EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEDURE (AMENDMENT NO. 2) RULES

2019 No. 1034 (L. 6)

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 The instrument amends the Civil Procedure Rules 1998 (S.I. 1998/3132) ("the CPR"), which govern practice and procedure in the Civil Division of the Court of Appeal, the High Court and the County Court.

2.2 The amendments make provision in Part 57 of the CPR for the procedure for claims and applications under the Guardianship (Missing Persons) Act 2017 (c. 27) ("the Act"), by (a) making minor amendments to the existing Part 57; and (b) inserting a new Section VI which introduces rules of court necessary for proceedings under the Act. The instrument also makes an amendment to the provisions of existing Part 57 to ensure that copies of court orders made under the Presumption of Death Act 2013 (c. 13) are sent to the Public Guardian [Free text.]

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The Civil Procedure Act 1997 established the CPR Committee and gave it power to make Civil Procedure Rules. The intention behind the CPR was to create a single procedural code for matters in the Civil Division of the Court of Appeal, the High Court and the County Court. The CPR had a number of policy objectives; two of the more prominent being to improve access to justice through transparent,

straightforward procedures and reduce, or at least control, the cost of civil litigation in England and Wales. The first CPR were made in 1998 and amendments are regularly made in response to practical experience of the operation of rules or decisions of the higher courts, to provide procedure for new matters such as new types of order provided for in new Acts of Parliament, for updating generally and do modernising purposes. References below to a rule or Part by number alone are references to the rule or Part with that number in the CPR.

6.2 Part 57 sets out the procedure for probate, inheritance and presumption of death proceedings. Section V of that Part sets out the procedure for claims under the Presumption of Death Act 2013, including provisions in relation to the notice and advertisement requirements and the procedure for intervening in proceedings under that Act. Section VI of Part 57, inserted by these amendments, introduces similar provisions for proceedings under the Act.

6.3 In addition to the statutory instrument which is the subject of this Explanatory Memorandum, there are additional instruments being made in order to fully implement the Act. They are as follows:

a) The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 20191, which makes provision relating to the additional functions of the Public Guardian in registering and supervising guardians.

b) The Guardianship (Missing Persons) Act 2017 (Designation of Court) Regulations 20192, which designates the High Court to have jurisdiction to exercise the functions of the court in proceedings under the Act.

c) The Public Guardian (Fees, etc) (Amendment) Order 20193, which sets the fees payable to the Office of the Public Guardian in relation to the registration and supervision

7. Policy background

What is being done and why?

7.1 The Act creates a new legal role of a guardian of missing persons who is appointed by the court to manage the property and financial affairs of a person who is "missing" as defined in the Act. The guardianship order will set out the terms of the guardian's authority and the extent of the property and financial affairs to which the order relates.

7.2 This instrument amends Part 57 of the CPR to provide rules for court proceedings for the new claims and applications which will be brought under the Act. The rules inserted by these amendments broadly follow the procedure for proceedings under the Presumption of Death Act 2013 (in Part 57 rules 57.17-57.23), which have been adapted to apply to the circumstances of proceedings under the Act.

7.3 The instrument introduces new rules for such procedure including –

i. that proceedings for or relating to guardianship orders must be issued in the Chancery or Family Division of the High Court and that the CPR will apply to such proceedings.

[1] S.I. 2019/1030
[2] S.I. 2019/1029
[3] S.I. 2019/1033

ii. setting out the process for making claims for a guardianship order, including details to be included on the claim form and evidence to be provided in support; and similarly, in relation to making applications for variation or revocation of a guardianship order once made by the court;

iii. notice and advertisement requirements for claims and applications under the Act. These provisions have again been modelled on the procedure under the Presumption of Death Act 2013. It may be appropriate to advertise in a local newspaper or on online news resources in some cases. It will be open to the court under its general powers to require further advertisement or inquiry through directions if the circumstances point to it being necessary. This requirement ensures that potentially interested third parties are informed of the application and have an opportunity to intervene;

iv. the process to be followed by those who wish to join proceedings as an intervener, either by notifying the court (for those the Act provides an automatic right to intervene) or by applying for permission to intervene (for those without a statutory right to do so);

v. the requirement that the court send a copy of all orders made in proceedings under the Act to the Public Guardian. This will enable the Office of the Public Guardian to maintain a register of guardianship orders and ensure they can properly exercise their statutory function of the supervision of guardians; and

vi. the effect of the death or likely death of the missing person on proceedings under the Act. The 2017 Act complements the Presumption of Death Act 2013; where the 2017 Act allows a person to look after the property and financial affairs of a missing person where they are presumed to be alive, the Presumption of Death Act 2013 allows families to ensure the property and financial affairs are dealt with under any will or intestacy rules where the person is presumed dead. There is no minimum period of years from a disappearance to when a presumption of death declaration can be sought. If the circumstances of the disappearance make death overwhelmingly likely, some families may choose to make an application for a declaration for presumed death after a guardianship order has expired.

7.4 In addition, this instrument adds a provision to the existing rules relating to Presumption of Death Act 2013 to ensure that all final orders of presumed death made by the court are sent to the Office of the Public Guardian.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 No further consolidation of the rules is planned at present.

10. Consultation outcome

10.1 On 19 December 2018 the Ministry published a public consultation that sought views on the department's proposals for implementing the Act, including a draft Code of Practice; the procedure to be followed by the court and the parties in guardianship

cases; the supervisory regime to be set up by the Public Guardian and fees to be charged.

10.2 The public Consultation received formal responses from The Law Society, HM Land Registry, Peter Lawrence OBE, National Crime Agency, Missing People, Lloyds Banking Group and TISA. Alongside this, consultation meetings were held with financial organisations, public utilities and industry regulators.

10.3 The Government's response acknowledged the concerns raised by respondents and have addressed these aspects in the Code of Practice, giving clearer direction to guardians on various aspects of the role (examples being ability to give gifts, access to confidential documents). The Government also responded to calls for the Code to be more accessible using simpler language as far as possible, given that it is providing advice on a variety of legal issues and scenarios.

10.4 The Government's Response was published on 29 April 2019 and can be found at https://consult.justice.gov.uk/digital-communications/guardianship-missing-persons-act/. Responses to the Consultation showed the proposals for implementing the Act were largely supported.

10.5 Following the Consultation, the CPR Committee was requested to consider amendments to Part 57, providing court rules for making claims for and applications relating to guardianship orders. The rules have followed the basic framework of those for Presumption of Death Act 2013 proceedings.

10.6 The CPR Committee must, before making Civil Procedure Rules, consult such persons as they consider appropriate (section 2(6)(A) of the Civil Procedure Act 1997). Where the Committee initiates amendments then consultation is undertaken where deemed necessary. Where amendments are required in consequence of initiatives which have themselves been the subject of consultation, the Committee will not generally undertake additional formal consultation, and has not in this instance.

11. Guidance

11.1 There is an accompanying Practice Direction for the new rules which provides guidance. Amendments to the Civil Procedure Rules are drawn to the attention of participants in the civil justice system by correspondence addressed by the Committee secretariat to members of the judiciary, to other relevant representative bodies (for example the Law Society, Bar Council, advice sector) and to the editors of relevant legal publications; as well as by publicity within HM Courts and Tribunal Service. News of changes to the Rules, together with the consolidated version of the rules, are published on the Ministry of Justice website at: https://www.justice.gov.uk/courts/procedure-rules/civil. In addition, a Code of Practice has been laid in draft and is publicly available on gov.uk, which aims to provide guidance to families and friends of the missing person who are applying to be guardians, as well as to guardians during their term of appointment. It addresses the provisions of these instruments, namely the court rules and procedures for applying for a guardianship order.

12. Impact

12.1 There is no significant, impact on business, charities or voluntary bodies.

12.2 There will be some minor impact on the public sector. The CPR, places obligations on both HM Courts and Tribunals Service (HMCTS) and the Office of the Public Guardian (OPG) to handle, process and hear guardianship applications. The OPG also maintain a register and provide supervision of guardians.

12.3 An Impact Assessment has not been prepared for this instrument because case numbers are estimated to be too low in frequency to require one.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 These rules will form part of the Civil Procedure Rules 1998 that are kept under review by the CPR Committee.

15. Contact

15.1 Peter Farr, Head of Civil Law at the Ministry of Justice, email: peter.farr@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 David Parkin, Deputy Director for Civil Justice and Law, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Paul Maynard MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.