RE C-J (SECTION 91(14) ORDER) [2006] EWHC 1491 (Fam)

Family Division

Coleridge J

10 April 2006

Contact – Appropriateness of s 91(14) order – Exercise of district judge's discretion

The father applied for contact with his 8-year-old daughter. The district judge ordered 12 months of indirect contact only, to consist of the father writing no more than once a fortnight. The district judge also made an order of his own motion, without giving notice to the parties, under s 91(14) of the Children Act 1989, restricting the father from making any further applications in relation to child, including contact and parental responsibility applications, for a 12-month period. The rationale for the s 91(14) order was to give breathing space to the mother who had been very distressed at the hearing (as had the father). The father argued that the s 91(14) order should not have been made without notice, and that had he known that the judge was considering the making of such an order he would have sought to submit expert evidence, in particular a report from the Domestic Violence Intervention Project (DVIP). A report from the DVIP indicated that the father represented a low physical risk and a moderate risk of emotional harm to the mother and did not represent any physical risk to the daughter in the event of direct contact and recommended a 6-month period of indirect contact, on the basis that the court would consider limited supervised contact thereafter.

Held – allowing the appeal to a limited extent and adjourning the father's application for contact –

(1) The judge should not have made a s 91(14) of the Children Act 1989 order of his own motion without proper notice. An application under s 91(14) had to be issued in advance and supported by evidence. This was not a case involving urgent or exceptional circumstances and the court should not have ignored the usual procedural steps of an application on notice supported by evidence (see para [19]).

(2) The discretion exercised by the judge had also been flawed in that this was not a case in which the father had made repeated unreasonable applications to the court. The father's conduct did not suggest that he was bringing proceedings in an abusive way or would threaten to do so in future. Indeed, the reports before the court indicated that he was genuine in his desire to seek contact, and that he had not deliberately flouted orders in relation to contact thus far (see para [20]).

(3) It was exceptional to adopt a remedy under s 91(14) when it was contemplated that the proceedings would not come to an end and it was not appropriate to do so in these circumstances, when there was an ongoing application of this kind (see paras [22], [26]).

(4) The balance between the father's rights and the mother's anxieties had not been struck; the order had gone too far in terms of protecting the mother and had not kept alive the father's legitimate expectation that one day he should have some contact with the daughter other than merely indirect contact (see para [26]).

Statutory provision considered
Children Act 1989, s 91(14)

Cases referred to in judgment
Cordle v Cordle [2001] EWCA Civ 1791, [2002] 1 WLR 1441, [2002] 1 FLR 207, CA
F (Restrictions on Applications), Re [2005] EWCA Civ 499, [2005] 2 FLR 950, CA

P (A Minor) (Residence Order: Child's Welfare), Re [2000] Fam 15, [1999] 3 WLR 1164, sub nom *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573, [1999] 3 All ER 734, CA

Rhiannon Lloyd for the applicant
Laura Scott for the respondent

Cur adv vult

COLERIDGE J:

[1] This is an appeal by a father, DJ, from an order of District Judge Crichton made at the Inner London Family Proceedings Court on 22 December 2005. By that order the district judge, of his own motion, placed a restriction on the father's ability to make any further applications to the court pursuant to s 91(14) of the Children Act 1989. The order was made in the context of an application by the father for contact to his daughter, J, born in May 1998, so she is rising 8.

[2] The basis for the learned district judge's order is set out in his reasons which are in the bundle before me. The hearing itself took place on 20 December 2005 and he produced the reasons within a day or so of the hearing. The principal basis for challenge by the father of the district judge's order is that it was made on the district judge's own motion and his initiative. That is apparent from the reasons which he gave. The essential rationale for his order was, I think, to provide the mother with breathing space, using his own language, in the proceedings.

[3] The first thing to remind myself about in relation to this appeal is, of course, that it is not a re-hearing in the sense that I am not carrying out the same function as the district judge. My task, in accordance with the case of *Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 FLR 207 is to review the hearing that took place in front of the district judge and only in certain narrowly defined circumstances would or should this court interfere with the discretion of the first instance judge.

[4] Summarising the position, those defined circumstances are that, first, there was some procedural irregularity. Secondly, that the court failed to take into account something which it should have taken into account or took into account a factor which was irrelevant and, thirdly, and more commonly, an appeal can be entertained if the decision by the first instance judge was plainly wrong. I remind myself that that is my limited function today. It is not to reconsider in detail the evidence behind the decision which the judge came to or to interfere with any findings of fact which he made.

[5] It is apparent on the face of the reasons that the hearing proceeded, if I may say so, in the conventionally unconventional way that contact applications of this kind very often do proceed. In other words it was a hearing which consisted largely of submissions and discussion between the judge and counsel as to the best way forward. There was no evidence called, as such, on either side. The district judge read the documentary evidence which had been filed, then, as I say, he undertook the kind of hearing with which those who deal in these exceptionally difficult matters very often do undertake, that is to say an attempt by discussion to try and see whether there was some common ground as to the way forward.

[6] The district judge refers to the fact, in his reasons, that the matter appeared in a busy list in front of him and he describes it as a difficult hearing. The reference to the difficult hearing, I think, was to the fact that the father in particular became very upset at certain stages in the proceedings as indeed did the mother. The mother was so distressed, apparently, that on one occasion she left the court although this was a reaction which did not, I think, take him particularly by surprise. Accordingly, having heard from counsel, he decided that the order which he would impose was indirect contact for a further period, together with a restriction on the father's ability to apply to the court for a period of 12 months without his leave. That is the part under appeal.

[7] The precise terms of the order pursuant to s 91(14) of the Children Act 1989, are that the father, DJ, should make no further application for parental responsibility, misspelt in fact in the order, nor contact, nor any other application in relation to J during the next 12 months without the leave of the court. Then, as I say, in parallel to that, indirect contact may continue by the father, DJ, writing to J no more than once a fortnight for the next 12 months.

[8] The background to the hearing that took place before the district judge was very long and difficult and counsel, Miss Scott for the mother, has very helpfully summarised it in the first part of that argument. She sets it out over the first 14 paras of her skeleton argument, and I do not propose to repeat all the various steps that have been taken or hearings that have taken place. What is absolutely clear is that the district judge was dealing with this case himself and providing the highest degree of judicial continuity which any litigant could expect. He had dealt with the case on numerous occasions in the past and had been doing his best to develop the application by the father for contact to his daughter.

[9] The principal ground and argument by Miss Lloyd, on behalf of the appellant father, is that she was not expecting to have to deal with this s 91(14) of the Children Act 1989 application until she arrived at court that morning. The application had not been issued by the mother and had she known that the s 91(14) application was going to be advanced she would have wanted to have evidence from the experts who had been involved in the process. There were, in particular, two experts whose evidence was especially relevant to the s 91(14) application. The first was the expert with whom the father had been engaged under the Domestic Violence Intervention Project (DVIP) on which he had been engaged for some very considerable time, Mr Roberts. She would have wanted the court to have heard from him and, secondly and equally importantly, she would have wanted to have a further chance to explore the evidence which was before the court in the form of a fairly brief statement from a Mr Rob Bell-Cross.

[10] Mr Bell-Cross, who is counsellor coordinator at the West London Centre for counselling, had produced on one side of paper, a statement which was before the court which said that Miss S was seen by him on 16 November 2005 to explore these issues further and to see if counselling would be an appropriate course of action for her. He said Miss S has been deeply affected by the violent behaviour of her ex-partner and was experiencing high levels of anxiety about an on-coming court case. The report says she is very fearful that the court proceedings may result in her ex-partner being granted unrestricted access to her daughter which she feels will be very detrimental to the well-being of the child. As her depression and high anxiety levels are having

an impact on her day-to-day life, it was agreed that Miss S should undergo counselling to address some of the issues she raises.

[11] Counsel for the father says that was a statement which was before the court which she would have wanted to explore. Furthermore, she says that so far as the father's position was concerned there were no fewer than two reports from the DVIP programme and that the latest one, dated 16 December 2005, specifically advocated a way forward so far as contact to J was concerned. In particular it suggested a date in the future, not immediately following the date of the court hearing, for which supervised contact should be considered upon certain conditions being fulfilled.

[12] Miss Lloyd also relies upon the conclusions of the second of those reports, namely that in his opinion Mr Jones represents a low risk of physical harm to Miss S and he does not think he presents any risk of physical harm towards J. There remains, however, a moderate risk of emotional harm to Miss S if direct contact takes place now. He goes on to recommend that there should be a period of 6 months when indirect contact should be in place and following that the question of some kind of very limited supervised contact should be considered by the court.

[13] Miss Lloyd says that in the light of those recommendations by the expert it was an improper use of s 91(14) of the Children Act 1989 to impose a 12-month bar on the father making any application at all, together, of course with the necessary procedural hurdle being included that he would first have to apply to the judge before any such further application could be contemplated.

[14] Miss Lloyd sets out the well-known cases in relation to the exercise of the court's powers under s 91(14) and in particular, of course, the well-known case of *Re P (A Minor) (Residence Order: Child's Welfare)* [2000] Fam 15, sub nom *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573 where the former President of the Family Division, Dame Butler-Sloss LJ, set out the guidance to the judiciary upon the way in which these applications should be handled and the factors which should be considered by courts when these matters come before them.

[15] Miss Scott, on behalf of the mother, says that this is a case with a very long history. The decision of the district judge was well within the bounds of decisions which he felt were appropriate for him to make if he felt they were the right ones and the court should not interfere with the exercise by the judge of his discretion. She, of course, highlights the very long, difficult and involved history which the court has been faced with in relation to this difficult matter. While she accepts that this was not an application made by her client, it was an application made by the court of its own motion, nevertheless that was something which the court could, in the circumstances, contemplate. She says that the judge was in a peculiarly good position to make an assessment of what the right way forward was and the court should be very slow to interfere.

[16] The first important point that I would make in relation to this appeal is that it lies from one of the most experienced judges sitting in the courts in London at the moment. There are few judges who have the depth and length of experience of this particular district judge sitting in this particular jurisdiction. I would be extremely slow to interfere with any order that he made, particularly in circumstances where he has, as he has in this case, had

the conduct of the proceedings for years. His reasons are set out in his judgment and so I would be extremely slow to interfere with any order that he made in the circumstances of this particular case.

[17] His essential reasoning, as I have already indicated, is that the mother needed breathing space. What he says is this:

> 'Having heard submissions I indicated that one of the possibilities for this court would be to relieve the pressure on mother for a longer period than six months, to allow her and J a period of twelve months of receiving regular written contact from the father (together with the promised maintenance payments) and to leave the onus upon father to reinstitute proceedings at the end of that period if he has managed to sustain commitment. I suggested that I might consider making an order under section 91(14) for a period of twelve months to ensure that mother and J have breathing space.
>
> This suggestion was opposed on behalf of father, and he himself started to become quite angry and distressed. I made it clear that I was merely extending the suggested period by six months to allow mother and J some respite from these proceedings, and the court was in no way trying to sever father's connection with J. Father's anger began to increase.'

[18] He then, by way of a postscript in his judgment, amplifies upon the father's distress at the conclusions that he had reached. His decision is this:

> 'Having considered everything that I have read, and everything that has occurred in court, I conclude that the course that I have been suggesting is the right course in all the circumstances, and in J's best interests. Accordingly I make an order that indirect contact may continue, father writing to J no more than once a fortnight for the next twelve months.'

He goes on to express the hope that the DVI programme will assist him to write and also that the solicitors on both sides will have to resolve these matters between them. He goes on:

> '… I am aware that in the short-term neither mother nor father will be represented because this would be an end of these proceedings.'

He says in relation to s 91(14) of the Children Act 1989:

> 'I am aware that it is extremely unusual to make such an order. However, in the light of my observations about mother's distress during the course of the hearing I believe that it is in the court's responsibility to ensure that no further proceedings are brought during the next twelve months. I therefore order that father should make no further application for parental responsibility or for contact, nor any other application in relation to J, during the next twelve months without leave of the court. In the event of father seeking to make such an application during the next twelve months I would hope that the matter is placed before me if possible.'

[19] Those were his essential reasons lying behind the order which he made. I have come to the conclusion that despite the very exceptional circumstances of this case, in the sense that the district judge had been in charge of the case for the period that I have already indicated, this was not an order which he should have made without notice to either side in advance. The court has said repeatedly, and I was shown a case as recent as 2005, *Re F (Restrictions on Applications)* [2005] EWCA Civ 499, [2005] 2 FLR 950, that these applications should be made properly, issued in advance and supported by evidence. That was not the situation in this case and I cannot find that this case was in such an exceptional category or there was such an urgency that it was open to the court to ignore the usual procedural step, namely the issue of the application on notice supported by evidence.

[20] So I find that the district judge had gone rather further than he should have done procedurally in the circumstances. I am also inclined to interfere with his discretion as this was not a case where there had been repeated unreasonable applications to the court by the father. It was unquestionably in that category of contact applications where there were very, very real, intractable difficulties, but the father had not indicated, it seems to me, by his conduct of the proceedings as opposed to his conduct outside of the proceedings, that he was bringing these proceedings in an abusive way or that he threatened to do so in the future unless he were prevented by order.

[21] The reports before the court do indicate that he is genuine in his desire to seek contact with his daughter and they also indicate that he has not deliberately flouted orders in relation to contact thus far. Accordingly, it seems to me that the discretion exercised by the district judge was flawed.

[22] I would say further that it is exceptional to adopt a remedy under 91(14) of the Children Act 1989 when it is contemplated, as here, that the proceedings in fact will not come to an end. This is just another further step along the way. The father has indicated that he was not pressing on the day and is not pressing today for direct contact, but he is pressing for indirect contact. The court has made an order to that effect and it is contemplated, certainly by the DVIP report, that some kind of very restricted, supervised contact might be considered within months if the father demonstrates his commitment by indirect contact.

[23] I am told by Miss Lloyd that it presents particular difficulties to this father because of his own lack of reading and writing skills but I do not myself think that should, in the circumstances, be a complete bar on his ability or a reason why he should not be able from time to time during the period contemplated, namely the 6-month period, to make efforts (with help) to communicate with his daughter and to demonstrate the commitment which the court was and would be looking for.

[24] Accordingly, it seems to me that the district judge went too far and the court is entitled to look at the order which the district judge made afresh and that I would propose to do. I have, of course, been helpfully referred to all the very clear guidelines set out by the court in *Re P*. They are set out in the *Family Court Practice* (Family Law, 2006). I have them very well in mind. I particularly have in mind the following, 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. The third one, an important consideration, is that to impose a restriction is a statutory intrusion

on the right of a party to bring proceedings before the court and to be heard in matters affecting his/her child. Fourthly, the power is therefore to be used with great care and sparingly, the exception and not the rule. Fifthly, it is generally to be seen as a weapon of last resort in cases of repeated and unreasonable applications. Of course, any attempt to define circumstances in which this very useful power is or is not employed always falls foul of some specific factor, but I do bear those matters very much in mind. However, I think, as I have indicated, that on this particular occasion this extremely experienced district judge went further than he should or needed to in the circumstances.

[25] The order which I propose to make in its place is merely to adjourn the father's application for contact until the first open date after 1 September 2006; the matter to be refixed by the father on application to the court.

[26] I make the order in that form because the father must be alive to the particular considerations which the DVIP report mentions he should comply with before the question of supervised contact should be considered further by the court as a matter of reality and practicality. However, I do not think it is appropriate in the circumstances to employ s 91(14) of the Children Act 1989 in a situation where there is an ongoing application of this kind. I am, of course, acutely conscious that these proceedings place an enormous strain on all the parties and I am acutely conscious of the reports that are before the court about the mother's own anxieties. The court always has to strike a balance. In this case I think the balance went too far in terms of protecting the mother and not keeping alive the father's legitimate expectation that one day he should have some contact to his daughter other than merely indirect contact. Accordingly, I will allow the appeal to that limited extent.

Appeal allowed in part.

Solicitors: *Glazer Delmar* for the appellant
Farrell Matthews & Weir for the respondent

NATASHA WADSWORTH
Law Reporter