



Neutral Citation Number: [2024] EWCA Civ 2

Case No: CA-2023-001373

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LUTON
Her Honour Judge Gargan
LU22C50017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 January 2024

Before:

SIR ANDREW MCFARLANE, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE WARBY

K (Children) (Powers of the Family Court)

Will Tyler KC and Meredith Major (instructed by **Bretherton Law Solicitors**)
for the **Appellant Child A** by his **Children’s Guardian**
Leslie Samuels KC and Kyri Lefteri (instructed by **Pathfinder Legal Services**)
for the **Respondent Local Authority**
Ben Birtchnell (by direct access) for the **Respondent Mother**
Mashood Iqbal (by direct access) for the **Respondent Father**
Damian Garrido KC and Michael Connor (instructed by **Machins Solicitors**)
for the **Respondent Child B** (written submissions only)

Hearing date: 7 December 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 11 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Sir Andrew McFarlane P:

1. This is the judgment of the Court.
2. The appeal concerns the powers of judges of the family court generally, with particular reference to the effect of section 31E(1)(a) of the Matrimonial and Family Proceedings Act 1984 ('the MFPA 1984'), which reads:

“31E Family court has High Court and county court powers

(1) In any proceedings in the family court, the court may make an order –

(a) which could be made by the High Court if the proceedings were in the High Court...’

3. The appeal is an opportunity to reaffirm the wide and flexible powers of the family court. Where proceedings have been properly issued, the judge or magistrates to whom the case has been allocated may make incidental and supplemental orders of a kind that could be made under the inherent powers of the High Court where the purpose of such orders is to give effect to their substantive decision.

The background

4. The issue arises in care proceedings concerning two brothers, B (15) and A (12), which sprang from longstanding private law proceedings between their parents. In a fact-finding judgment in August 2021 the court made strong findings against the father of alienating, controlling and coercive behaviour. The local authority was directed to investigate and report under section 37 Children Act 1989, and it duly issued proceedings. In February 2022, the children were removed from their father’s care under interim care orders and moved to a maternal family placement. The final hearing before the judge, Her Honour Judge Gargan, took place between 23 and 26 May 2023. She announced her decision at the end of the hearing and gave her reasons in a judgment delivered on 26 June 2023. Care orders were made on the basis of plans, supported by the mother and the Children’s Guardian, for the boys to remain in the family placement. The father and B, who was separately represented, had argued for the boys’ return to the father’s care.
5. Ahead of the final hearing, the mother had made a formal application for an injunction against the father in the following terms:

“The Father shall by 4pm on 30 June 2023 provide to the Local Authority the details of his Apple ID and password and thereafter shall provide all cooperation necessary to effect the transfer of the parental controls of B and A’s Apple ID accounts (including but not limited to forwarding immediately any account-holder authentication passcodes sent to any phone or email address that he has, and forwarding any relevant email or other correspondence from Apple to the Local Authority).”

This application arose from a long-running issue about the parental controls to the children's iPhones. The mother's case was that the parental controls remained linked to the father's account, resulting in the children having unmonitored and unrestricted access to the internet and all other means of communication via their phones, and to the father being able to track the children's movements. At the end of the hearing on 26 May 2023, the court heard submissions on the application, which was supported by the local authority and the Guardian, but opposed on its merits by the father and by B, who was separately represented. The father claimed that he did not have the means of divesting himself of the parental controls. No one argued that the judge did not have the power to make the order.

The judge's decision

6. The judge determined the injunction application at the end of her extempore judgment on 26 June 2023. She declined to grant it on the basis that, as a Circuit Judge, she did not have the power to do so. These were her reasons:

“The last matter I have to deal with is mother's application for the injunction. I've read the skeleton argument which is agreed by other counsel. I've considered the authorities and the President's guidance. The difficulty I have with this is my experience and understanding, and I recognise that I'm going against the wishes of five experienced counsel... is that the Family Court is a court made up of multiple jurisdictions. Its inception brought together all levels of judiciary under one umbrella, but did not endow the powers or jurisdictional rights of a Judge of the Division on other ranks. One no longer transfers a case to the High Court, it remains within the Family Court which reallocates the case to be heard by a High Court Judge sitting in the Family Court. The cases cited do not stand on all fours with this case. I do not see that I have the jurisdiction as a Circuit Judge who is not section 9 to make the order sought, particularly involving, as it would, Apple. The way in which this Court rightly or wrongly has dealt with applications that require the jurisdiction of the High Court is within the Family Court to refer to them one of the judges at the Court Centre who sit section 9. That would require a further application to be made. This is commonly done where for example limitations are sought to be placed on a party's exercise of PR or a local authority duty to serve notice and information on a party; previously matters were re-allocated if they required a DOLS order. I have offered to list this aspect before our DFJ to resolve but am told I have jurisdiction to deal with it.

I agree the principle that this Apple account must be sorted out – the father has said he's willing to do it. He hasn't actually done it although he's had every opportunity. There may well be justification for the order sought. It may also be that he has to make an appointment with someone to stand over him until its done without recourse to injunctions or powers of arrest. In making the Care Order, the LA have within their power should

they choose to exercise it, to simply replace the iPhones and set up new accounts for the boys and... transfer information from accounts.

... If I need to make a finding [it is] that on the evidence given, I do not accept the father's assertion that he does not have access to an Apple device. Evidence is clear that he certainly had and on balance of probability still has an iPad.

I have considered carefully the authorities cited to me none of which are on all fours with this situation. While I am concerned that I am taking a different view to Counsel, I consider that Mr Birtchnell's interpretation of section 37 [*sc.* 31E], however inviting, is extending it beyond its intention by application to this situation, however frustrating that may be. I therefore decline to make this order and sadly, absent a separate application elsewhere, the iPhones remain a real issue and one that I am unable to resolve."

7. In exchanges after the judgment, the judge added this:

"I have a lot of evidence all about the help the father has been given; there was a meeting where an Apple technician was on screen. All the father had to do was send an email... and that he has never done. The mother has offered to sit down and go through this with him and third parties to enable this transfer to happen. On balance this is another example of the father failing to assist and engage."

The appeal

8. The Guardian appeals, with permission of Peter Jackson LJ, on these grounds:

The judge was wrong to conclude that she did not have jurisdiction to make the injunction sought under s31E(1)(a) MFPA 1984:

1. It was wrong to interpret s31E(1)(a) as requiring such power to be exercised by a Judge of the Family Court sitting as a Deputy (or full) High Court Judge.
2. The case law referred to was wrongly distinguished so as to determine that the power did not extend to a Judge (or magistrates) of the Family Court.
3. It was wrong to conclude that the injunction sought involved Apple in any relevant way and/or that any such involvement would be relevant to the question of jurisdiction.

The appeal is supported by the local authority and by the mother. The father agrees that the family court had the power to make the order but he does not concede that the

judge did. A skeleton argument on behalf of B expresses neutrality but asks for the opportunity to be heard if the mother's application is remitted.

9. We are grateful to counsel. As the issue concerns a matter of law and procedure, we will not rehearse the submissions but come directly to our analysis.

The statutory framework

10. The family court came into being on 22 April 2014 following the enactment of the Crime and Courts Act 2013, which added Part 4A to the MFPA 1984. Sections 31A to 31P of that Part contain the primary legislation relating to the court, and we will refer to a number of its sections as showing the statutory framework within which section 31E sits. We will then refer to Part 5, concerning the distribution and transfer of family business.

11. Section 31A established the court:

“31A Establishment of the family court

(1) There is to be a court in England and Wales, called the family court, for the purpose of exercising 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.

(2) The family court is to be a court of record and have a seal.”

Schedule 11 confers jurisdiction on the family court in a wide range of enactments by substituting the family court for the county court.

12. Section 31C(1) contains a list of persons who are judges of the court, ranging from a justice of the peace to the Lord Chief Justice (sic).

13. Section 31D provides for rules to be made about the composition of the family court and the distribution of business among judges of the court. Subsections (3) and (4) allow for the rules to restrict certain business to certain judges:

“(3) Rules about the distribution of business of the family court may in particular—

(a) prohibit specified judges from conducting specified business;

(b) prohibit judges from conducting specified business unless authorised to do so by a specified judicial office holder;

(c) prohibit specified judges from conducting business, or specified business, unless authorised to do so by a specified judicial office holder;

(d) prohibit specified judges from exercising specified powers of the court.

(4) In subsection (3)—

...;

“specified” means specified in, or of a description specified in, rules under this section.”

14. Section 31E reads, in its full terms:

“31E Family court has High Court and county court powers

(1) In any proceedings in the family court, the court may make any order—

(a) which could be made by the High Court if the proceedings were in the High Court, or

(b) which could be made by the county court if the proceedings were in the county court.

(2) In its application to a power of the High Court to issue a writ directed to an enforcement officer, subsection (1)(a) gives the family court power to issue a warrant, directed to an officer of the family court, containing provision corresponding to any that might be contained in the writ.

(3) Subsection (1) is subject to section 38(3) of the County Courts Act 1984.

(4) Subsection (1) is without prejudice to, and not limited by, any other powers of the family court.

(5) The Lord Chancellor may by regulations make provision, about or in connection with the effect or execution of warrants issued by the family court for enforcing any order or judgment enforceable by the court, that corresponds to any provision applying in relation to the effect or execution of writs issued by the High Court, or warrants issued by the county court, for the purpose of enforcing any order or judgment enforceable by that court.”

15. Section 31F, which concerns proceedings and decisions, includes subsections (4) and (5), which provide for the breadth of orders that may be made by the family court when it is exercising its own powers:

“(4) Where the family court has power to require the doing of anything other than the payment of money, or to prohibit the doing of anything, an order of the court made in exercising the power may contain provision—

- (a) as to the manner in which anything is to be done,
- (b) as to the time within which anything is to be done,
- (c) as to the time during which anything is not to be done, and
- (d) generally for giving effect to the order.

(5) Where the family court has power to require the payment of money, an order of the court made in exercising the power may allow time for payment or order payment by instalments; and where the court has ordered payment by instalments and default is made in the payment of any one instalment, proceedings may be taken as if the default had been made in the payment of all the instalments then unpaid.”

- 16. Section 31G, concerning witnesses and evidence, provides for the power to issue witness summonses and for committal in default of attendance or for refusal to testify.
- 17. Section 31I allows for the High Court to order the transfer to it of proceedings in the family court.
- 18. Section 31J lists miscellaneous powers of the family court under seven other enactments.
- 19. Section 31L provides for the enforcement of payments ordered by the family court.
- 20. Part 5 MFPA 1984 concerns the distribution and transfer of family business. It begins with section 32, which defines ‘family business’ as being all those matters listed at paragraph 3 of Schedule 1 to the Senior Courts Act 1981 that are assigned to the Family Division of the High Court, as opposed to any other Division. These encompass the full range of modern family law work. ‘Family proceedings’ means proceedings which are family business. (For completeness, we note that section 8(4) of the Children Act 1989 also contains a definition of ‘family proceedings’ for the purposes of that Act.)
- 21. Later in Part 5 MFPA 1984, sections 38 and 39 provide for the transfer of proceedings from the High Court to the family court and from the family court to the High Court:

“38 Transfer of family proceedings from High Court

(1) At any stage in any family proceedings in the High Court the High Court may, if the proceedings are transferable under this section, either of its own motion or on the application of any party to the proceedings, order the transfer of the whole or any part of the proceedings to the family court.

(2) The following family proceedings are transferable to the family court under this section, namely—

- (a) all family proceedings commenced in the High Court which are within the jurisdiction of the family court;

(b) wardship proceedings, except applications for an order that a minor be made, or cease to be, a ward of court or any other proceedings which relate to the exercise of the inherent jurisdiction of the High Court with respect to minors; and

(c) all family proceedings transferred to the High Court under section 39 below or section 41 of the County Courts Act 1984 (transfer to High Court by order of High Court); and

(d) all matrimonial causes and matters transferred from the family court or a county court otherwise than as mentioned in paragraph (c) above.

39 Transfer of family proceedings to High Court

(1) At any stage in any family proceedings in the family court, the family court may, if the proceedings are transferable under this section, either of its own motion or on the application of any party to the proceedings, order the transfer of the whole or any part of the proceedings to the High Court.

(2) The following family proceedings are transferable to the High Court under this section, namely—

(a) all family proceedings commenced in the family court which are within the jurisdiction of the High Court, and

(b) all family proceedings transferred from the High Court under section 38 above.”

The apparently broad effect of section 39 is restricted by FPR 2010 r.29.17(3) and (4), which state that the power to transfer from the family court to the High Court can only be exercised by a judge of the Family Division or Court of Appeal. PD 29C contains a limited exception where 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.

The Rules

22. The Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014/840) ('the Rules'), made under the power contained in section 31D MFPA 1984, accompanied the creation of the family court. The earlier parts of the Rules concern the composition of the court, and divide the judiciary into four levels: (1) High Court judge level, (2) circuit judge level, (3) district judge level, and (4) lay justices. Rule 9 provides the President of the Family Division with the power to grant authorisations to judges at district judge and circuit judge levels, and the Lord Chief Justice (sic) with the power to authorise magistrates to conduct business in the family court.
23. Part 5 of the Rules concerns the distribution of business within the court. It consists of rules 13 to 20, whose relevant provisions can be summarised as follows:

Rule 13 recites that this Part makes provision regarding the level of judge of the family court to which a matter is to be allocated initially, and refers to Rule 29.19 of the Family Procedure Rules 2010, which allows a judge of the family court to determine that a matter should be heard by a different level of judge of the family court.

Rule 14 asserts the parity between levels of judge:

“Persons who may exercise jurisdiction of the family court

14 Subject to the provisions of this Part or of any other enactment, any jurisdiction and powers conferred by any enactment on the family court, or on a judge of the family court, may be exercised by any judge of the family court.”

Rule 15 gives effect to Schedule 1, which allocates certain types of business to certain levels of judge:

“Allocation of proceedings in Schedule 1

15 (1) An application in a type of proceedings listed in the first column of the table in Schedule 1 shall be allocated to be heard by a judge of the level listed in the second column of that table.

(2) Paragraph (1) and the provisions of Schedule 1 are 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.”

Rule 16 concerns emergency applications.

Rule 17 concerns the allocation of applications in existing proceedings or in connection with proceedings that have concluded. It also gives effect to Schedule 2, which lists remedies that may not be granted by certain levels of judge:

“Allocation: applications in existing proceedings or in connection with proceedings that have concluded

17 (1) Subject to paragraphs (3) to (5), an application made within existing proceedings in the family court shall be allocated to the level of judge who is dealing with the existing proceedings to which the application relates.

(2) Subject to paragraphs (3) to (5), an application made in connection with proceedings in the family court that have concluded shall be allocated to the level of judge who last dealt with those proceedings.

(3) In Schedule 2—

(a) the remedies listed in tables 1, 2 and 3 may not be granted by lay justices;

(b) the remedies listed in tables 2 and 3 may not be granted by a judge of district judge level;

(c) the remedies listed in table 3 may not be granted by a judge of circuit judge level, subject to any exception stated in that table.

(4) Where the effect of Schedule 2 is that an application for a particular remedy may not be granted by the level of judge referred to in paragraph (1) or (2), then that application shall be allocated to a level of judge who is able to grant that remedy.

(5) Any power of the family court to make an order for committal in respect of a breach of a judgment, order or undertaking to do or abstain from doing an act may only be made by a judge of the same level as, or of a higher level than, the judge who make the judgment or order, or who accepted the undertaking, as the case may be.”

Rule 20 contains the criteria that govern the allocation of applications not covered by Schedule 1 or Schedule 2; in practice this applies to the majority of the business of the family court:

“Allocation: all other proceedings

20 (1) An application of a type not referred to in other rules in this Part or in Schedule 1 or Schedule 2 shall be allocated by one or more of the persons referred to in rule 4.

(2) When deciding which level of judge to allocate such an application to, the decision must be based on consideration of the relative significance of the following factors—

(a) the need to make the most effective and efficient use of the local judicial resource and the resource of the High Court bench that is appropriate, given the nature and type of application;

(b) the need to avoid delay;

(c) the need for judicial continuity;

(d) the location of the parties or of any child relevant to the proceedings; and

(e) complexity.”

24. It is unnecessary to set out the provisions of Schedule 1, which allocates certain types of business to certain levels of judge, or of Schedule 2, which restricts certain levels of judge from granting certain remedies. The Schedules appear at the end of the Rules, which can be found [here](#).

25. Part 6 contains Rule 21, which provides that the President of the Family Division may, after consulting the Lord Chancellor, issue guidance on the application or interpretation of Part 5.

Guidance

26. Guidance ('the 2014 Guidance') was duly issued on 22 April 2014, to accompany the creation of the family court: *President's Guidance on Allocation and Gatekeeping for Care, Supervision and other Proceedings under Part IV of the Children Act 1989 (Public Law)*. Guidance was issued at the same time in relation to private law proceedings.
27. The public law Guidance is primarily directed towards allocation decisions taken under Rule 20, i.e. not decisions that are mandated by or restricted by the schedules. It contains its own Schedule, updated on 5 June 2020, and found [here](#). This contains the expectation that proceedings with the characteristics described in column 1 will be allocated to district judge level, while those with the characteristics described in column 2 will be allocated to a judge of circuit judge level or a judge of High Court level and will not be allocated to a judge of district judge level unless specifically released by the Designated Family Judge or a nominated deputy.
28. Finally, Paragraph H of the 2014 Guidance contains categories of cases that are reserved to the High Court. These are a number of cases with a particular international element, cases concerning the inherent jurisdiction of the High Court, and certain other cases. The matters falling under the inherent jurisdiction are 'Injunctions invoking the inherent jurisdiction of the court' and 'Interim or substantive relief which requires the inherent jurisdiction of the High Court to be invoked'. The other cases are applications for declaratory relief, applications which require the jurisdiction of the Administrative Court to be invoked, issues as to publicity (identification of a child or restriction on publication or injunctions seeking to restrict the freedom of the media), and applications in medical treatment cases e.g. for novel medical treatment or life-saving procedures.
29. Further Presidential Guidance ('the 2018 Guidance') was issued on 28 February 2018 and updated on 24 May 2021: *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*. This Guidance, which is to be found [here](#), seeks to clarify the distinction between the family court and the High Court. It states (at paragraph 4) that the High Court, of which the Family Division is part, has unlimited jurisdiction, while the jurisdiction of the family court, defined by statute, is very extensive but not unlimited.
30. Paragraph 15 of the 2018 Guidance refers to the provision that lies at the heart of this appeal:

"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).”

31. Paragraphs 16 to 19 concern the allocation of matters as between the family court and the High Court. Paragraphs 17 and 18 read:

“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.”

32. The Schedule gives more detail than the 2014 Guidance about matters that must or should be commenced in or transferred to the High Court:

“The Schedule

<i>Part A : family court does not have jurisdiction; must be commenced in the Family Division</i>	
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 Dependents) Act 1975 *
6	Proceedings under the Trusts of Land and Appointment of Trustees Act 1996 *
7	Proceedings under the Child Abduction and Custody Act 1985 (including under Part II)
8	Adoptions with a foreign element involving: <ul style="list-style-type: none"> (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: <ul style="list-style-type: none"> (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

* 5 and 6 can also be commenced in the County Court.

<i>Part B : family court has jurisdiction but must be commenced in the Family Division</i>	
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 Hague Convention country (a contracting State to the 1980 Hague Child Abduction Convention and/or a contracting State to the 1996 Hague

	<p>Child Protection Convention) or a non-Convention country, or</p> <p>(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</p>
--	--

Case law

33. Instances of the application of section 31E MFPA 1984 in practice are found in:

- (1) *In re K (Maintenance Enforcement: Justices' Powers)* [2017] EWFC 27; [2017] 1 W.L.R. 3605. Justices, as judges of the Family Court, have the power in proceedings to enforce foreign or domestic maintenance orders to issue a warrant of arrest to secure the attendance of an alleged maintenance debtor who has failed to appear in response to their summons. This applied the reasoning in *Westwood v Knight* [2012] EWPC 14, a civil case concerning the equivalent provision in section 38(1) of the County Courts Act 1984. While the legislation does not confer on the court a jurisdiction to hear a case it has no jurisdiction to hear, it supplies remedies and orders which the court can make in proceedings properly before it.
- (2) *CH v WH (Financial Provision: Approval of Consent Order)* [2017] EWHC 2379 (Fam); [2017] 4 WLR 178. The family court can require a party to use his or her best endeavours to procure the release of the other party from mortgage covenants.
- (3) *A v B* [2021] EWHC 1716 (Fam); [2021] 4 WLR 108. The family court can issue a freestanding port alert order (but not a tipstaff order) as an incidental or supplemental order to give effect to its decision.

34. By contrast, in *Re T (A Child)* [2017] EWCA Civ 1889, a deputy High Court judge had purported to transfer a case to the High Court in order to make a geographic exclusion order under the inherent jurisdiction to prevent a parent from subverting a care order. The transfer was beyond his powers, but it is said at paragraph 29 of the 2018 Guidance that there was, in any event, no need to transfer the case to the High Court, as it was within the power of the family court to make that supplemental order under section 31E of the 1984 Act.

Summary

35. Drawing matters together, we would summarise the position in this way:

- (1) The family court is a single, unified court within which almost all family proceedings are conducted.
- (2) The legislation shows that Parliament intended the family court to have full and flexible powers to achieve its aims, and for family business to be conducted by the court unless there are specific reasons for the High Court to be engaged.

- (3) Family business is distributed within the family court to the levels of judge ordained by the Rules, the 2014 Guidance and the 2018 Guidance.
 - (4) Once a family case has been allocated, there is parity among judges and magistrates of the family court in relation to the orders that can be made, subject only to the limits on remedies that appear in the Schedule 2 to the Rules.
 - (5) Family proceedings that cannot or should not be commenced in the family court, but must instead be commenced in the High Court, are most conveniently listed in the Schedule to the 2018 Guidance.
 - (6) When family proceedings have been properly issued in the family court, it is open to the court to make incidental and supplemental orders to give effect to its decisions.
36. The practical consequence is that where judges of the family court are considering whether they have the power to make a particular order, they should ask these questions:
- (1) Are these properly issued family proceedings?
 - (2) Is the order sought one that is incidental or supplemental to the substantive orders that are sought in the proceedings?
 - (3) Is the remedy one that is reserved to a higher level of judge by the Schedule to the Rules or by the 2014 Guidance?
 - (4) Is the application one that is reserved to the High Court by the Rules or by the 2018 Guidance?

If the answer to the first two questions is ‘yes’ and to the other questions ‘no’, the power to make the order exists. Whether an order should be made will depend upon an assessment of welfare and fairness, and insofar as the Convention rights of others are affected, considerations of necessity and proportionality.

37. The conclusion to be drawn is that judges of the family court should not be deterred from making incidental and supplemental orders that are beneficial and fair. They should approach the matter on the basis that they have the power to make such orders unless it is shown by reference to the Rules and Guidance that they do not. In this way, effective orders can be made in appropriate cases and delay, expense and duplication of effort can be minimised.
38. For completeness, we note that it is open to judges and magistrates to transfer a specific case to a higher level within the family court where there is a pressing reason to do so. But before taking such a step, due consideration should be given to any delay and expense that may be caused by the transfer.

Application to this case

39. All the parties submitted to us that the family court had the power to make the order sought by the mother. All parties who appeared at the hearing, except the father, agree that the judge had the power to make the order. The father demurred on that issue,

submitting that there can be no certainty as there is no express statutory or regulatory provision to that effect. He submitted that, as the judge had not been authorised by the President to sit as a deputy High Court Judge, she had no authorisation to make the injunction sought.

40. We have no doubt that the submissions of the majority are correct. The framework that we have outlined shows that the judge had the power to make the order because there was no inhibition upon her doing so. There was no requirement that such orders can only be made at High Court level, so the judge's lack of a section 9 authorisation was of no consequence.
41. The issue about the control of the boys' phones concerned an exercise of parental responsibility (if confirmation is required, see *Manchester City Council v CP and Others* [2023] EWHC 133 (Fam); [2023] 2 FLR 610 at [54]). No difficulty would have arisen when this was still a private law case, as the mother could have applied for a specific issue order under section 8 of the Children Act 1989. However, section 9(1) prevents the making of a section 8 order, other than a child arrangements order, with respect to a child who is in the care of the local authority. As it was, once care orders were made, the local authority, by virtue of section 33(3), held parental responsibility for the boys, with the power to determine the extent to which the parents might exercise their parental responsibility. In relation to control over the boys' phones, there were clear indications that the father's actions might need to be regulated. Any obstruction on his part was likely to hinder the local authority's ability to exercise its parental responsibility and interfere with its duty to safeguard and promote their welfare in accordance with section 22(3)(a).
42. Insofar as the judge may have been influenced by the possibility that any order may have been directed against Apple, that was a misunderstanding. The most that was suggested here was that the father should be directed to cooperate with the Apple helpdesk if that was necessary to get the parental controls passed over, and to forward messages received from Apple to the local authority. Even if the order would have directly impinged on Apple, that would not necessarily have required the transfer of the case to High Court level.
43. Once that issue is out of the way, it can readily be seen that the judge had the power to make the injunction sought by the mother. It was not one of the few remedies that may not be granted by a circuit judge in the family court under the Schedule to the 2014 Rules. The application did not fall within Part A of the Schedule to the 2018 Guidance, because it was not an exercise of power equivalent to the High Court's substantive inherent jurisdiction relating to children, but rather an incidental order in support of the care orders. In short, this was classic example of an order that was within the power of the family court at any level.
44. We acknowledge that the judge was delivering an extempore judgment, albeit a reserved one. However, it was not accurate to describe the family court as having "multiple jurisdictions". It is also unclear whether she considered that she lacked jurisdiction as a circuit judge or whether she considered that the family court itself lacked jurisdiction. Far from needing a separate application to the High Court, the application was properly made to the family court in the existing proceedings. In the end, if the judge had asked herself the questions outlined above, she would inevitably have concluded that there was no obstacle to her deciding the application on its merits.

45. The remaining question is what order this court should make. It appears likely that the judge would have made the order if she had appreciated the extent of her powers, although it would have been preferable if she had stated her conclusion explicitly. Mr Birtchnell made a strong submission on behalf of the mother that this court should simply order the father to effect the transfer of the Apple IDs by an early date, and back the order with a penal notice. Despite the attractions of this course, several months have now passed and it is unfortunately necessary for the mother's application to be remitted to the judge for her to make whatever orders she considers appropriate in the light of up-to-date information.
 46. The appeal is therefore allowed, and the matter is remitted to the judge for her to determine the mother's application.
-