PRESIDENT'S GUIDANCE

JURISDICTION OF THE FAMILY COURT: ALLOCATION OF CASES WITHIN THE FAMILY COURT TO HIGH COURT JUDGE LEVEL AND TRANSFER OF CASES FROM THE FAMILY COURT TO THE HIGH COURT

28 FEBRURY 2018

1 There remains considerable confusion concerning the extent and exercise of the power by judges sitting in the family court to transfer a case, or part of a case, to the High Court.

2 **A transfer of a case to the High Court to be heard by a judge of that court is not the same thing as an allocation of a case within the family court to a judge of High Court judge level.** This is a crucial distinction which still too often appears to be overlooked.

3 This confusion derives in significant part from the complexity of the legislative framework governing the family court. This Guidance seeks to clarify the position. It deals in turn with six topics:

1 The family court and its relationship with the High Court.
2 The jurisdiction of the family court.
3 The allocation of matters as between the family court and the High Court.
4 The allocation of matters within the family court.
5 The transfer of matters from the family court to the High Court.
6 Transfer: general principles.

<u>The family court and its relationship with the High Court</u>

4 The High Court, of which the Family Division is part, is a superior court of record. It has unlimited jurisdiction. The family court, in contrast, is a creature of statute, with its jurisdiction defined by statute. The jurisdiction of the family court, although very extensive, is not unlimited.

5 The family court was created on 22 April 2014 by section 17(3) of the Crime and Courts Act 2013 (the 2013 Act), which, together with Part 1 of Schedule 10, inserted a new Part 4A, sections 31A-31P, in the Matrimonial and Family Proceedings Act 1984 (the 1984 Act).

6 The composition of the family court and those who are entitled to sit as judges of the family court are defined in the Family Court (Composition and Distribution of Business) Rules 2014, SI 2014/840. The puisne judges of the Family Division, the President of the Family Division, and section 9 judges sit in the family court as what are referred to as "judges of High Court level": see rules 2(1) and 3(1)(a)(iii) of the 2014 rules.

7 Because puisne judges of the Family Division, the President of the Family Division, and section 9 judges can, and do, sit both in the Family Division and in the family court, it is important always to be clear as to whether, in a particular case, they are sitting in the Family Division or in the family court. However, just as a judge can, when appropriate, sit simultaneously in both the Family Division and the Court of Protection, there is nothing to prevent a judge, when appropriate, sitting simultaneously in both the Family Division and the family court.

8 The family court is a single court with power to sit and conduct business at any place in England and Wales: section 31B(1) of the 1984 Act. It is therefore a solecism to refer to "the Barchester Family Court" or to head orders "In the Barchester Family Court." The correct heading is "In the Family Court sitting at Barchester."

9 It is particularly important, when a case is being heard by a judge of High Court level, that the order should accurately record whether the judge is sitting in the High Court or in the family court. If the judge is sitting in the family court, the order must be headed "In the Family Court sitting at …" and not "In the High Court of Justice Family Division." This is so whether the judge is sitting in the Royal Courts of Justice or anywhere else. Accordingly, when the judge is sitting in the Royal Courts of Justice, but in the family court rather than the High Court, the order must be headed "In the Family Court sitting at the Royal Courts of Justice." In the same way, it is important to ensure that the correct form of neutral citation number is used. When a judge of High Court level is sitting in the Family Division, the correct form of neutral citation number is [2018] EWHC xxx (Fam); when a judge of High Court level is sitting in the family court, the correct form of neutral citation number is [2018] EWFC xx.

The jurisdiction of the family court

10 The jurisdiction of the family court is defined by section 31A(1) of the 1984 Act, which provides that the family court has:

> "the jurisdiction and powers conferred on it –
>
> (a) by or under this or any other Act, or
>
> (b) by or under any Act, or Measure, of the National Assembly for Wales."

11 This was implemented by the amendment, in accordance with Part 1 of Schedule 11 of the 2013 Act, headed "Transfer of jurisdiction to family court", of a long list of statutes, starting with the Married Women's Property Act 1882 and ending with the Children and Families (Wales) Measure 2010. These amendments provided, in particular, for the substitution of references to the family court for the previous references to the county court. Thus, for example, the definition in section 52(1) of the Matrimonial Causes Act 1973 of the words "the court" for the purposes of that Act was amended by paragraph 65 of Schedule 11 to read "the High Court or the family court" in place of the previous wording "the High Court or, where a county court has jurisdiction by virtue of the Matrimonial Causes Act 1967, a county court."

12 The Crime and Courts Act 2013 (Family Court: Transitional and Saving Provision) Order 2014, SI 2014/956, provides that:

> "2. In this Order –
>
> …
>
> (d) "original court" means any court exercising transferred jurisdiction before the transfer day;
> (e) "transfer day" means 22nd April 2014;
> (f) "transferred jurisdiction" means any jurisdiction that is transferred to or conferred on the family court by virtue of the 2013 Act; and
> (g) "transferred proceedings" means proceedings which were issued before the transfer day in the original court under transferred jurisdiction.
>
> 3(1) On and after the transfer day, transferred proceedings are continued in the family court as if they had been issued in that court."

The effect of this is that all existing proceedings which were now within the jurisdiction of the family court were automatically transferred to the family court on 22 April 2014 and thereafter continued as if they had been issued in the family court. This applied not merely to proceedings commenced before 22 April 2014 in the family proceedings court or the county court but also to proceedings commenced before that date in the High Court: see *Rapisarda v Colladon* [2014] EWFC 1406, [2015] 1 FLR 584, para 2. Thus, for example, a variation application in

relation to a periodical payments order made in the High Court before 22 April 2014 must be issued and heard in the family court.

13 Although the list of statutes amended by Schedule 11 is lengthy, it is not all-embracing. There are important statutes which were not amended in this way and where, in consequence, the family court does not have jurisdiction: these include the Inheritance (Provision for Family and Dependants) Act 1975, the Child Abduction and Custody Act 1985 and the Trusts of Land and Appointment of Trustees Act 1996.

14 Part A of the Schedule to this Guidance lists those matters which are not within the jurisdiction of the family court: see paragraph H of column 2 of the schedule to President's Guidance of 22 April 2014, Allocation and Gatekeeping for Care, Supervision and other Proceedings under Part IV of the Children Act 1989 (Public Law) and Part 3 of the schedule to President's Guidance of 22 April 2014, Allocation and Gatekeeping for Proceedings under Part II of the Children Act 1989 (Private Law).

15 Section 31E(1)(a) of the 1984 Act provides that "In any proceedings in the family court, the court may make any order … which could be made by the High Court if the proceedings were in the High Court." This does not permit the family court to exercise original or substantive jurisdiction in respect of those exceptional matters, including applications under the inherent jurisdiction of the High Court, that must be commenced and heard in the High Court. It does, however, permit the use of the High Court's inherent jurisdiction to make incidental or supplemental orders to give effect to decisions within the jurisdiction of the family court. Thus, for example, the family court can:

(a) issue a bench warrant to secure the attendance of a judgment creditor at an enforcement hearing: see *Re K (Remo: Power of Magistrates to issue Bench Warrant)* [2017] EWFC 27); and

(b) require a party to use his or her best endeavours to procure the release of the other party from mortgage covenants: see *CH v WH* [2017] EWHC 2379 (Fam).

<u>The allocation of matters as between the family court and the High Court</u>

16 Rule 5.4 of the Family Procedure Rules 2010 provides as follows:

> "(1) Where both the family court and the High Court have jurisdiction to deal with a matter, the proceedings relating to that matter must be started in the family court.
>
> (2) Paragraph (1) does not apply where –
>
> (a) proceedings relating to the same parties are already being heard in the High Court;
>
> (b) any rule, other enactment or Practice Direction provides otherwise; or
>
> (c) the court otherwise directs."

Paragraph (1) accordingly does not apply where President's Guidance of 22 April 2014, Allocation and Gatekeeping for Care, Supervision and other Proceedings under Part IV of the Children Act 1989 (Public Law) and President's Guidance of 22 April 2014, Allocation and Gatekeeping for Proceedings under Part II of the Children Act 1989 (Private Law), both of which were issued in accordance with rule 21 of the Family Court (Composition and Distribution of Business) Rules 2014, SI 2014/840, provide otherwise.

17 The following matters **must** be commenced in the Family Division of the High Court rather than in the family court:

(a) The matters listed in Part A of the Schedule to this Guidance: matters in respect of which the family court does not have jurisdiction and which therefore **must** be commenced in the Family Division.

(b) The matters listed in Part B of the Schedule to this Guidance **must** be commenced in the Family Division even though the family court has jurisdiction but may at any time be transferred by the High Court to the family court in accordance with section 38 of the 1984 Act.

18 Except as specified in the Schedule to this Guidance every family matter **must** be commenced in the family court and **not** in the High Court. Where a family matter (for example an application under Part III of the 1984 Act) has been commenced in the High Court in circumstances other than those specified in the Schedule to this Guidance, the matter will ordinarily be immediately transferred by the High Court to the family court in accordance with section 38 of the 1984 Act.

19 Where a matter listed in either Part A or Part B of the Schedule to this Guidance has been received in the family court:

(a) The matter must immediately be transferred by the family court to the Family Division: see paragraph 27 of President's Guidance of 22 April 2014, Allocation and Gatekeeping for Proceedings under Part II of the Children Act 1989 (Private Law).

(b) Failing such transfer, the matter will be transferred by order of the Family Division in accordance with section 31I of the 1984 Act.

<u>The allocation of matters within the family court</u>

20 The allocation of cases within the family court is regulated by the Family Court (Composition and Distribution of Business) Rules 2014, SI 2014/840, by President's Guidance of 22 April 2014, Allocation and Gatekeeping for Care, Supervision and other Proceedings under Part IV of the Children Act 1989 (Public Law), and by President's Guidance of 22 April 2014, Allocation and Gatekeeping for Proceedings under Part II of the Children Act 1989 (Private Law).

21 These give full power to allocate a case of complexity for hearing in the family court by a "judge of High Court level" or, if appropriate, a judge of the Family Division.

22 In the family court, the following remedies must be heard by a judge of High Court level: an application for a search order; a claim in respect of a judicial act under the Human Rights Act 1998[1]; an action in respect of the interference with the due administration of justice; an application for a warrant of sequestration; and an application under Article 13 of the Protection Measures Regulation in relation to an incoming protection measure: see the Family Court (Composition and Distribution of Business) Rules 2014, Schedule 2, Table 3.

23 In financial remedy cases, the allocation criteria are set out in the Statement dated 1 February 2016 on the Efficient Conduct of Financial Remedy Hearings Allocated to a High Court Judge Whether Sitting at the Royal Courts of Justice or Elsewhere.

24 When a freezing order is sought, the application should always be heard in the family court, normally at District Judge level, but may be allocated to a judge of High Court level by reference to the criteria in the Statement, applied by analogy: see *Tobias v Tobias* [2017] EWFC 46.

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[1] A claim in respect of a judicial act by a High Court Judge may only be heard in the Court of Appeal: *Mazhar v The Lord Chancellor* [2017] EWHC 2536 (Fam)

25 Although rule 15(1) and Schedule 1 para 4(a) of the Family Court (Composition and Distribution of Business) Rules 2014 state that proceedings under Part III of the 1984 Act, sections 12 and 13 (both permission and substantive applications) should normally be allocated to a judge of High Court level, rule 15(2) provides that this principle is "subject to the need to take into account the need to make the most effective and efficient use of local judicial resource and the resource of the High Court bench that is appropriate given the nature and type of the application." Unless such a case has some special feature, or complexity, or very substantial assets, it should be allocated to a district judge for the permission decision, as well as substantively: see *Barnett v Barnett* [2014] EWHC 2678 (Fam).

The transfer of matters from the family court to the High Court

26 The powers to transfer cases from the family court to the Family Division which are conferred by sections 31I and 38 of the 1984 Act are exercisable only by the Family Division and not by the family court. Section 39 of the 1984 Act confers jurisdiction on the family court to transfer cases to the High Court. The exercise of this power is, however, subject to the stringent limitations imposed by rules 29.17(3) and (4) of the Family Procedure Rules 2010, which provide as follows:

> "(3) A case may not be transferred from the family court to the High Court unless –
>
> (a) the decision to transfer was made by a judge sitting in the family court who is a person to whom paragraph (4) applies; or
>
> (b) one or more of the circumstances specified in Practice Direction 29C applies.
>
> (4) This paragraph applies to a person who is –
>
> (a) the President of the Family Division;
>
> (b) an ordinary judge of the Court of Appeal (including the vice-president, if any, of either division of that court);
>
> (c) a puisne judge of the High Court."

The expression "a puisne judge of the High Court" does not include a section 9 judge. PD 29C provides as follows:

> "1.1 Rule 29.17(3)(b) FPR provides that a judge other than one to whom rule 29.17(4) applies may make a decision to transfer proceedings from the family court to the High Court where the circumstances specified in this Practice Direction apply.
>
> 1.2 The circumstances are that the proceedings are to be transferred solely for the purpose of making an order under the inherent jurisdiction of the High Court to require a Government Department or agency to disclose an address to the court."

27 The effect of this is that:

(a) The only circumstances in which a District judge, a Circuit Judge or a Recorder (even if sitting under section 9) can transfer a case from the family court to the High Court are those specified in paragraph 1.2 of PD 29C (which, in practice, applies only in cases where disclosure is required from HM Revenue and Customs).

(b) A transfer in accordance with paragraph 1.1 of PD 29C is temporary, being "solely" for the purpose of making the disclosure order. As soon as the order has been made the matter should be re-transferred back to the family court.

28 There are still far too many instances in which, despite the plain and peremptory language of FPR rules 29.17(3) and (4) and of PD 27C, cases are being purportedly transferred

from the family court to the High Court by judges other than those authorised to do so under FPR 29.17(4). Such 'transfers' are doubly wrong: (i) the 'transfer' is made without jurisdiction and, in any event (ii) there is almost always no justification for transferring the case to the High Court rather than re-allocating it for hearing in the family court by a "judge of High Court level" or, if appropriate, a judge of the Family Division.

29 In *Re T (A Child)* [2017] EWCA Civ 1889, a section 9 judge had purported to transfer a case to the High Court in order to make, pursuant to the inherent jurisdiction, a geographic exclusion order so as to prevent the natural mother from subverting a care order. That purported transfer was beyond his powers. There was, in any event, no need to transfer the case to the High Court, for it was within his power, as a judge of the family court, to make that supplemental order pursuant to section 31E of the 1984 Act.

Transfer: general principles

30 It is very important for the family court, which has now been in existence for nearly four years, to gain the respect it deserves as the sole, specialist, court to deal with virtually all family litigation. Except as specified in the Schedule to this Guidance, cases should only need to be heard in the High Court in very limited and exceptional circumstances.

(a) There is no justification for transferring a case from the family court to the High Court merely because it requires to be heard by a judge of the Family Division. The proper course is to re-allocate the case for hearing in the family court by a "judge of High Court level" or, if appropriate, a judge of the Family Division.

(b) There is no justification for transferring a case from the family court to the High Court merely because it is linked with proceedings which are properly in the High Court. The proper course (see paragraph 7 above) is to re-allocate the case for hearing in the family court by a "judge of High Court level" or, if appropriate, a judge of the Family Division, and to ensure that that judge sits simultaneously both in the Family Division and in the family court to hear both sets of proceedings.

(c) There is no justification for transferring a case from the family court to the High Court merely because of some perceived complexity or difficulty. The proper course is to re-allocate the case for hearing in the family court by a "judge of High Court level" or, if appropriate, a judge of the Family Division. It is, for example, virtually impossible to conceive of a divorce or financial remedy case which needs to be transferred from the family court to the High Court.

31 Where a case has been properly commenced in or transferred to the High Court and the substantive decision has been made it is important that any remaining, residual, issues are transferred at the soonest opportunity to the family court, and usually at District or Circuit Judge level, unless there remain exceptional features that justify the case staying in the High Court. Thus, for example, where a case has been commenced in the High Court to obtain a location order, pursuant to the inherent jurisdiction, in respect of a missing child, and where the child has later been found, it will almost certainly not be necessary for the case to remain in the High Court.

The Schedule

Part A : family court does not have jurisdiction; **must** be commenced in the Family Division		
1	Inherent jurisdiction of the court relating to children (including applications for interim relief and injunctions invoking the inherent jurisdiction of the court and applications to make a child a ward of court or to bring such an order to an end)	
2	Cases in which a Tipstaff Order is applied for	

3	Applications for Declaratory Relief (other than under Part III of the Family Law Act 1986)	
4	Declarations of incompatibility under the Human Rights Act 1998	
5	Proceedings under the Inheritance (Provision for Family and Dependants) Act 1975	Note
6	Proceedings under the Trusts of Land and Appointment of Trustees Act 1996	Note
7	Proceedings under the Child Abduction and Custody Act 1985 (including under Part II)	
8	Adoptions with a foreign element involving: (a) an issue concerning placement for adoption of the child outside the jurisdiction, (b) application for direction that section 67(3) of the Adoption and Children Act 2002 (status conferred by adoption) does not apply, (c) parental responsibility order prior to adoption abroad (Adoption and Children Act 2002, section 84(1)), or (d) application for annulment of overseas or Convention adoption under Adoption and Children Act 2002, section 89	
9	Registration of: (a) foreign judgments under Part 1 of the Foreign Judgments (Reciprocal Enforcement) Act 1920; (b) judgments given in a different part of the UK under Part 2 of the Civil Jurisdiction and Judgments Act 1982; (c) Part 1 orders made in a court in another part of the UK under the Family Law Act 1986 section 32(1)	
10	Applications under Part 31 of the FPR (registration of orders under the 2201/2003 Council Regulation, the 1996 Hague Convention and the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005).	
11	Applications under Article 16 of the 1996 Hague Convention for a declaration as to the extent or existence of parental responsibility.	
12	Applications under Article 15 of the 2201/2003 Council Regulation and Articles 8 and 9 of the 1996 Hague Convention (request for transfer of jurisdiction) but only when required by FPR 2010 12.61-12.66 to be made to the High Court	
13	Issuance of letter of request for person to be examined out of the jurisdiction	
Part B : family court has jurisdiction but **must** be commenced in the Family Division		
14	Cases which require the jurisdiction of the Administrative Court to be invoked	
15	Radicalisation cases within the meaning of President's Guidance, Radicalisation cases in the family courts, dated 8 October 2015	
16	Issues as to publicity (identification of a child or restriction on publication or injunctions seeking to restrict the freedom of the media) where this is the principal relief sought	
17	Applications in medical treatment cases e.g. for novel medical treatment or lifesaving procedures	

18	Public law cases in which an application is made for (a) permanent placement or (b) temporary removal from the jurisdiction to a non-Hague convention country	
19	Proceedings with an international element relating to recognition or enforcement of orders, conflict or comity of laws which have exceptional immigration/asylum status issues	
20	Public law cases in which: (a) a child has been brought to this jurisdiction in circumstances which might constitute a wrongful removal or retention either from a EC Member State, a Hague Convention country (a contracting State to the 1980 Hague Child Abduction Convention and/or a contracting State to the 1996 Hague Child Protection Convention) or a non-Convention country, or (b) a child is alleged to have been abducted overseas and applications have been made in this jurisdiction such as for a declaration that the child was habitually resident in this country prior to the abduction or for an order that the child be returned with a request for assistance etc	

Note: These cases can also be commenced in the county court

Sir James Munby, President of the Family Division

28 February 2018