The Evolution of Section 91(14) Orders:
A Local Authority v F & Ors [2022] EWFC 127

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Introduction

1. Section 91(14) of the Children Act 1989 allows courts to make orders which bar individuals, usually parents, from making applications to a court without the court's permission. Historically, such orders were often used as a last resort, particularly in private law cases where there was a history of unreasonable applications.

2. The courts have more recently revisited Section 91(14) orders in a modern context and, in the case of ***A Local Authority v F & Ors* [2022] EWFC 127**, considered the further provisions set out in Section 91A as implemented by section 67 of the Domestic Abuse Act 2021, which has been in force since 19 May 2022. It can be seen that in fact whilst such orders may remain relatively rare, such orders may offer a significant protective filter for children and should therefore be considered as an option by practitioners more than has perhaps been the case previously.

A Brief Summary of the Law up to 2021

3. Section 91(14) reads:

   "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"

4. The lead case in relation to section 91(14) orders is ***Re P (Section 91(14) (Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 289** where the Court of Appeal proffered the following guidelines:

   (1) Section 91(14) should be read in conjunction with section 1(1) of the Children Act 1989 which makes the child's welfare the paramount consideration.

   (2) The power to restrict applications is discretionary and in exercising its discretion, the court must weigh in the balance 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.

(4) The power should therefore be used sparingly and should be the exception and not the rule.

(5) It is generally to be seen as a useful weapon of last resort in cases of repeated and unreasonable applications.

(6) In suitable cases, and on clear evidence, the court might impose the leave restriction where the welfare of the child requires it, even though there was no past history of unreasonable applications.

(7) In cases where there was no past history of unreasonable applications, the court would need to be satisfied that:

(a) The facts went beyond the commonly encountered need for a time to settle a regime ordered by the court and that all too common situation where there was animosity between the parties (adults and/or local authority); and

(b) There was a serious risk that, without the imposition of the restriction, the child or primary carers would be subject to unacceptable strain.

(8) A court might impose a restriction in the absence of a specific request, subject to the rules of natural justice, allowing a party to be heard.

(9) A restriction might be imposed with or without a limit of time.

(10) The degree of restriction should be proportionate to the harm it was intended to avoid.

(11) Without notice orders should not be made, other than in exceptional cases.

(12) An absolute prohibition on making an application could not be ordered under section 91(14) but only by an order made under the inherent jurisdiction of the court.

5. The court in ***PM v CF (section 91(14) Order: risk to mother and children)*** **[2018] EWHC 2658 (Fam)** confirmed that orders without a time limit should only be made in the most egregious of cases.

The evolution of the use of s91(14) within the modern context

6. The Court of Appeal's decision in ***Re A (A Child) (Supervised Contact) (Section 91(14) Children Act 1989 Orders) [2021]*** **EWCA Civ 1749** considered the legal principles engaged in a modern context. It also considered how the provisions in section 67 of the Domestic Abuse Act 2021 may impact on the established guidelines for the making of Section 91(14) orders set out in ***Re P.***

7. In ***Re A,*** the Court of Appeal recognised the need for guidelines to be reflective of modern society, taking into account the universal use of email as a form of instant communication and the withdrawal of legal aid from most private law proceedings. Despite the court's case management powers, litigants regrettably bombarded the court or the party with emails, either because of anxiety in some cases or in others, as part of a campaign of oppressive behaviour by one parent against the other. This behaviour causes distress and anxiety to both the party on the receiving end and to the children at the centre of the dispute. The Court of Appeal recognised the considerable scope for the use of this protective filter in the interests of individual children but also, the benefit to other children whose cases are delayed, and court lists clogged up, by applications that should have never come before a judge.

8. Section 67 of the Domestic Abuse Act 2021 has been in force since 19 May 2022 and amended the Children Act 1989 by inserting Section 91A, which provides further provision as follows:

(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 can 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 to 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 in circumstances since the order was made.*

The decision in *A Local Authority v F & Ors* [2022] EWFC 127

9. It was against this background that, in the judgment of ***A Local Authority v F & Ors* [2022] EWFC 127,** Mrs Justice Knowles analysed the evolution of the law relating to orders under s91(14) and noted the changes envisaged by the Court of Appeal in ***Re A* (supra)** as a result of the implementation of the Domestic Abuse Act 2021.

10. The judgment itself, which sets out the factual background to the case, can be accessed via this link:

https://caselaw.nationalarchives.gov.uk/ewfc/2022/127/data.pdf

11. For the purposes of this article, it is sufficient to note that the case involved the killing of the mother/stepmother by the father which was noted to have caused the gravest emotional harm to the children. Restrictions as to the exercise of the father's parental responsibility under the inherent jurisdiction and an order under section 34(4), as well as an order under s91(14) were sought.

12. In essence, the implementation of Section 91A has dovetailed the modern approach outlined in the decision in ***Re A.***

    (1) The provision at section 91A(2) gave statutory effect to the guideline 6 of ***Re P*** by permitting a section 91(14) order to be made where the making of an application itself would put the parent or child at risk of physical or emotional harm.

    (2) Section 91A(4) above requires the court, when considering whether to grant leave, to consider whether there had been a material change of circumstances. The Court of Appeal in ***Re A*** commented that this provision would put the current approach to the granting of leave on a statutory footing.

13. Mrs Justice Knowles considered the definition of harm for the purposes of Section 91A(2) being defined in accordance with section 31(9) of the Children Act 1989 to mean *"the ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill treatment of another."*

14. It was highlighted that the risk that harm may arise to a child under the age of 19 unless the making of application is restrained is not qualified by words such as "serious" or "significant." Mrs Justice Knowles observed that section 91A(2) sits a little uneasily alongside guideline 7 of ***Re P*** that states that there must be a "serious risk."

15. In the judgment, Mrs Justice Knowles applied the new statutory approach to harm as set out in section 91A(2), rather than guideline 7 of ***Re P*** and noted that this course is consistent with the modern approach of the Court of Appeal in ***Re A.***

16. Mrs Justice Knowles makes some important observations on the greater latitude the new statutory framework has given the court when looking at section 91(14) orders:

    (1) The principles that emerged from ***Re P*** recorded that the court must consider if there is a "serious risk of harm" to the child. Section 91A(2) provides that an order may be appropriate if the child is at risk of harm but this risk does not have to be serious or significant, nor does the degree of harm itself.

    (2) Section 91A(3) introduces a narrower definition of harm which applies to a child or other individual who has reached the age of 18. That harm is to be read as making reference to ill treatment or impairment of physical or mental health. The Domestic Abuse Act 2021 provides this narrower definition because, in contrast, the definition in section 31(9) of the Children Act 1989 encompasses elements specific to a child, such as the impairment of development.

17. It is important to note the changes that the Domestic Abuse Act 2021 has incorporated into the statutory framework for the making of Section 91(14) orders. It has given statutory footing to the long-standing principles set out in ***Re A*** and ***Re P***. It has also cemented the position that parties will need to satisfy the court that the child is at risk of harm, but not that this risk is *serious or significant*, or that the degree of harm itself is *serious or significant.*

What is the likely impact in practice?

18. This of course remains to be seen. However, the recent authorities make it clear that the courts are likely to use such orders more creatively for the protection of children, particularly in cases where there have not been repeated applications but where future applications could have a profound destabilising effect on the child or their carer. It is an option in the children's law practitioner's armoury that should not be forgotten.

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Law is correct as at 5 January 2023