

# President's Guidance

26 March 2015

## The Role of the Attorney General in Appointing Advocates to the Court or Special Advocates in Family Cases

I have updated guidance first circulated by Mr Justice Holman, when he was Acting President, on 21 November 2012. The roles of Advocate to the Court, and Special Advocate are, of course, quite separate and distinct but each is potentially a burden on the limited public interest funds of the Attorney General.

### Advocates to the Court

The Memorandum agreed between Lord Goldsmith and Lord Woolf on 19 December 2001 remains in effect and applies in family as in other cases. It is reproduced in the annual *The Family Court Practice*. The test or criterion for seeking the assistance of an advocate to the court is at paragraph 3, namely “when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument”. This requires that the point is both “important” and “difficult”. It also requires that there is a danger of the point “being decided”. This is different and distinct from the point having been decided, but the court being unclear what the decided law is. The Memorandum is very clear, and the Attorney General is clear, that an Advocate to the Court ought not to be requested simply because there are self-represented litigants and the court does not know what the decided law is. We must be very sparing in requests for Advocates to the Court, and ensure that the request does properly fall within the test in the Memorandum.

There may of course be cases (particularly as Litigants in Person are now more common since most private law cases were taken out of scope of Legal Aid in April 2013) in which a judge genuinely perceives that an important and difficult point of law requires to be decided, but he is unaware that the point has already been decided. I have agreed with the Attorney General that in such a case, when responding to the court's request, his office may bring to the court's attention the relevant decided law.

### Special Advocates

These are not the subject of the above, or any, Memorandum. Usually a Special Advocate is required because a public body that is party to the litigation, often a local authority or the police, resist disclosure of sensitive documents. The Attorney General has asked that at the point of requesting him to instruct a Special Advocate the court should specifically consider and make provision (after, of course, hearing submissions from the parties) as to which party should pay the costs of the Special Advocate. The essential point is that this is not a service which the Attorney General will normally cover. I can see no reason why he should be expected to do so, and no reason why the court should not fix in advance which party will pay the costs of the Special Advocate. Please, therefore, do this.

It is rare that an Advocate to the Court or Special Advocate is requested by judges below that of the High Court Bench in the Family Court. If these issues arise below the level of the High Court Bench it would be prudent to seek the views of the Family Division Liaison Judge before considering any request.

Sir James Munby  
*President of the Family Division*