FOURTEEN

Barring Orders

How far can you push the Court over s91(14) orders now that the threshold appears to have been lowered?

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1) Where we were

“History is not the past but a map of the past, drawn from a particular point of view, to be useful to the modern traveller.”

Henry Glassie – American historian/ philosopher

- S91(14) contains no guidance as to how the power should be exercised
- All the guidance as to how, when and what s91(14) should be used for came from case law
- *Re P* [1999] 2 FLR 573
  - Section 91(14) should be read in conjunction with s. 1(1).
  - 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.

- 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.
- The power is therefore to be used with great care and sparingly, the exception and not the rule.
- It is generally to be seen as a useful weapon of last resort in cases of repeated and unreasonable applications.
- 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 history of making unreasonable applications.

- The court will need to be satisfied
  - 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.

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

- 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 the order.
- A number of other cases followed, but they clarified and/or were fact-specific but did not really herald a change

2) What is new and why

- *Re A* [2021] EWCA civ 1749
  - Re P guidance generally stood the test of time
  - S91(14) used sparingly and weapon of last resort
  - BUT, Judges had not been using the power enough, particularly in the context of fast paced modern world where emails and digital communication meant that there was easy access to litigation and high volumes of correspondence

- Highlighted cases of coercive control as requiring particularly careful consideration of the use of s91(14)
- Meritless applications (not just repeated ones) might indicate a need for s91(14) order
- the conduct of the litigation e.g. voluminous emails etc may prompt consideration of use of s91(14) (note that the change reflects the changing understanding of the nature of abuse and the changing modes of communication within society)

- s91A CA 1989 inserted by DAA 2021
  - s91A(2): s91(14) can be used where an application under the Act would put a child or other relevant individual at risk of harm
  - Where a s91(14) order is made and someone applies for leave, the court must consider whether there has been a change of circumstances since the order was made
  - S91(14) orders can be made by the Court of its own motion

- Is this truly new and, if not, why put it in?
  - Harm report said not using barring enough to protect victims from litigation that perpetuated abuse
  - Government implementation plan said there was a need to clarify statute
  - The plan queried where there should be an amendment to CA 1989 or through Domestic Abuse Act, but needed to be at statutory level

- *"By clarifying the law on the use of section 91(14) 'barring orders' in the family courts, we will be protecting more victims from being repeatedly dragged back to court by their abusive ex-partners*."

    - Lord Wolfson, Parliamentary Under Secretary of State, Ministry of Justice

- Guidance from the President

  - https://www.judiciary.uk/guidance-and-resources/a-short-view-from-the-presidents-chambers-july-2022/

  - *"….For two decades, the circumstances in which a party may be prohibited from bringing further CA 1989 applications has been governed by …Re P… which required the use of the power in s 91(14) to be exercised with great care and sparingly, the exception not the rule…*

– *CA 1989, s 91A establishes **a new, lower, statutory threshold 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**'."* (emphasis added)

- FPR 2010 PD 12Q
  - First time parliamentary guidance as to how one might exercise s91(14) powers
  - Relevant individual likely to be someone with PR or respondent to future application but not necessarily
  - Not only can order be made of the Court's of own motion but the court **has** to give early and active consideration to a s91(14) order even if no one applies (para 2.6)

- If the Court is considering making a s91(14) order it must record the same on the face of the order
- ‘Harm’ is not only from domestic abuse (para 3.4)
- The Court needs to consider at an early stage what facts need to be determined in order to decide whether or not to make such an order (para 3.4)

- If made the court must consider (para 3.6)
  - Duration of order
  - Scope (all CA 1989 orders or just one/some)?
  - Also if any initial application for leave after the s91(14) order has been made should be dealt with on paper or orally
- Duration of order
  - This must be proportionate to harm alleged

– Future applications

- The Court can determine whether or not an application should be served on a respondent or not prior to being dealt with on paper or orally
- The Court must have regard to whether or not there has been a change of circumstances
- Section 7 reports should not normally be ordered to assist determination of leave applications

- *A Local Authority v F & Ors* [2022] EWFC 127
  - The 'harm' in s91A does not have an adjective like 'serious' or significant
  - Accordingly it would appear that the phraseology *in Re P* of there needing to be 'serious risk' did not sit comfortably with the statutory test
  - Therefore there was now greater latitude to make s91(14) order than had been the case when Re P was decided

3A) How far can you push it?

- Obvious considerations
  - Lower threshold to make the orders
  - In DA cases should be routine consideration of whether or not s91(14)
  - Think whether or not experts should be asked to comment on impact of litigation
  - Consider impact on child and victim of DA of further proceedings

- Some more obscure considerations
  - PD12Q harm to a ‘relevant individual’ is usually a respondent or someone with PR but not always
    - Can it be a step-parent?
    - Can it be another member of the household?
    - An adult half-sibling?

- What is harm?
  - It does not have to arise from DA
    - Does this not mean that any of the ‘usual’ grounds for s91(14) constitute harm?
  - It does not have to be ‘serious risk’ harm anymore
  - Take these two strands together and the doctrine is far reaching indeed

- Safeguards on. return application
  - Paper only
  - No notice to respondent until granted
  - Statement explaining change of circumstances
  - Duration

3B) when is too far?

- Hard to know
  - To give breathing space is still unlikely to be sufficient
  - Proportionality test will still apply
  - Still a draconian measure so don't get too 'trigger happy'

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