FAMILY LAW UPDATE

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FEBRUARY 2022

SECTION 91(14) ORDERS KNOWN AS 'BARRING ORDERS'

On 31 January 2022, the Home Office updated their Policy Paper 'Section 91(14) barring orders'[1] given the recent Domestic Abuse Act 2021. This article considers the likely effects of these changes.

Background

Section 91(14) of the Children Act 1989 allows the Court to Order that further applications in relation to a child or children may not be made by the party named without leave of the court:

> ***91(14)*** *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.*

One of the purposes of the section is to prevent instances where abusive ex-partners have attempted to repeatedly bring victims back to court for no reasonable purpose.

The statute does not provide a test for when orders should be made, but guidance has been provided as set out below.

[1] https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/section-9114-barring-orders

Undertaking the balancing exercise

The Family Court Practice 2021 commentary states:

> ***'no application … without leave of the court' (s 91(14))—****This subsection has produced many reported decisions concerning the circumstances in which an order restricting future applications should be made. In* Re P (Section 91(14) Guidelines) (Residence and Religious Heritage) *[1999] 2 FLR 573), CA, Butler-Sloss LJ drew up a number of guidelines from the reported cases, while indicating that the court always has to carry out a balancing exercise between the welfare of the child and the right of unrestricted access of the litigant to the court. The guidelines are as follows:*
>
> *(1) Section 91(14) should be read in conjunction with s 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 (see also* Re P (Children Act 1989 ss22 and 26: Local Authority Compliance) *[2000] 2 FLR 910 FD).*
> *(7) In cases under para 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 (see also* Re S (Contact: Promoting

Relationship with Absent Parent) *[2004] 1 FLR 1279,CA). The Court of Appeal has reiterated the principle that a need for time to settle to the regime ordered is not sufficient to justify a s 91(14) order: the purpose of the order could and should have been achieved by giving the order time to work itself out:* Re G (Residence: Restrictions on Further Applications) *[2009] 1 FLR 894 CA).*

*(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. In particular it is wrong in principle, except in exceptional circumstances, to put a litigant in person in the position, at short notice, of having to contest a s 91(14) order (*Re C (Prohibition on Further Applications) *[2002] 1 FLR 1136 CA).*

(9) A restriction may be imposed with or without limitation of time. In Re B (Section 91(14) Order: Duration) *[2004 1 FLR 871], CA, it was said that where the mother was determined to excise the father from a child's life the court should never abandon endeavours to right the wrongs within the family dynamics. A s 91(14) order which was to last during the child's minority and was without limitation to specific applications gave the wrong message in a case in which the father had not abused the family justice system nor undermined the mother's primary care. An order which is indeterminate or is to last until a child is 16 should be an exceptional step because it is, in effect, an acknowledgement that nothing more can be done. If such an order is made the court must spell out why and what needs to be done to make a successful application in the future (*Re S (Permission to Seek Relief) *[2007] 1 FLR 482 CA). In* S v B & Newport City Council: Re K *[2007] 1 FLR 111, FD, a special guardianship order and a s 91(14) order were made preventing the natural parents making any application for contact without limitation of time because the child's needs required that order to be made and failure to do so, in the light of the parents' volatile behaviour, would impose an unacceptable strain on the carers.*

(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 (see also Re G (Contempt: Committal) *[2003] 2 FLR 58, CA).*

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

Is a s. 91(14) order an absolute bar to future applications?

Whilst they are often referred to as 'draconian' orders, s. 91(14) orders are not an absolute bar to a future application being made. They simply add an additional hurdle by requiring the court's permission before an application can be made. That is why it has been held that a s. 91(14) order does not infringe the Human Rights Act 1998 or European Convention on Human Rights, Art 6(1) (right to a fair trial).

If an absolute bar is required, an application can be made under the court's inherent jurisdiction, rather than s. 91(14) (see *Re R (Residence: Contact: Restricting Applications*) [1998] 1 FLR 749).

The order

Although the court may state what should be addressed before it is likely to grant permission for a future application to proceed (and this may be recorded in a recital), the court cannot attach conditions to the order requiring a party to take a specific step before an application for permission will be successful (see *Re S (Permission to Seek Relief*) [2006] EWCA Civ 1190, [2007].

It is possible to state in the order that any future applications for permission should not be served on the resident parent. This can be especially useful in cases where the application for permission itself would cause further harm.

'Imperative requirements'

There are some mandatory requirements that must be met, and they are set out in the Family Court Practice commentary as follows:

> ***Imperative requirements—****Before making a s. 91(14) order, the court must be satisfied that the parties affected:*
>
> *(i) are fully aware that the court is seized of an application and is considering making such an order;*
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> *(ii) understand the meaning and effect of such an order;*

(iii) have full knowledge of the evidential basis on which such an order is sought; and
(iv) have had a proper opportunity to make representations in relation to the making of such an order; this may of course mean adjourning the application for it to be made in writing and on notice: Re T (A Child) (Suspension of Contact) (s91(14) CHA 1989 *[2016] 1 FLR 916, CA.*

Domestic Abuse Bill

As set out in The Home Office paper, in May 2019, the Government established a panel of experts to review how the family courts deal with the risk of harm to children and parents in private law children cases involving domestic abuse and other serious offences. This panel published their report in June 2020, and concluded that barring orders were not being used sufficiently to prevent alleged perpetrators from continuing their abuse through court applications under the Children Act 1989, and that amendments should therefore be made.

The Government published an Implementation Plan alongside the panel's report, in which it was acknowledged that:

> *further clarification is required to the law on barring orders, to ensure that the use of section 91(14) is available to parents and children to protect them where further proceedings would risk causing them harm, particularly where proceedings could be a form of continuing domestic abuse.*

The Government committed to exploring whether this aim could best be achieved via an amendment to the then Domestic Abuse Bill.

Re A (A Child) (supervised contact) (s91(14) Children Act 1989 orders [2021] EWCA Civ 1749

Section 91(14) orders were further considered by Lady Justice King in the *Re A* case who observed that, whilst the *Re P* guidance had stood the test of time having been endorsed in numerous subsequent cases, the fact is that now 22 years on the world is in an entirely different place and the guidance needs to be considered in the modern world. The courts had been reluctant to make these orders save for the most egregious cases. This, she observed, in the context of the issues of the modern

world, including litigants in person, was not appropriate; whilst the judiciary had understandably been reluctant to make such orders, this was misplaced.

Maria Scotland, who acted as counsel for the appellant in the *Re A* case, summarised Lady Justice King's observations of how the *Re P* guidance should now be applied as follows, bearing in mind the protection of a parent who has been subjected to coercive or controlling behaviour:[2]

- *No requirement for number of applications – the court's jurisdiction to make such an order is not limited to those cases where a party has made excessive applications. It may be one substantive live application but that a person's conduct overall is such that an order made under s91(14) is merited. the Re P guidelines do not say that a s91(14) order should only be made in exceptional circumstances, rather Guideline 4 says such an order should be the 'exception and not the rule'*
- *This is anticipated by Guideline 6 of Re P: 'In suitable circumstances (and on clear evidence), a court may impose the leave restriction in cases where the welfare of the child requires it, even if the proceedings were not dogged by numerous applications.*
- *Unmeritorious applications – the making of a s91(14) order is not only to protect a child from the effects of endless but also from unmeritorious applications.*
- *Example (in the current case) – where there have been vindictive complaints to the police and social services.*
- *Coercive control – where the judge forms the view that the type of behaviour indulged in by one of the parents amounts to 'lawfare', that is to say the use of the court proceedings as a weapon of conflict, the court may feel significantly less reluctance than has been the case hitherto, before stepping in to provide by the making of an order under s91(14), protection for a parent from what is in effect, a form of coercive control on their former partner's part.*

Lady Justice King then went on to refer to S.67 (3) of the Domestic Abuse Act 2021.

[2] https://www.familylaw.co.uk/news_and_comment/re-a-(a-child)-(supervised-contact)-(s91(14)-children-act-1989-orders)-2021-ewca-civ-174

Domestic Abuse Act 2021

Section 67 of the Domestic Abuse Act 2021, amends s. 91(14) and provides for the introduction of a new s. 91A of the CA 1989. The new clause seeks to clarify that s 91(14) orders are available where proceedings are putting the child or individual at risk of harm, particularly where proceedings could be a form of continuing abuse, and that courts can make an order on their own initiative.

Section 67(3)(2) Domestic Abuse Act 2021 states:

> *(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—*
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> *(a) the child concerned, or*
>
> *(b) another individual ("the relevant individual"),*
>
> *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—*
>
> *(a) 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;*
>
> *(b) of its own motion.*
>
> *(6) In this section, "the child concerned" means the child referred to in section 91(14)."*

Conclusion: What will this mean?

According to the Home Office Paper cited above:

> *This change in the law therefore clarifies that barring orders are available to parents and children to protect them where further proceedings would risk causing them harm, in particular where proceedings could be a form of continuing domestic abuse.*

Further:

> *The courts will be required to consider carefully whether the circumstances that gave rise to the barring order have materially changed such that permission to apply should be granted. This will offer further protection to domestic abuse victims.*

It is clear therefore that the tide is changing with regards to the approach to section 91(14) Orders of the Courts (Re A) and Parliament. The aim of Parliament is that these Orders are used more often by the courts to protect victims of domestic abuse where further applications put them at risk of harm. Further, that there is additional protection provided to victims of domestic abuse as there will be a statutory test of 'material change' which must be considered upon receipt of an application for leave.

The Ministry of Justice *Assessing Risk of Harm to Children and Parents in Private Law Children Cases* report 'unveiled deep-seated and systematic issues that were found to affect how risk to both children and adults is identified and managed.' The responses received raised concerns about 'how family courts address domestic abuse and child sexual abuse in private law children proceedings'. The Domestic Abuse Bill received Royal Assent on 21 April 2021, although the section 67 commencement date is Spring 2022. What remains to be seen is whether the new section will indeed bring further protection for victims of domestic abuse which is arguably urgently required.

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