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Section 91(14) of the Children Act 1989 – following recent developments, in what circumstances can an order be made?

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Section 91(14) of the Children Act 1989 – following recent developments, in what circumstances can an order be made?

In this article Kate Pye-Jones and Holly Platt consider the application of section 91(14) of the Children Act 1989 and how recent developments both in statute and case law have changed the circumstances in which the provision can be utilised.

Section 91(14) of the Children Act 1989 is used as a protective filter to restrict further applications to court without leave of the court in certain circumstances. It provides that:

> *On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court.*

Re P (A Child) [1999] EWCA Civ 1323

The statute itself provides limited guidance regarding the use of section 91(14) in practice. Case law has therefore provided key guidance regarding its implementation, with ***Re P***[1] historically being the key authority. In *Re P*, Butler-Sloss LJ gave the following guidance [41]:

1. *Section 91(14) should be read in conjunction with section 1(1) which makes the welfare of the child the paramount consideration.*
2. *The power to restrict applications to the court is discretionary and in the exercise of its discretion the court must weigh in the balance all the relevant circumstances.*
3. *An important consideration is that to impose a restriction is a statutory intrusion into the right of a party to bring proceedings before the court and to be heard in matters affecting his/her child.*
4. *The power is therefore to be used with great care and sparingly, the exception and not the rule.*
5. *It is generally to be seen as a weapon of last resort in cases of repeated and unreasonable applications.*
6. *In suitable circumstances (and on clear evidence), a court may impose the leave restriction in cases where the welfare of the child requires it, although there is no past history of making unreasonable applications.*
7. *In cases under paragraph 6 above, the court will need to be satisfied first that the facts go beyond the commonly encountered need for a time to settle to a regime ordered by the court and the all too common situation where there is animosity between the adults in dispute or between the local authority and the family; and secondly that there is a serious risk that, without the imposition of the restriction, the child or the primary carers will be subject to unacceptable strain.*

1 *Re P* (A Child) [1999] EWCA Civ 1323

8. *A court may impose the restriction on making applications in the absence of a request from any of the parties, subject, of course, to the rules of natural justice such as an opportunity for the parties to be heard on the point.*

9. *A restriction may be imposed with or without limitation of time.*

10. *The degree of restriction should be proportionate to the harm it is intended to avoid. Therefore the court imposing the restriction should carefully consider the extent of the restriction to be imposed and specify, where appropriate, the type of application to be restrained and the duration of order.*

11. *It would be undesirable in other than the most exceptional cases to make the order ex parte.*

In applying the *Re P* guidelines, the courts have previously been very reluctant to make orders pursuant to section 91(14), generally limiting the making of such orders to where there has been repeated and unreasonable applications.

Recent Developments

The Harm Report, dated June 2020, was the catalyst in bringing about significant change in relation to the making of orders under section 91(14). The report recommended that in order to protect children and victims more effectively from harm, there should be an amendment to the statute to reverse what was described as the 'exceptionality' requirement laid down in *Re P,* and to enable orders to be made where the court finds that the bringing or prolonging of the proceedings constitutes domestic abuse [page 178].

The first significant case to consider the use of section 91(14) following the recommendations contained within the Harm Report was ***Re A***[2]. *Re A* was determined prior to the implementation of section 91A, however the Court of Appeal was aware of its planned implementation into statute and King J noted that the provisions contained within section 91A dovetailed the modern approach she suggested should now be taken. In *Re A*, King J noted that although the *Re P* guidelines have substantially stood the test of time, the fact remained they were set out in April 1999, some 22 years ago. In that period the landscape has significantly changed with the use of social media, email as a means of instant communication, and the withdrawal of legal aid in many private law cases meaning that a large proportion of parents are now unrepresented. One of the consequences of these changes is that the other parties can, and often are, bombarded with emails from a parent representing themselves, which in some cases may be part of a campaign of behaviour which amounts to a deeply disturbing form of oppressive behaviour on their part. King J observed that the guidance in *Re P* should now be seen in the modern-day context. King J took the view that there had been an understandable, but perhaps misplaced, reluctance for judges to make orders under section 91(14) save for the most egregious cases. The judgment goes on to make clear that the *Re P* guidelines do not say that a section 91(14) order should only be made in exceptional circumstances, rather Guideline four says that such an order should be the "exception and not the rule". King J concluded that there is much greater scope for making a section 91(14) order in the present day.

At paragraphs 38 to 42, King J provides helpful guidance regarding the sorts of circumstances in which she envisaged a greater use of orders pursuant to section 91(14). The examples include:

a) Meritless applications (even if the number of applications has not been excessive). This not only protects the child from the effects of unproductive applications and/or a campaign of harassment by the absent parent, but also benefits other children whose cases are delayed as court lists are clogged up by meritless applications [40];

b) Where a party's conduct has been inappropriate [39] (for example excessive emails during the course of proceedings or vindictive complaints to the police and social services);

2 *Re A (A Child) (Supervised Contact) (s91(14) Children Act 1989 orders)* [2021] EWCA Civ 1749

c) Cases in which the proceedings have effectively been used by a party as a form of coercive control [41].

Following *Re A*, section 91A of the Children Act 1989 came into force.

Section 91(A) provides:

> *2. The circumstances in which the court may make a section 91(14) order include, among others, where the court is satisfied that the making of an application for an order under this Act of a specified kind by any person who is to be named in the section 91(14) order would put—*
>
> *a) the child concerned, or*
>
> *b) another individual ("the relevant individual"),*
>
> *c) at risk of harm.*
>
> *3. In the case of a child or other individual who has reached the age of eighteen, the reference in subsection (2) to "harm" is to be read as a reference to ill-treatment or the impairment of physical or mental health.*
>
> *4. Where a person who is named in a section 91(14) order applies for leave to make an application of a specified kind, the court must, in determining whether to grant leave, consider whether there has been a material change of circumstances since the order was made.*
>
> *5. A section 91(14) order may be made by the court—*
>
> *d) on an application made—*
>
> *i) by the relevant individual;*
>
> *ii) by or on behalf of the child concerned;*
>
> *iii) by any other person who is a party to the application being disposed of by the court;*
>
> *e) of its own motion.*

On 28 July 2022, the President provided **guidance** in respect of the new amendment to the statute, making it clear that section 91A has lowered the threshold for the making of orders under section 91(14). The President stated:

> *3. Section 67 of the DAA 2021 inserts a new s 91A into the Children Act 1989 ['CA 1989']. For two decades, the circumstances in which a party may be prohibited from bringing further CA 1989 applications has been governed by the Court of Appeal decision in Re P [1999] 2 FLR 573 which required the use of the power in s 91(14) to be exercised with great care and sparingly, the exception not the rule.*
>
> *4. CA 1989, s 91A establishes a **new, lower, statutory threshold*** [emphasis added] *for the deployment of a s 91(14) prohibition by which the power may be exercised when the court is satisfied that the making of an application for a CA 1989 order of a specified kind would put the child concerned or another individual 'at risk of harm'.*

Practice Direction 12Q provides helpful guidance regarding the implementation of section 91A stating, inter alia, that:

a) The court has a discretion to determine the circumstances in which an order would be appropriate. These circumstances may be many and varied [2.2];

b) The circumstances in which an order can be made include where one party has made repeated and unreasonable applications; where a period of respite is needed following litigation; where a period of time is needed for certain actions to be taken for the protection of the child or other person; or where a person's conduct overall is such that an order is merited to protect the welfare of the child directly, or indirectly due to damaging effects on a parent carer. Such conduct could

include harassment, or other oppressive or distressing behaviour beyond or within the proceedings including via social media and e-mail, and via third parties [2.3];

c) An order may be required where a further application would constitute a pattern of coercive control or other domestic abuse towards the victim [2.4];

d) "other individual" is not defined within the Act but it is likely to be, but not limited to, anyone who has parental responsibility for the child and/or is living with the child or has contact with the child, or any other person who would be a prospective respondent to a future application [2.5];

e) In every case where domestic abuse is alleged or proven or in which there are allegations or evidence of other harm to a child or other individual, the court must give early and ongoing consideration to whether an order is appropriate, even if an application for such an order has not been made [2.6];

f) The court has a discretion regarding the duration of any order. It should be proportionate to the harm it is seeking to avoid. The court should give reasons for the duration of the order [4.1].

PD12J paragraph 37A also provides that the court must consider whether a section 91(14) order is appropriate where a finding or admission of domestic abuse is made, even if an application for such an order has not been made. PD12B also reiterates much of the guidance as detailed in PD12Q. It is therefore clear that Parliament, in amending the statute, intended for the courts and parties to give much greater consideration as to whether an order under section 91(14) is appropriate, especially in cases involving domestic abuse and coercive control.

A Local Authority v F and Others[3] was the first significant case to consider the use of section 91(14) following the implementation of section 91A. Knowles J highlighted that the risk of harm as contained within section 91A is not qualified by words such as 'serious' or 'significant' and neither is the degree of harm that a child may experience. She went on to highlight the now seeming disparity between the guidance in *Re P* and section 91A(2) given that Guideline 7 in *Re P* states that there must be a 'serious risk' that without the restriction the child or primary carers will be subject to unacceptable strain whereas the risk of harm within section 91A does not have the same qualification. Section 91A(2) therefore gives the court greater latitude to make section 91(14) orders than the *Re P* guidelines do. Knowles J expressly stated that in coming to her decision in that case she applied the new statutory approach to harm as set out in section 91A(2) as opposed to Guideline 7 of the *Re P* guidelines.

Hayden J has also recently considered the use of section 91(14) in ***F v M***[4]. The judgment concerns the final hearing following the judgment he previously handed down in ***F v M***[5] in 2021. In *F v M* in 2021, Hayden J made very serious findings of coercive and controlling behaviour perpetrated by the father and in the most recent *F v M*, Hayden J found that the father had continued to use the court process as a further means of seeking to exert his control. It is clear from the judgment that Hayden J views the provisions contained within section 91A as providing much greater scope for the courts to make an order under section 91(14), in particular when the court process is being used as a further means of control by an abuser, and that the courts and lawyers must be vigilant to ensure this does not happen:

> *The provisions within Section 91A are* ***transformative*** [emphasis added]. *The section provides a powerful tool with which Judges can protect both children and the parent with whom they live, from corrosive, demoralising and controlling applications which have an insidious impact on their general welfare and wellbeing and can cause real emotional harm. This amended provision strikes me as properly recognising the very significant toll protracted litigation can take on children and individuals who may already have become vulnerable, for a variety of reasons. It also dovetails with our enhanced understanding of the nature of controlling and coercive behaviour. When all other avenues are lost, too often the Court process becomes the only weapon available. Lawyers and Judges must be assiduous to identify when this occurs,*

3 *A Local Authority v F and Others* [2022] EWFC 127
4 *F v M* [2023] EWFC 5
5 *F v M* [2021] EWFC 4

in order to ensure that the Court is not manipulated into becoming a source of harm but a guarantee of protection [20].

Conclusions

a) The threshold for making a section 91(14) order is clearly lower than as set out in *Re P* and there is now considerable scope for greater usage of the provision.

b) Cases involving coercive control, meritless applications even if conducted reasonably, and where there is inappropriate conduct or litigation is being used to further abuse a victim are the sorts of cases in which the court should be giving greater consideration to the use of section 91(14).

c) The courts now have a duty to actively consider the making of an order in cases involving domestic abuse or other harm to a child or other individual.

d) Neither the risk nor the degree of harm that the child or other relevant individual would be at risk of should an order not be made needs to be serious or significant.

e) The statute does not define 'another individual' but it is clear that there is greater scope to make an order when a person who is not the child, primary carer or a party to proceedings is at risk of harm if an order is not made. It may be, for example, that someone else within the child's household who is not a party falls into this category.

f) If the court decides to make an order, it must consider the practical considerations at PD12Q, paragraph 3.6.

Practical considerations

a) If you are seeking to argue that an order should be made as a result of domestic abuse or other harm to a child or other individual, early consideration will need to be given as to whether findings are necessary to determine any disputed allegations and provide an evidential basis upon which the court can make an order.

b) If you are representing a party seeking to rely on section 91A(2), it would be helpful to set out within a witness statement the impact and risk of harm to the child or relevant person of further proceedings.

c) Consider whether expert evidence may assist in establishing the likely impact on the child or relevant person if an order is not made.

d) If you are seeking an order on the basis that a relevant individual is at risk of harm, consider whether a witness statement setting out the risk of harm is required from the relevant person.

e) If the court has indicated at an earlier hearing that it will consider making a section 91(14) order at the final hearing, ensure this is clearly recorded on the order to ensure all parties are put on notice that this issue will be determined alongside the substantive application.

f) Reference to the Harm Report and the rationale behind the implementation of section 91A may be useful when seeking to argue that an order should be made to protect a person from further abuse.

g) When seeking a section 91(14) order, ensure you also address the practical considerations as detailed at PD12Q, paragraph 3.6.

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February 2023