

FAMILY LAW UPDATE



August 2023

Practice Direction 12Q and Barring Orders

In the [February 2022 Family Law Update](#), Victoria Hoyle considered the amendments to the operation of Section 91(14) 'barring orders' by the introduction of the Domestic Abuse Act 2021 in her article. This article should be read alongside the February 2022 update, which provides invaluable guidance on the background to and operation of s.91(14) order.

This article seeks to summarise the guidance that has subsequently been introduced in May 2022 in the form of Practice Direction 12Q.

Section 91A of the Children Act 1989

Section 91A was inserted by Section 67 of the Domestic Abuse Act 2021. It reads as follows:

Section 91(14) orders: further provision

- (1) This section makes further provision about orders under section 91(14) (referred to in this section as “section 91(14) orders”).*
- (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”),**

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).*

Practice Direction 12Q

In May 2022, Practice Direction 12Q (‘PD12Q’) was introduced, providing further guidance on the operation of orders under section 91(14) orders and section 91A.

The full Practice Direction is available [here](#) and should be read in full. What follows is a brief summary of some of the essential points.

The practice direction begins with a reminder (at paragraph 2.1) that s.91(14) orders are a ‘protective filter’, applied by the court ‘in the interests of children’. The emphasis on such orders being a ‘protective filter’ rather than an absolute bar appears again at paragraph 2.7, in which it is highlighted that there is ‘considerable scope’ for their use in appropriate cases.

Paragraphs 2.2 and 2.3 provides guidance on the circumstances ('many and varied') in which the use of such an order may be an appropriate exercise of the court's discretion:

'... They include circumstances where an application would put the child concerned, or another individual, at risk of harm (as provided in section 91A), such as psychological or emotional harm. The welfare of the child is paramount.

These circumstances can also 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. Such conduct might also constitute domestic abuse'.

There is a focus within the Practice Direction on the potential use of proceedings as a continuation of domestically abusive conduct, and the use of 'barring orders' in such circumstances. Paragraph 2.4 reminds users that future applications can be part of a pattern of coercive or controlling behaviour or other abuse towards the victim. Paragraph 2.6 provides that, in cases where domestic abuse is alleged or proven, the court should give 'early and ongoing consideration' as to whether it would be appropriate to make a s.91(14) order, regardless of whether there is an application before the court for the same.

The Practice Direction also provides guidance on procedure, within paragraph 3, including the following points:

- If at any stage of the proceedings the court is considering making an order of its own motion (s.91A(5)(b)), it should record that fact on the

- order, along with any related directions (para 3.1), including the representations that the court may require from the parties (para 3.5);
- If an application is made for a 'barring order', the Part 18 procedure should be used. The application can be made in writing using [Form C2](#) or orally during a hearing (para 3.3);
 - As part of the court's responsibility to give 'early and ongoing consideration' to whether such an order is appropriate, the court should consider whether any findings of fact will be required to establish whether a s.91(14) order should be made (para 3.4).

Paragraph 3.6 is worth producing in full. It reads:

'If the court decides to make a section 91(14) order, the court should give consideration as to the following matters:

- a. the duration of the order (see section 4);
- b. whether the order should cover all or only certain types of application under the 1989 Act;
- c. whether service of any subsequent application for leave should be prohibited until the court has made an initial determination of the merits of such an application (see section 6). Such an order delaying service would help to ensure that the very harm or other protective function that the order is intended to address, is not undermined; and
- d. whether upon any subsequent application for leave, the court should make an initial determination of the merits of the application without an oral hearing (see section 6).'

Paragraphs 4.1 and 5.1 remind the reader that the court has a discretion as to the duration of an order under s.91(14), and to which applications such an order shall apply, but provides that the court should explain its reasons for the duration and scope of the order made.

Paragraph 6 of the Practice Direction provides helpful guidance on applications for leave during the life of a s.91(14) order, including a reminder that the court

has a discretion as to whether leave should be granted, and that whilst s.91A(4) requires the court to consider whether there has been a material change in circumstances, such a change in circumstances is not necessarily required for leave to be granted (para 6.4).

Recent case law

The High Court and Court of Appeal have had the opportunity to review the use of s.91(14) in a number of cases since the introduction of PD12Q.

In **B v C [2022] EWFC 189**, HHJ Parker at first instance was considering a case in which the father ('F') had received seven life sentences previously in relation to a previous relationship in which he kidnapped, attempted to kidnap, falsely imprisoned, and raped his partner. After his release on licence in 2015, he established a relationship with the mother ('M') and they had a child together ('A'). Both M and another individual complained of serious systemic sexual violence during their relationships with F and he was subsequently convicted of 24 further counts of rape, as well as coercive and controlling behaviour, false imprisonment, and threats to kill. F had applied to the court for an orders for Parental Responsibility, contact, and a non-molestation order against M. Within that litigation, M sought a s.91(14) order preventing future applications by F. Her application, which was for such an order for an unlimited period ('until further order') was supported by the children's guardian.

In finding that post-conviction, F continued to 'control and manipulate' M emotionally and had no insight into the impact of his actions, HHJ Parker dismissed each of F's applications. In considering M's application for a s.91(14) order, HHJ Parker considered the amendments made by the Domestic Abuse Act 2021 and the guidance within Practice Direction 12Q. HHJ Parker considered the case to be a 'compelling' one for an order under s.91(14). He made an order preventing F from making further applications for Parental Responsibility or a Child Arrangements Order without leave of the court.

On the issue of the duration of the order, the learned Judge said:

35. Sections 91(14) and 91A are silent on the duration of a section 91(14) order. The Court, therefore, has a discretion as to the appropriate duration of the order. Any time limit imposed should be proportionate to the harm it is seeking to avoid. If the Court decides to make a section 91(14) order, the Court should explain its reasons for the duration ordered. Sections 91(14) and 91A give a discretion to the Court as to the types of application under the 1989 Act that can be made subject to permission from the Court. If the Court decides to make a section 91(14) order, the Court should consider which types of application should be specified in the order and it should explain its reasons.

36. I have also had regard to *Re A (A Child) (Supervised Contact) (Children Act 1989 Section 91(14) orders) [2021] EWCA Civ 1749*. I consider this to be a compelling case for a section 91(14) order for the reasons appearing above. I intend to make a section 91(14) order to prevent the father making any application for a child arrangements order or an order for parental responsibility in respect of A for a period of 10 years. Whilst that is an exceptionally long period, in my view, this is an exceptional case because of the nature of the father's offending, his failure to accept the convictions, his attempts to influence the mother to retract her evidence and his sophisticated, controlling personality, as I find it to be. I am satisfied that the current applications of the father have been abusive and emotionally harmful for the mother. Further applications would be likely to impact on A to an increasing extent as his awareness and understanding grows. They would impact on the mother in a harmful way and that would cause her anxiety, which A would be likely to feed off. I am, therefore, satisfied that further applications by the father, without leave, would put the mother particularly but also A at risk of harm.

37. I am making that order time-limited despite the submissions made by the mother and the Children's Guardian that I should make it until further order because I do not consider this to be proportionate. I have

decided on 10 years because, at that stage, A will be 15 years of age and will have a much greater awareness of the existence of his father. In addition, he will also begin to understand the issues in a way that means the Court would have to attach some weight to his views. At that stage, the father will need to have developed better insight into his offending and the consequences of it for his erstwhile partners and to have accepted it. That may be a forlorn hope, but it may be that the Court considers making an order for indirect contact at that stage. I have tried to hold a balance between the need to protect the mother and A whilst also factoring in the possibility that things can change sufficiently for the Court to revisit the issue of indirect contact.

38. I am not satisfied that there is no hope of any change in the future. In any event, to succeed in getting leave to make such applications during the currency of a section 91(14) , section 91A(4) provides,

"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".

I make it clear that there would have to be profound change in insight and approach to his offending behaviour demonstrated by the father to achieve this.'

In ***A Local Authority v F and Others [2022] EWFC 127***, Mrs Justice Knowles was concerned with care proceedings, the background to which was that the father ('F') had been convicted of murdering the mother ('M') and hiding her body. F continued to be in denial that he was guilty of the offences, or even that M was dead. The court allowed the application on behalf of the local authority and children's guardian for an order under s.91(14) preventing F from making an application to discharge or vary the Children Act orders that had been made during the proceedings, until the children had reached the age of 18.

Readers are likely to be familiar with the litigation in *F v M* [2021] EWFC 4, in which Mr Justice Hayden provided helpful guidance on the identification and understanding of coercive and/or controlling patterns of behaviour. Two years later, in *F v M* [2023] EWFC 5 Mr Justice Hayden was concerned once more with the case. The court had found at the earlier fact-finding hearing that the father ('F') had coercively controlled the mother ('M') throughout the relationship and had raped her on more than one occasion.

The making of a s.91(14) order was not a controversial point in the case, it being agreed between the parties that the court should make such an order lasting until the youngest child reaches the age of 18. However, in the course of his judgment, Mr Justice Hayden examined the amendments introduced by the Domestic Abuse Act 2021, and considered PD12Q. In his judgment, he states (at paragraph 20) that:

'The provisions within Section 91A are transformative. 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, in order to ensure that the Court is not manipulated into becoming a source of harm but a guarantee of protection.'

Conclusion

The introduction of Practice Direction 12Q is a welcome development, in an area in which the court otherwise has limited guidance on how to exercise a discretionary power.

The author anticipates that the guidance will lead to an increase in the number of s.91(14) orders made in the Family Court. The new s.91A, and the accompanying Practice Direction, emphasise the potential scope and utility of 'barring orders', particularly in cases involving domestic abuse and where a risk that a party may use further applications to the court as a continuation of a pattern of controlling and/or coercive behaviours. As the courts continue to improve their understanding and recognition of such patterns of abusive behaviour, this author expects that s.91(14) orders will be more readily deployed by the courts as a method of limiting the potential for future abuse.

Charlie Barrass-Evans
Barrister

THE FAMILY TEAM:

Victoria Hoyle (Head of Family)

Joanna Martin KC

Nicholas Bradley

Sally Daulton

Scott Horner

Rachel Eyre

Amy Edinborough

Danielle Metters

Sophie Johns

Charlie-Barrass-Evans

James Adams

Naila Hadid (pupil)

Matthew Mortimer (pupil)



Devon Chambers

8 The Crescent

Plymouth

PL1 3AB

01752 661659

www.devonchambers.co.uk

clerks@devonchambers.co.uk