In the Family Court
sitting at LIVERPOOL

Neutral Citation Number: [2024] EWFC 62 (B)
Case no: LV20P01742/PR21P00042

The Children Act 1989

The Children **X aged 10**
Y aged 9
Z aged 8

BEFORE HIS HONOUR JUDGE GREENSMITH

15 MARCH 2024

SECOND JUDGMENT on conclusion of an application under s8 Children Act 1989: An application for a s91(14) order

Upon hearing:

Mr John Ison (a McKenzie Friend to who a right of audience has been granted) for the Applicant Father and from the Father in person upon submissions; and,

Mr Gareth Thomas of counsel for the Respondent Mother.

HHJ GREENSMITH

The background

1. I have delivered a judgment finalising the father's application to vary a section 8 Child Arrangement Order made in 2018. In advance of finalisation of these proceedings the mother has made a formal application (by way of C2) for the court to make an order under s91(14) restricting the father form making further applications without first obtaining leave. The mother suggests a period of three years. The Guardian for the children supports the application and suggests seven years. The father does not agree that an order should be made.
2. I have decided to deliver a discreet judgment on the mother's application although it is in the context of the father's application being finalised.

The Law

3. For the benefit of the parents and the father in particular I will set out the law in full as it may assist the father better understand why I have made the decision I have.
4. By virtue of S91(14) and S91A the court may make orders restricting further applications to the court for a period of time.

   S91(14) provides:

   > (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.

   S91A supplements the provision:

(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") is at risk of harm.

(5) A section 91(14) order may be made by the court

(a) on an application made

(iii) by any person who is a party

(b) of its own motion

(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. (my emphasis)

4. There is guidance in the application of s91(14) dating back to *Re P* (2000) which has been put into a "modern context" by King LJ in *Re A (A CHILD) (supervised contact) (s91(14) Children Act 1989 orders)* [2021] EWCA Civ 1749. The essence of Her Ladyship's guidance is contained in paragraphs 32 to 39 of her judgment. I make no apologies for incorporating such a large extract of Her Ladyship's judgment; I deem this necessary so that the parties and the father in particular will have a full grasp of the legal principles involved in the hope that he will be best equipped to accept the order a I am going to make.

32. The classic statement of the legal principles at play when making a s91(14) order were set out by Butler-Sloss LJ in the form of guidelines in Re P (Section 91(14) (Guidelines)(residence) and Religious Heritage) sub nom: In Re P (A Minor)(Residence Order: Child's Welfare) [2000] Fam 15; [1999] 2 FLR 573 at p19. The guidelines are as follows: "Guidelines

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

(2) 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.

(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 in matters affecting his/her child.

(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 useful weapon of last resort in cases of repeated and unreasonable applications.

(6) 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 past history of making unreasonable applications.

(7) In cases under paragraph 6 above, 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.

(8) 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.

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

(10) 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."

King LJ continues:

... it is worth placing the Re P guidelines into a modern context and also considering how the provision in section 67 of the Domestic Abuse Act 2021 may impact upon the guidelines when the time comes for that section to be brought into force.

34. Although the guidelines have substantially withstood the test of time and have received the endorsement of this court on a number of occasions in the intervening period, the fact remains that they were set out in April 1999, some 22 years ago. In the intervening period the forensic landscape has changed out of all recognition. Amongst the many advances is the advent of the smart phone and of social media in all its forms. Of particular relevance in this context is the almost universal use of email as a means of instant communication. Another development of relevance is that as a result of the withdrawal of legal aid in the majority of private law cases, a large proportion of parents are unrepresented and therefore do not have, as the judge described it in the present case, the 'steadying influence' of legal advisors.

35. One of the consequences of these changes which is seen not uncommonly in private law proceedings is that the other parties, and often the judge him or herself, can be (and often are) bombarded with emails from a parent, whether male or female, who is representing him or herself. Such behaviour may be the result of anxiety but in other cases, as in this case, it is part of a campaign of behaviour by one parent against the other which amounts to a deeply disturbing form of oppressive behaviour on their part.

36.Regardless of the motivation, behaviour of this type, as exhibited by the mother in this case by way of an example, is deeply distressing to the parent who is the subject of such abuse and litigation at this level and is highly debilitating to each of the parties and to their children. All too often such communications are ill-considered and ill-judged with the consequence that every minor dispute or misunderstanding is met with an application to the judge. More importantly, the distress and anxiety caused to the other parent and to the children at the centre of such a raging dispute cannot be overestimated, nor can the damaging consequences where the focus of the litigation veers away from what, on any objective view, would and should be regarded as the real issues going to the welfare of the children concerned.

37. I referred to similar problems in a civil context in Agarwala v Agarwala [2016] EWCA Civ 1252 where I said at [72] that:

> *"Whilst every judge is sympathetic to the challenges faced by litigants in person, justice simply cannot be done through a torrent of informal, unfocussed emails, often sent directly to the judge and not to the other parties. Neither the judge nor*

the court staff can, or should, be expected to field communications of this type. In my view judges must be entitled, as part of their general case management powers, to put in place, where they feel it to be appropriate, strict directions regulating communications with the court and litigants should understand that failure to comply with such directions will mean that communications that they choose to send, notwithstanding those directions, will be neither responded to nor acted upon."

38. Even though every family judge has the case management powers to which I referred in Agarwala, often even strict directions designed to limit the torrent of emails have no effect. The easy accessibility to the court and the other parties as a result of emails means that Guideline 5 in Re P which says that s91(14) orders are: 'generally to be seen as a useful weapon of last resort in cases of repeated and unreasonable applications', has even more resonance now than it did in 1999. It seems, however, that the phrase 'weapon of last resort', when put together with Guideline (4) which says that: 'The power is therefore to be used with great care and sparingly, the exception and not the rule', has led to an understandable, but perhaps misplaced, reluctance for judges to make orders under s91(14), save for the most egregious cases of which, on the facts as found by the judge, this is one.

39. Although an order made under s91(14) limits a party's ability to make an application to the court, the court's jurisdiction to make such an order is not limited to those cases where a party has made excessive applications, although that will frequently be the case. It may be that there is one substantive live application but that a person's conduct overall is such that an order made under s91(14) is merited. This situation is anticipated by Guideline 6 of Re P: '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 past history of making unreasonable applications.' In my judgment the sort of harassment of the father seen in this case, in the form of vindictive complaints to the police and social services, is an example of circumstances where it would be appropriate to make an order under s91(14), even if the proceedings were not dogged by numerous applications being made to the judge.

40.Further, the guidelines do not say that a s91(14) order should only be made in exceptional circumstances, rather Guideline 4 says such an order should be the 'exception and not the rule'. That is of course right, there is no place in our child focused family justice system for any sort of 'two strikes and you are out' approach, but it seems to me that in the changed landscape described in paragraph 30 above there is considerable scope for the greater use of this protective filter in the interests of children. Those interests are served by the making of an order under s91(14) in an appropriate case not only to protect an individual child from the effects of endless unproductive applications and/or a campaign of harassment by the absent parent, but tangentially also to benefit all those other children whose cases are delayed as court lists are clogged up by the sort of applications made in this case, applications which should never have come before a judge.

41. In my judgment in many cases, but particularly in those cases where the judge forms the view that the type of behaviour indulged in by one of the parents amounts to 'lawfare', that is to say the use of the court proceedings as a weapon of conflict, the court may feel significantly less reluctance than has been the case hitherto, before

stepping in to provide by the making of an order under s91(14), protection for a parent from what is in effect, a form of coercive control on their former partner's part.
42. The guidelines in Re P should now be applied with the above matters in mind and in my judgment the prolific use of social media and emails in the modern world may well mean that orders made under s91(14) need to be used more often in those cases where the litigation in question is causing either directly or indirectly, real harm.

43.It is not for this court to presume to interpret or to purport to provide a commentary upon a section in an Act which is not yet in force and in respect of which statutory guidance has yet to be published. It is worth however noting that the proposed new section 91A dovetails with the modern approach which I suggest should be taken to the making of s91(14) orders. In particular the provision at section 91A(2), if brought into effect, gives statutory effect to Guideline 6 of Re P (see para 39 above) by permitting a s91(14) order to be made where the making of an application under the Children Act 1989 would put the parent or child at risk of physical or emotional harm.
46.Under section 91A(4) when considering whether to grant leave the court will consider whether there has been a material change of circumstances. Again, this would put the current approach to the granting of leave on a statutory footing.

5. *While it has frequently been the case that applications for leave have been heard without notice this issue was addressed by Sir Andrew Macfarlane P in Re S (CA 1989, s91(14) where the President confirmed and earlier decision by Cobb J that an application for leave under s91(14) should be heard on notice to the other party.*

   On notice to the other party would not include the children at that stage. This is a significant protective factor as an application to vary a s8 order could involve the children to some extent as Cafcass would be required to prepare a safeguarding letter for the court for the first hearing. depending on the information provided with the application Cafcass may consider it appropriate to obtain information from the children directly, depending upon their age and understanding.

Factual context

6. The father has a propensity to resolve issues through litigation. The father has a publicly documented history of resorting to litigation to resolve issues. There are 10 cases reported on Bailii. The father is the applicant/appellant in each case. Three cases are family cases in the Court of Appeal regarding the father's earlier family proceedings; two are cases in the High Court (Administrative Court); others are in the Employment Tribunal and the Employment Appeals Tribunal. The father has often been a litigant in person in these proceedings. This court makes no comment as to the appropriateness, merits or outcome of any of these proceedings. They are merely referred to demonstrate the father's familiarity with the court process and his willingness to pursue his causes through the courts. I have prepared a hyperlinked list of the cases which will remain in the court file in the event they are required by a court considering either an appeal against this order or a future application made by the father.
7. In the current proceedings the father has made eight formal applications by C2 or C79. He has sent many emails (around 25) to the court which he has asked to be referred to myself. These have invariably been long (several pages of A4 in close type) and complex emails which the court staff have been required to refer to me. The court staff cannot be expected to determine whether emails should be referred to a judge when a litigant in person has asked that they be so. Having received the emails, I have been compelled to read them as I had to establish if a response was necessary. Each

letter has taken well over an hour of court and judicial time which could have been better spent on other cases.

8. The father has applied for leave to appeal to the High Court against three case management orders made by me: 25 January 2023, 19 April 2023 and 3 March 2023. Each application has been dismissed as totally without merit by Sir Jonathan Cohan. In respect of the last application Sir Jonathan ordered:

> *"This is the third application by the applicant which has been dismissed as totally without merit. On any further such application consideration will be given to a Civil Restraint Order";*

I am unaware of any further application for leave to appeal being made following this last order.

9. The father has a diagnosis of autism. This gives rise to two considerations relevant to this application. Firstly it has resulted in in participation directions which have proved difficult to arrange and which have involved a considerable use of court resources. All hearings have been held remotely with the father in the court building in a room reserved for his purpose where he has attended with his intermediary and his Makenzie Friend. This accommodation has been difficult to arrange as small conference rooms were deemed inappropriate. The final hearing was conducted with the father located in the court's main conference / meeting room making it unavailable for its usual use by the Judiciary and HMCTS for the entire week. During hearings the father would frequently say has was having an autistic meltdown which caused adjournments and further delays.

Analysis

10. The father has a voracious appetite for litigation; in my judgment, his litigation conduct amounts to what King LJ has described as *"lawfare"* [para 41].
11. It is not the concern of this court how the father conducts his own affairs where his conduct does not affect the welfare of the children. However, where the conduct does affect the welfare of the children the court has a duty to take whatever protective measures it can.
12. Where there is conflict between the rights of the father and the children (Arts 6 and 8) I give priority to those of the children.
13. Whenever children are engaged in litigation it has an adverse effect on their welfare. It is an adverse childhood experience. To be involved in prolonged litigation between waring parents is likely to cause significant harm.
14. Apart from the direct harm recurrent court proceedings cause children there is a more nuanced issue. The children in this case are aged between 6 and 11. They are all highly intelligent. Two have been diagnosed as autistic. The third is awaiting his assessment for ADHD. The children have been the subject of private court proceedings brought by their father for 18 months in the first application and nearly four years in these proceedings. The children are very aware of the proceedings; they have been the subject of intervention by Cafcass, NYAS (as court appointed guardian) and the local authority (following a section 37 referral with interim care orders made under s38 CA 1989). It is likely the children will have lost a significant amount of confidence in their own parents' ability to parent them without court support and intervention, I fear the children may regard the court (and probably the judge) as a third parent. This cannot be right. It must be detrimental the children's welfare.
15. During the final hearing, I implored the parents to reach an agreement. Through their counsel I stated that the best outcome would be for the parents to be able to tell the children they had reached an agreement on all issues. I hoped that if this was possible it would go some way to restore the

confidence in the children in their parents' ability to parent without having to be told what to do. The main sticking point in reaching an agreement was the father holding out that he wanted a shared care arrangement with one of the children. This was a wholly unreasonable position to maintain and one which the mother would (quite rightly) never agree to. The father even went so far as to submit in his closing submissions that in default of a shared care the child's residence should be transferred to the father; a suggestion so far removed from reasonableness that it throws into question the father's overall ability to judge how the welfare of his child should be served.

16. Where a party brings an application before the court it is for that party to prove its case based on evidence presented. Where a court makes an order of its own motion it is open to the court to rely upon its own experience of the parties to evaluate whether the relevant test is met and whether the making of such an order serves the welfare of the children. I make this observation because the father has submitted that the mother has failed to support her application with any or sufficient evidence. In so far as this may be accurate, in that the mother has relied on submissions made by her counsel, I make it clear that the order I will make is made both on the application of the mother and of the court's own motion. It is for the latter reason that I am justified making judicial comment on the father's conduct throughout this application and upon his involvement in other litigation which I have supported by reference to law reports which are in the public domain.
17. In my judgment, based on my very extensive experience of the father over the last two years, he is consumed with his own diagnosis of autism. This is a constancy throughout the proceedings. It is exemplified by the repeated reference to this during the father's oral submissions. It is the father's stated belief that because he is autistic, he is the better placed parent to help the children adjust to their neurodiversity. I have always accepted unreservedly the father's professional diagnosis of autism. I am firmly of the view, and have stated this in a previous judgment that the mother is equally equipped to care for the welfare of the children at all levels and this includes their neurodiversity. I fear the father's position may become stronger as time goes on and as the children grow older; he may use this to justify further applications. I make this point now, having regard to the President's comments in <u>*Re S*</u> that:

    > *It would be wrong to determine [a] leave application without having full sight of the reasons that led to the s91 order being made in the first place.*[15]

18. Making an order under s91(14) would not be a simple filter against unmeritorious applications, thus causing further costs and usage of court resources (which it would), it would be a filter to guard against the children suffering significant harm arising from such applications. I remind myself that these are highly vulnerable children with extreme behavioural disorders. They need stability throughout their childhood.
19. Neither would making an order simply allow for a settling period; it would give the children real stability for as long as they need it.
20. It is the father's case against making an order that it would cause an unnecessary layer of court applications and might well delay the court dealing with a truly meritorious and urgent application. In my judgment the extra layer of application would be resources and time well spent if it meant the children were protected from further exposure to harm caused by unnecessary applications.
21. Should the court be required to adjudicate on a truly urgent matter, there is no doubt it would do so. An application for leave can be made urgently and if granted (probably on paper in those circumstances) a substantive application could swiftly follow.

<u>Conclusion</u>

22. Having the children's welfare as my paramount consideration it is in my judgment necessary and proportionate to make an order as asked by the mother. I fear that if an order were made for any period less than each child reaching the age of sixteen it would not be sufficient to serve their

welfare throughout theor childhood. The purpose of this order is primarily to avoid the children being put at further risk of harm. It may be that further applications are necessary for the children, but to avoid further harm by making this order the father will first have to demonstrate a material change in circumstances *S91A(4)*. This requirement is necessary to protect all three children.

23. I repeat what I have said in my judgment finalising the father's application to vary the order made in 2018.

> *As a postscript I pause to consider what the father has achieved by his application to vary an order made in 2018: two of the children remain living with their mother and have contact with their father. The oldest child has moved to live with his father which he would probably have chosen to do without these proceedings. The children are receiving appropriate education provision; this is not a result of the proceedings. That the children have received medical assessments is not a result of these proceedings. In my judgement this application has achieved nothing to further the welfare of the children. It has only caused emotional harm to three vulnerable children who are totally reliant on their parents to provide them with stable and good enough parenting.*

24. To inform any future application by the father for leave to make an application in respect of any of the children I set out what I consider to be the key elements which the court may consider should be the considerations to assess whether there has been a material change in circumstances. This list is not intended to be exhaustive, prescriptive or mandatory and is not intended in any way to limit or fetter any future judicial discretion. In my judgment the key prevalent facts are:

A. X wishes to remain living with his father as he finds it difficult to live with his mother while his siblings live with her.
B. The children have direct contact with the parent they do not live with at a level that meets their needs.
C. The children have a sibling relationship which can manifest in sibling conflict.
D. Y is living with his mother who is providing good enough care for him.
E. Z is living with his mother who is providing good enough care for him.
F. The father is autistic and is convinced that he is the parent better placed or assist the children with any symptoms of neurodiversity that they may have.
G. Z and X have diagnoses of autism.
H. Y is being tested for ADHD: this order is made on the basis that there is a real possibility that Y may suffer from ADHD and may be autistic.
I. The children receive education provision which meets their needs as assessed by education professionals.
J. The parents have difficulty in communicating regarding the children's welfare.
K. The father lacks understanding of what living arrangements best serve his children's welfare.

END