legal advice, as they will need to be aware of the amendments made by this instrument and how to apply them.

10.2 This instrument has no impact on the public sector save that Her Majesty's Courts and Tribunals Service ("HMCTS") staff will need to be aware of the amendments and how to apply them.

10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the www.legislation.gov.uk website.

11. Regulating small business

11.1 The legislation does not apply to small businesses other than as set out at paragraph 10.1 above.

12. Monitoring & review

12.1 The changes made by this instrument are procedural changes which may increase timeliness and efficiency for those involved in the appeals process. The Ministry of Justice will monitor the impact of these amendments by engaging with the senior judiciary, HMCTS and Family Procedure Rule Committee.

12.2 A statutory review clause under the Small Business, Enterprise and Employment Act 2015 has not been included in this instrument, as the provisions of this instrument relate to the distribution of business within the courts in England and Wales, and so do not impose regulation on business or voluntary and community bodies.

13. Contact

13.1 Please contact Aaron Manku, Senior Policy Manager, Ministry of Justice, (telephone: 0203 334 3480 or email: aaron.manku@justice.gsi.gov.uk) who can answer any queries regarding the instrument.