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# Are s.91(14) orders becoming the norm?

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# Are s.19(14) orders becoming the norm?

Commonly known as 'barring' orders, a section 91(14) Order empowers the court when disposing of an application under the Children Act 1989 ("CA 1989") to make an order that prevents further future applications for an order under the Act being made:

> *"(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."*

The starting point when considering the making of a s.91(14) order is Re P (a Child) (Residence Order: A Child's Welfare) [1999] EWCA Civ 1323, [1999] 2 FLR 573 where Butler Sloss LJ, drawing from previous authority, set out some guideline principles for the making of orders under section 91(14). Those principles included:

> *'(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'*

Following two recent judgments in April 2020, and an increase in the number of cases before the Courts seeking or considering the imposition of s.91(14) Order and/or seeking the leave of the court to bring an application during such an order, this article contemplates whether the use of s.91(14) is now becoming the norm as opposed to the rarity and ultimately, whether the discretion afforded to the Court is being cast too wide. There is ample case law on the implementation and use of s.91(14) orders and on whether leave should or should not be granted. This article does not intend to delve into the case law and/or provide an analysis of that.

There are of course numerous established principles that have been established and followed when considering s.91(14) orders such as:

- Usually there should be a limit of time on the order whether that be a specific number of years or an "end" date such as in Re S (children) [2006] where the s.91(14) order was to last until the child is 16 years old.
- An order should not impose an absolute prohibition on bringing applications, that would have to be made under the inherent jurisdiction of the court, and not under s.91(14) (Re R (Residence: Contact: Restricting Applications)). The s.91(14) order should state the terms of the order, in particular it must be made clear what type of applications the order prevents.
- An order cannot attach "conditions" to the bar (Stringer v Stringer [2006]) however, it can state what should be addressed before its likely to grant permission for a future application.
- Parties should be given ample notice of an application for a section 91(14) order, or if the making of such an order is being contemplated by the court. While the court may of its own motion make an order under section 91 (14), this is subject to the rules of natural justice (per Re P above).
- Advance notice is particularly important where the order sought is against a litigant in person. This was considered in Re C (a child) [2009], where the Court of Appeal gave guidance about making such orders when litigants in person are involved.

As per the wording of the section, once a s.91(14) Order is imposed, an application cannot be brought within the time limit without "leave of the court". This is what prevents a s.91(14) Order being an absolute prohibition and instead it essentially places a "hurdle" that needs to be overcome before a future application will be considered.

The applicant seeking leave of the court should issue a C2 application for leave and the applicable test is as set out in Re S (Permission to Seek Relief) [2006] EWCA Civ 1190 [2007] 1 FLR 482 namely, '*is there an arguable case demonstrating the need for renewed judicial investigation by the court?*'

As with the imposition of a s.91(14) order, again it is a discretionary exercise for the Court. Usually in considering this, the Court will consider whether a genuine and substantial change in the circumstances that originally underlay the original order is present. The Court will also often consider the history of the case and any risk of harm to the child (and often the child's current carers if applicable).

Mr Justice Mostyn appears to go even beyond those considerations in the recent reported decision of SZ v DG, PG & LG [2020] EWHC 881 (Fam). This was the Father's application for permission to pursue an application for indirect contact and it came before Mr Justice Mostyn on 14 April 2020.

In the initial proceedings, the reasoning behind the imposition of the s.91(14) was as follows:

> *"10. I now turn to the question of whether there should be a section 91(14) bar on any application for an order for contact, variation of contact or any other section 8 order. In my judgment I am satisfied that it would be appropriate to make such an order. That would mean that any such applications would be put on the same footing as an application to discharge the special guardianship order itself. That requires the leave of the court. It would put it on the same footing as an application for post-adoption contact, as set out in section 51A(4)(c) of the Adoption and Children Act 2002. In my judgment it is plainly an order that should be made so that the stability of the placement with the special guardians can be guaranteed, or at least, if not guaranteed, assured so far as is possible. It should be understood that an order under section 91(14) carries with it no stigma. It simply requires that the parents, were they to make an application the nature of which I have mentioned, to satisfy a court that they have an arguable case before the special guardians are troubled by the application. In my judgment, on the facts of this case where this is not a conventional special guardianship order (they are normally made in favour of relatives) but is in fact made in favour of carers whose identities shall remain confidential. In my judgment that order under section 91(14) should endure until ED's 14th birthday. In other words until 27 June 2026. After his 14th birthday his own views, were an application to be made for contact, would, in my view, be, if not decisive, then highly influential, and in such circumstances it would not be necessary for the court's leave for an application to be made."*

The s.91(14) Order appears to have therefore been made for a period of over eleven years, which when considering that in light of many other authorities, is a lengthy period of time.

However, in January 2020, the Father applied for permission to pursue an application for indirect contact, both for himself to write to ED and for the three children in his care to write to him. In accordance with the test for the granting of leave as per Re S, as expected, Mostyn J considered any change of circumstances since the granting of the order. Interestingly and unusually, Mostyn J also considered the tests for an application for leave to seek to vary a SGO or for post adoption contact on the basis that his rationale behind making the s.91(14) order initially had been to put any application on the same footing as those.

The evidence before the Court was that since the proceedings had ended in 2015, the Father had returned to the Czech Republic and had three more children removed from his care. In 2017 he received a conviction and custodial sentence for battery and failure to comply with notifications. The basis of his application however, was that in October 2019, the court in the Czech Republic returned the three children to Father's care under supervision and it was on that basis that the Father made this application to seek indirect contact only with ED. A psychological report had been completed on the Father, quotes of which are contained at paragraph 19 of his judgment but to which Mostyn J accurately refers to as a "mixed bag".

The learned judge concludes that although the matter is quite finely poised, leave should not be granted. Mostyn J sets out his reasoning at [32] and [33]:

> *'I place particular weight on the risk of disruption and on the views of the special guardians. I consider that the negative matters outlined in the Czech psychiatric/psychological report outweigh the positives. In the light of that I am not satisfied that the applicant would make a positive contribution to the well-being of ED.'*

A further case in April 2020 which was an appeal against the making of a s.91(14) order was Re C-D (A Child) [2020] EWCA Civ 501. The proceedings involved "B" who was 10 years of age. In a final order dated 28 October 2019, HHJ Wright made a care order and s.91(14) Order. The Judge had first raised the proposition of a s.91(14) order at a Case Management Hearing at the start of October and asked the Guardian specifically to address the likely effect on B and stability of his placement if there were to be further litigation. The Guardian strongly supported the making of a s.91(14) Order.

Along with the final care order, a s.91(14) Order was made until 18 October 2021 (for a period of just under two years). Paragraphs 52 and 53 of the Judgment describe the basis for the making of the order in the initial proceedings:

> *'[52] The judge noted the "legal test" for the making of an order under s.91(14). She acknowledged that this was not a case "where there have been repeated applications" and analysed whether the risk to B's welfare from further applications to court was such as to justify an order. She identified a number of factors which persuaded her that an order was required. These included the following. B had been involved in proceedings since October 2018 and he needed "to achieve stability". The mother had a "history of failing to cooperate with professionals"; the prognosis for her engagement in any therapeutic work was "poor". She did not accept the contact plan or B's placement in foster care. The mother "regularly undermines boundaries; when she doesn't get what she wants she makes it very difficult and she also seeks to undermine B's placement". This reflected both the mother's own issues and the fact that she and B had "an enmeshed relationship".*

> *[53] The judge considered it "likely that the mother will not cooperate within the looked after children process and at some stage she may well attempt to return this matter back to court". B was about to move to his fifth placement and the judge clearly considered it essential that his need "to achieve stability" was not undermined by his being involved in further proceedings at least until October 2021. The judge was "satisfied that B needs to have a break from further potential" applications to court.'*

The Mother appealed against both orders. In relation to the s.91(14) Order, this formed her seventh ground of appeal and was simply that the Court was wrong to make the s.91(14) Order.

In relation to this specific ground of appeal, the Court highlighted Re P and the discretionary nature of the imposition of a s.91 (14) Order. The Court referred to Re K (Special Guardianship Order) [2013] 1 FLR 1265 where Black LJ had imposed a s.91(14) Order to provide for a "period of calm" for the child AK on the basis that AK's welfare required the imposition of a s 91(14) order.

This appeal was dismissed in its entirety and the Court concluded that HHJ Wright was right to conclude B's welfare required a s.91(14) Order and there were '*powerful reasons for concluding that B required a "period of calm" and that the mother could not be trusted not to "attempt to return the matter to court"'.*

As per the principles laid out in Re P, it was envisaged that s.91(14) be used in the case of repeated and unreasonable applications and the rationale behind that is both obvious and necessary. However, the more discretionary and complicating basis is that of the child's welfare: *"[I]n 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"* (Re P).

In Re P, Butler-Sloss LJ elaborates upon this: "*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)".*

What has become difficult to distinguish is when does a particular case go beyond the 'commonly encountered need' to settle and when is it such that this power, noted as being a weapon of last resort and an exception should be used? It is noted in the SZ case above, that the word "stability" is utilised when imposing such an order, and in Re C-D, the phrase a "period of calm" and the Courts clearly considered these two cases went beyond the commonly encountered need for time to settle, but the judgments do not assist on why that is so.

It is of course, a discretionary exercise for the presiding Judge who will undertake an analysis taking into account numerous factors, but what the Judge should be taking into account is less obvious. The difficulty that arises is consideration as to at what point it goes beyond 'normal'. There are surely factors in all Children Act cases that would point to a need for stability, and a need for a period of calm, and the outcome of that is that the use of s.91(14) order is becoming more common and in turn it therefore loses its rarity and "last resort" usage.

It is fair to conclude that nearly all proceedings under the Children Act 1989 are inevitably stressful for all involved whether that be for the parents, the carers and/or the children. On the most basic and simplistic level, private proceedings usually entail at least three court hearings, the involvement of CAFCASS and telephone interviews, more often than not a more in depth report that requires direct work to be done with the relevant child/children and a final hearing requiring both written and oral evidence. It is expected with public law proceedings, these often take a longer period of time requiring a high level of local authority intervention and disruption to a child's life.

It is often stressful, upsetting and intrusive and although one hopes that often children can be subject to these proceedings unknowingly, or without being greatly affected, that is rarely the case and the children can be, and are, negatively impacted by the proceedings.

Therefore, it can be said in every case, that a child (and parents or carers) will benefit from a period of calm and will benefit from stability and without the threat of further applications and further court proceedings hanging over them. That is where the risk arises, the risk of widening the net that encapsulates the cases where a s.91(14) order should be imposed, in the classic phraseology "opening the floodgates". But at what point is the Court able to distinguish between the unfortunate harm that is part and parcel of being involved in proceedings, and such a level of emotional harm which justifies the restriction of an individuals right to bring proceedings. The current authorities lack guidance as to where this line is to be drawn and the risk remains that inevitably in all cases, there are persuasive arguments to be made as to why a s.91(14) order should be imposed.

There are alternate routes to achieve a similar outcome without such a profound impact for example proposing judicial continuity as per A Father v Lancashire County Council [2010] EWHC 2503 (Fam) where despite there being protracted litigation, numerous applications and some stress on the carer of the child as a result, the Judge was persuaded to step back from a barring order on the basis that any future application (whilst strongly discouraged) should be listed before him and would be anxiously scrutinized. Again, in Re A B & C (Children) [2010] EWCC 30 (Fam) the local authority, with the support of the guardian, sought a s91(14) order preventing the mother from making further applications to discharge a care order. The judge declined at that stage to make an order, adjourning the s91(14) application and the mother's application to discharge for a short period pending the resolution of contact issues which were still live, noting that with the benefit of judicial continuity any further unmeritorious discharge applications could be dealt with summarily.

It is clearly a fine line to be balanced and perhaps benefitted by the Court being afforded such discretion in the area, however when one considers seeking such an order, or opposing such an order, the well-established principles in Re P should always be the first point of consideration. As is clear from Re P and should be remembered by all, this is a power to be used sparingly and it should not be considered the 'norm' in Children Act proceedings.

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