Section 91 (14) Orders - Proceed with caution!

The courts' reluctance to make an order under Section 91 (14) of the Children Act 1989 (" Section 91") still persists today, nearly 20 years after the statute was given effect. Wall LJ in **Re S (Permission to Seek Relief) [2006] EWCA Civ 1190** described Section 91 (14) as 'both draconian and flexible' but highlighted that its use had to be 'carefully controlled by the court as part of its over-arching strategy, which is to preserve and foster relationships.'

Over the years there have been a number of cases where orders have been made and set aside. The most recent decision in **Re G (A Child) [2010] EWCA 470** serves as a useful reminder as to why care should be taken when considering a Section 91 (14) application. Before considering this case in further detail and the reasoning behind the decision, a consideration of some key cases follows.

Re P

Section 91 (14) provides:

On disposing of any application for an order under this Act [Children Act 1989], the court may (whether or not it makes any 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.

It is easy to see why judges have struggled with the interpretation of Section 91 (14) which contains no guidance as to when such an order should be made. There are no helpful checklists (unlike Section 1 (3) - the welfare checklist) so once again the common law has had to step in to help out. One of the most important cases in this area is the case of **Re P (Section 91(14) Guidelines) (Residence and Religious Heritage) [1999] 2 FLR 573** and one which practitioners need to consider when making an application under Section 91 (14). Not trying to replace the wording of the statute, Butler-Sloss LJ (as she then was) helpfully extracted guidelines from previous cases. A summary of the guidelines appears below:

1) The welfare of the child is the court's paramount consideration and therefore this principle should be read alongside Section 91 (14)

2) All relevant circumstances must be weighed up when exercising discretion to restrict applications

3) Imposing a restriction is a statutory intrusion of a party's right to litigate on matters affecting his/her child

4) The power is to be used with great care and sparingly, the exception and not the rule.

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

6) It is not necessary to have a past history of applications. If the welfare of the child requires it, the restriction may be imposed

7) The facts must go beyond the usual need for parties to settle into a regime ordered by the court and the common situations where there is animosity between adults in dispute or the local authority and the family.

8) If the child/carers will be subject to unacceptable strain then there is justification in imposing the restriction.

9) If no party has made an application for an order then the order can be made provided the parties have an opportunity to be heard on this point.

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

11) The restriction should be proportionate to the harm it is intended to avoid.

12) Careful consideration should be given to the extent of the restriction and should specify the type of application and the duration of the order

13) Ex parte orders would be undesirable in other than the most exceptional cases

The guidelines provided in **Re P** are points of note and highlight that the threshold to cross is a high one.

Procedural points

Having dealt with the merits of such an application, the next obstacle to tackle is the procedure. Some practical points were highlighted by Wall LJ in the case of **Re C (A Child) [2009] EWCA Civ 674.** Once again a brief summary of the points is set out below:

1) Applications are to be made in writing and on notice

2) Where the making of the order arises during or at end the hearing it is of the utmost importance that the person affected by the order understands

    a. that an application has been made

    b. the meaning and effect of the order and

    c. has a proper opportunity to make representations in answer.

    If the party affected is unrepresented it is particularly important that they understand the points listed above.

3) If the parties are unrepresented (particularly the one affected by the making of the Section 91 (14)), the court may be able to deal with the matter without a formal application but if the affected party requires a short adjournment then that should be generally allowed. If there is a substantive objection the application should be made in the normal way (in writing and on notice).

4) If all parties are unrepresented then there is a powerful obligation for the court to explain what actions it will adopt which involves, the meaning of the order, the effect and the duration. More importantly a party must be given the opportunity to make any submissions. If they require legal representation then the order should normally not be made or if made then they should be given permission to set aside the order within a set time.

Wall LJ did not consider the merits of the application and simply pointed to the case of **Re P** and the comments of Butler-Sloss LJ which in his view more than adequately addressed these issues.

Cases of note

While there are many cases where orders that have been rightly made, equally there have many set aside. Consideration of the following helps further understanding:

Case	Order	Outcome
Re S (Permission to Seek Relief) [2006] EWCA Civ 1190 - 18 August 2006	Two applications were heard at the same time. One related to a father's application for leave to apply for contact during a Section 91 (14) order. The second related to a father who appealed Section 91 (14) order which stated that he was not allowed to make further applications until the child was 16	The appeal in first case was dismissed but permission was allowed in the second. The Court dealt with a number of issues: a) It is not permissible to attach conditions to a Section 91 (14) order beyond stating duration and type of order - the court had no jurisdiction to attach conditions to the order as Section 91 did not provide for this and the power to impose conditions as per Section 11 (7) of the Act is only restricted to Section 8 orders. b) The correct approach for leave to apply was drawn from the tests of Thorpe LJ (Re A (Application for Leave) [1998] 1 FLR 1 and Butler Sloss LJ (Re P as above) - 'Does this application demonstrate that there is any need for renewed judicial investigation' and 'the

	without leave and until a psychological or psychiatric report reported that the father had engaged in treatment	applicant must persuade the judge that he has an arguable case with some chance of success'. c) Orders which are made without restriction of time or until the child reaches 16 should be the exception and not the rule and if made, reasons are to be set out fully and carefully. d) Parties are to have a proper opportunity to be consider the order and be heard on it.
RH v BK CV05PO306 - 18 May 2007	The father had made an application for a redefined contact order in respect of his 11 year old son. The father had been subject to previous Section 91 (14) orders and after the expiry of each he would immediately apply to the court for contact.	His Honour Judge Bellamy's approach was to consider the following when reaching his decision: a) Section 1 (1) of the Children Act 1989 - welfare being the paramount consideration b) Section 1 (3) - the welfare checklist c) Article 8 rights of both the parents - right to respect for private and family life The Judge highlighted how the child was due to start secondary school in September of that year and that it would be 'an important transition for him'. Previous Section 91 (14) orders had been for 12 months and the judge taking on the recommendations of the guardian made a Section 91 (14) order for 5 years. The Judge explained that 'orders of that length are unusual and should only be made in exceptional circumstances' and had no 'hesitation in coming to the conclusion that this is an exceptional case.'

Re J (A Child) [2007] EWCA Civ 906 - 17 July 2007	The mother had applied to appeal a Section 91 (14) order that prohibited further application until the child reached 18 (aged 14 then).	Although the order related to a child in care which Wilson LJ said was a unique feature, he did indicate that 'not much seems to turn on that.' The judge explained that by making an order to last until the child's 18th birthday would in effect mean that it was on order without limit of time. He reinforced the view that the making of the order should be the 'exception and not the rule' and that 'orders made of such duration should be made only in respect of cases at the egregious end, which merit the strongest degree of forensic protection for the child from further ill-founded conflict.' The Judge however dismissed the appeal, upheld the order made by Munby J as the Mother stated that she was 'going to carry on until the truth is out', and therefore in the child's interest, agreed that there should a 'lengthy moratorium on all proceedings save those with prima facie reasonable foundation should be imposed.'

Re G

Considering the above principles, it is clear why the case of Re G was appealed successfully. The case involved a father (who appeared in person) and applied to appeal a decision where he was to have no contact (either direct or indirect) or to make an application for residence/contact without leave for 5 years in respect of his daughter, now aged 3 ½.

Difficulties had arisen with contact due to allegations against the father by the mother of violence and excessive alcohol consumption, along with a suggestion that the father was resident in Panama.

Social services considered contact impracticable as there were no means of it being monitored. However there was no fact finding hearing dealing with the allegations.

Wall LJ stated that he would only be looking at the case '…purely and simply from the point of view of the little girl and what is perceived to be in her best interests', reinforcing the view that Section 91 (14) orders should be read in conjunction with the welfare principle.

Wall LJ found that one of the reasons why the order should not have been made was due to the facts not being understood properly and therefore the judge when exercising his discretion '…went too far in cutting off all contact without any really good reason for doing so…'. He found that the period of 5 years and the fact that the father was not to have any form of contact with the child excessive. One other factor that may have assisted the Court of Appeal judge in reaching the decisions (which Thorpe LJ highlighted) was the fact that the father had now become habitually resident in this jurisdiction and therefore 'a highly significant shift' had taken place.

The order was therefore substituted to indirect contact for 2 years by means of cards and small presents and the father could then apply for a more direct form of contact when that period ceased.

Conclusion

The care to be taken in making such applications cannot be underplayed. The application is an uphill struggle and appeal judges will not think twice in setting aside orders which should not have been made in the first place.

Unfortunately this may not always be ideal in situations where one party has been 'hounded' by repeat applications. A party who requires the court's assistance to prevent the other party from continually making applications without merit could also look towards the inherent jurisdiction of the High Court.

In **Harris and Harris [2001] 2 FLR 895** Munby J found that a Section 91 (14) order had had no effect on the father. He therefore adopted an approach which was 'nothing short of the weapon of last

resort' and made an order whereby the father was only allowed to issue an application for leave from a particular court. The mother or the child would not be informed of the application unless leave had been granted. The Judge appreciated it was drastic action but one which had to be taken in order to deter the father from continuing the litigation 'in a wholly excessive, oppressive, unreasonable and indeed abusive fashion.' This approach could be seen as similar to the one used in civil proceedings when applying to have a party named as a 'vexatious litigant' as per section 42 of the Supreme Court Act 1981.

However, the writer is of the view that with more measures available to try and keep contact going such as contact activity directions, warning notices and enforcement orders, applications inhibiting parties are more than likely to be used only in the most extreme and last resort cases.

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