Neutral Citation Number: [2021] EWCA Civ 1749

Case No: B4/2021/1398

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHELMSFORD COUNTY COURT AND FAMILY COURT
Her Honour Judge Dawson
CM18P02988

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2021

Before:

LADY JUSTICE KING
LORD JUSTICE NEWEY
and
LORD JUSTICE ARNOLD

- -

Between:

Re A (A CHILD) (supervised contact) (s91(14) Children Act 1989 orders)

- -
- -

Maria Scotland (instructed by **The Family Law Company**) for the **Appellant**
1st Respondent appeared in person
Andrew Bagchi QC and Matthew Fletcher (instructed by **David Wilson Solicitors**) for the **2nd Respondent, the Children's Guardian**

Hearing date: 12 October 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 11:00am on 23 November 2021.

Lady Justice King:

1. This is an appeal by the mother against orders made by HHJ Dawson in private law proceedings in relation to her daughter, A, who is rising 7 years of age. The orders now challenged were made on 20 May 2021 and:

    i) Provided that A should live with her father by the final confirmation of an existing interim order made in August 2019;

    ii) Provided for ongoing contact by A to her mother on a professionally supervised basis every fortnight for up to 6 hours;

    iii) Prohibited any further application under the Children Act 1989 being made in relation to A for a period of 2 years without the permission of the court pursuant to section 91(14) of the Children Act 1989 ('s91(14)').

2. By an application notice filed on 15 June 2021, the mother applied for permission to appeal against each of the orders made including the refusal to grant an adjournment. Because the application was made from orders made by a Tier 2 Circuit Judge in private law proceedings, the avenue of appeal was to a judge of the High Court under Part 30(8) of the Family Procedure Rules 2000 ('FPR').

3. On 9 August 2021, Cohen J granted limited permission to appeal, restricting the appeal to the question of contact and the making of the s91(14) order. He refused permission to appeal against the order confirming that A should live with the father or the refusal by the court of the mother's application for an adjournment. Pursuant to FPR r 30.13(1)(a), the appeal was transferred to the Court of Appeal, Cohen J having considered that the appeal raised an important point of principle or practice.

4. The mother subsequently applied to renew her application for permission to appeal based on the rejected grounds at an oral hearing. The hearing took place on 5 October 2021 at which Cohen J refused the application.

5. The issues before this court are whether the judge was:

    i) wrong to make a supervised contact order without specific provision for that contact to progress to unsupervised contact and if not;

    ii) whether, in any event, the making of an order under s91(14) coupled with a supervised contact order placed an impermissible fetter on movement towards unsupervised contact and to the development of a more natural relationship between mother and child.

Background

6. The mother is originally from Hungary. She is a medical doctor and intermittently works in hospitals on locum contracts in various parts of the country. The mother has three children from earlier relationships.

7. The mother and father formed a relationship in 2013 and A was born in 2015. In April 2017, the mother returned to Hungary leaving the four children in the care of the father. Six months later, she returned to this country and announced her intention to relocate

to Hungary taking all of the children with her. The father immediately applied for a prohibited steps order to prevent this but it would appear that the parties reconciled before an order was made.

8. In May 2018, the father agreed to the mother taking A to Hungary for two weeks for the purpose of A undergoing medical treatment. The other children remained in England with the father. A was not returned in accordance with the agreement. In August 2018 the mother told the father that their relationship was over and in October 2018, A not having been returned to this country, the father issued child abduction proceedings for the return of A to this jurisdiction. In fact, unbeknownst to the father, the mother had already returned to this country and in October 2018 she made an application for a child arrangements order and offered the father one hour's contact each week to be supervised by her. The mother's unsettled lifestyle continued, she moved to Hastings without informing the father and then in June 2019, she moved to Northern Ireland. The father first became aware of the mother's relocation when a Northern Irish contact centre contacted him to inform him that contact would now take place in their premises in Northern Ireland. The mother subsequently failed to comply with a court order to return A to England and to surrender A's passport.

9. As time went on concerns about A's welfare were such that a Children's Guardian was appointed to represent A's interests in what was to prove to be long running and destructive private law, child arrangements proceedings. Eventually, sufficiently worried about A's welfare in the care of her mother, the Children's Guardian took the most unusual step of making an urgent application for the residence of A to be forthwith transferred to the father. The application was granted by the judge on 21 August 2019 and subsequently appealed by the mother. The mother's appeal against the transfer was dismissed by Cohen J and A has lived with her father ever since.

10. At a finding of fact hearing in October 2019, the judge held that the mother had deliberately placed barriers in the way of the father having a natural relationship with A by taking planned and covert steps to relocate some distance from the father.

11. Following the finding of fact hearing, a direction was given for a Dr McCartan to carry out a psychological assessment of the mother. In the meantime, as the mother was still in Northern Ireland, telephone contact was ordered to take place with A twice a week. In January 2020, the Children's Guardian was once again driven to make an urgent application to the court, this time to suspend the telephone contact following an incident during the mother's allocated phone call when A was questioned by a police officer from Northern Ireland about the mother's (wholly unfounded) allegations of sexual abuse of A by the father.

12. Supervised contact took place thereafter, but no telephone contact was allowed. By March 2020, the mother was expressing further concerns and making allegations about A's physical and mental health and her development to her GP and Social Services. The mother's focus was, and remains, that A is not putting on enough weight in the care of her father and that she is living in a sexually inappropriate environment. By way of example, the mother vehemently disagreed with a diagnosis of thrush made by A's GP, attributing it to her having been exposed to inappropriate sexual conduct whilst in the father's care. The mother's persistent complaints finally led to the GP referring A to a paediatrician, Dr Filby, who carried out a physical examination of A. At that examination, Dr Fliby found nothing untoward, either physically or developmentally.

The court nevertheless agreed to appoint a further paediatrician, Dr Chawla an expert chosen by the mother, who in due course filed a report in the ongoing proceedings.

13. In her judgment, the judge summarised the endless applications and the deluge of email correspondence, which had been forthcoming largely from the mother, during the course of the proceedings. Emails making allegations against the father were sent to the court, the school, the GP, social services and to the police. In addition, the mother made formal complaints to the professional bodies of the psychologist Dr McCartan, the paediatrician Dr Filby, the solicitor representing the child and the Child's Guardian themselves. Informal complaints were also made towards counsel representing the child. By the time the matter came on for trial, the papers in what should have been a straightforward child arrangements dispute, ran to six lever arch files.

14. Dr Chawla gave evidence. She had not carried out a physical examination of A herself given the restrictive Covid-19 environment, but this did not present any difficulties given that A had only recently been seen by Dr Filby. Dr Chawla had had access to all the medical records and the benefit of Dr Filby's recent report. Dr Chawla was cross examined at length and her evidence, which was accepted by the judge, was that there was no concern with regard to A's weight, that her progress is now steady and it is in her genetic make up to be small. Dr Chawla had no other concerns and noted that when Dr Filby examined her, A had presented as 'articulate, active and imaginative'. The judge, having heard the evidence of Dr Chawla, accepted that although A's weight had plateaued in the summer of 2019, it was not attributable to the father's care and noted that her weight now continues to grow in congruence with her height.

15. When cross examined about alleged sexualised behaviour, Dr Chawla was robust in her view. She said that an intimate examination of A, a year after she had had vaginal thrush was not warranted. Many children, she said, attend A & E with thrush and exhibiting symptoms of itching and scratching. She added that: 'we do not refer a child for a sexual examination if there is no cause. It will traumatise the child'. The judge was equally clear and having set out the mother's allegations of either the sexual abuse or sexual exploitation of A by the father, concluded in robust terms that there was not a 'shred of evidence' that the father is a sexual risk to A.

16. The court also heard from Dr McCartan, the clinical psychologist approved by the mother to conduct the assessment of her. The judge set out the findings of Dr McCartan in detail between paragraphs 60 – 70 of her judgment and it is unnecessary to rehearse them here. Dr McCartan concluded that the personality disturbance of the mother which she had identified in her report, meant that she had been exposing her children to 'maltreatment without being aware of the impact of her behaviours and presentation on her children'. The children, Dr McCartan said, had a 'lack of stability. Suffered a lack of respect for their education process, were exposed to conflict and did not have their needs consistently met, including their needs to have a relationship with their respective fathers.' Dr McCartan considered that the mother was 'highly unlikely to engage in therapeutic intervention aimed at helping her to address her personality issues'. It was Dr McCartan's view that the mother regarded therapy as a sign of weakness and did not perceive that there was a problem.

17. Dr McCartan went on to express her professional opinion that the mother would derive great benefit from DBT (Dialectical Behavioural Therapy) by way of a 24-month programme which is, she said, highly useful in the treatment of emotional

dysregulation. Absent therapy, Dr McCartan said, it would be likely that the mother would continue to engage in conflict with A's father and to involve the court process. Dr McCartan was clear that contact needed to be supervised until DBT was completed 'which in itself would provide motivation for the mother to engage in the work'. Assuming the mother engaged in and made progress in the therapy, contact could be increased, and supervision reduced.

18. The judge accepted the evidence of Dr McCartan which had been the subject of 'intense scrutiny' by counsel.

19. The Children's Guardian gave evidence and was also subjected to detailed and vigorous cross examination on behalf of the mother; she too was absolutely clear that any contact had to be supervised and said that direct unsupervised contact would be much more damaging than not having any face to face contact.

20. The judge gave a lengthy and detailed judgment before confirming that A should live with her father and have professionally supervised contact with the mother for 6 hours every other weekend. The judge made an order under s91(14) prohibiting either party from making an application to the court without leave for a period of two years.

21. I have described in only the barest detail the exorbitant court proceedings which have taken place. When considering the mother's appeal against the terms of the contact order and the making of an order under s91(14), it is necessary for this court to also consider the judge's findings as to the impact of the mother's campaign against the father and therefore upon A. In evidence, the father referred to receiving 80 emails in an 8 week period from the mother, each complaining about his care of A. Complaints were also made by the mother to the police and social services, one example being an untrue allegation made by the mother to the police that the father had committed a sexual assault on the mother's older daughter, an allegation which was inevitably investigated by the police. The father spoke of the huge impact which the various formal complaints made by the mother had on his home life and on A, involving as it did a number of police officers and social workers coming to make enquiries and carry out risk assessments in order to determine A's safety in her father's care.

22. The father, while having been represented at various points up to and including the fact-finding hearing, has been unrepresented since then and has had to cope as best he can. Fortunately, as the judge noted, since the mother has had solicitors, these damaging and unjustified complaints have stopped. Having heard the mother give evidence, however, the judge formed the impression that once the spotlight of the proceedings was removed and the 'steadying influence' of her legal advisors came to an end, the mother would revert to her peripatetic lifestyle and endless criticisms of the father.

23. The judge found that, notwithstanding his 'weariness at having to manage a barrage of complaints and accusations from the mother and the intrusions by police and social services into the family home', the father had done all he could to promote contact and that his proposed restrictions around contact were designed for A's protection, not as a form of revenge against the mother.

24. It should be noted that even now the mother does not accept that her child is perfectly healthy and developing normally. At the conclusion of the appeal hearing during which her counsel made sensible and proportionate submissions, the mother stood up and tried

to address the court in relation to her concerns about A's weight. The day after the appeal had concluded, the mother sent a lengthy, unsolicited document to the court making allegations across a range of issues which have already been determined by the court including, once again, in relation to A's weight and general health and also making serious allegations that Dr McCartan had 'falsified' her report. This mother, who is herself a doctor, must of all people be aware of just how serious it is to make such a complaint, and the disinhibited way in which she made it serves only to confirm the judge's fears as to the future conduct of the mother.

Discussion

Contact

25. The judge held that if contact were unsupervised:

i) The risk of abduction would be high;

ii) It is likely that the mother would denigrate the father to A given her unshakeable belief that the father is a serious risk to A;

iii) That the mother would use unsupervised contact as an opportunity medically to examine A or have her examined in an attempt to prove that A is abused, unwell or badly cared for by the father.

26. The judge therefore concluded that although A's relationship with her mother is important and best achieved by direct contact, the risk of the mother acting in a way that would be detrimental to A's well-being if it were unsupervised is high. The judge went on:

> "Unless and until the mother is able to accept appropriate therapy to modify her emotions and her presentation, she is likely to influence [A] with all her concerns or prejudices. I consider that supervision is a protective measure for [A]; it will stop her being conflicted emotionally and will prevent her from fearing that her home with her father is likely to be disrupted by the mother".

27. The judge ordered the mother to pay the cost of professional supervision which the mother says she can ill afford as a locum doctor. The Guardian expressed the view that if the planned 6 hours a fortnight of contact was unaffordable, the duration of the contact visits should be reduced rather than the frequency.

28. Ms Scotland on behalf of the mother sensibly accepted that in the light of the findings of fact made by the judge, in respect of which the mother has no permission to appeal, she cannot realistically challenge the judge's conclusion that contact should, at present, be supervised. Ms Scotland emphasised to the court that whilst on the facts as found by the judge she had no alternative but to accept that the judge was entitled to conclude that contact has to be supervised, the mother does not accept that outcome or that supervision is either necessary or appropriate.

29. The focus of Ms Scotland's submissions therefore is that the order that contact is to be supervised when coupled with the making of a s91(14) order, does not allow for progression to unsupervised contact unless the mother undertakes the therapy recommended by Dr McCartan. Ms Scotland drew the attention of the court to a number of authorities which emphasise that in the ordinary course of events, supervision of contact should be regarded as a stepping stone to unsupervised contact. That may be so, but as I said in *Re S (a Child)* [2015] EWCA Civ 689, at para.[23], that does not mean that in an appropriate case 'such a route should not be deployed as a means of allowing a child to continue to have a relationship with her absent parent'.

30. I am entirely satisfied, as was the judge and the Children's Guardian, that this is one of those unhappy cases where the inability of the mother to regulate her behaviour in the interests of her child means that the choice was not between supervised and unsupervised contact, but between no direct contact or supervised contact. The judge rightly considered the importance of contact between A and her mother on the one hand, and the need to protect her on the other. I am satisfied that Ms Scotland's concession was well made and that the judge had no alternative but to order contact to be professionally supervised.

31. That view is reinforced by the intemperate and wild allegations made by the mother to the court in writing immediately after the hearing, allegations which when put together with her resistance to the highly specialised therapy she needs (as opposed to her stated willingness to have some therapy in the form of counselling/CBT from her GP) make it likely that A's welfare will require contact to be supervised for some time to come.

Order under s91(14) Children Act 1989

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."

33. Before considering the way the mother puts her case in this appeal, 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 *(Agarwala)* 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. On 29 April 2021 the Domestic Abuse Act 2021 received Royal Assent. Section 67 of the Domestic Abuse Act 2021 which relates to orders under s91(14) will come into force in accordance with provisions yet to be made by the Secretary of State. *(Commencement Note 403).*

44. Section 67 (3) provides so far as is relevant, as follows:

> "**91A Section 91(14) orders: further provision**
>
> (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 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'),
>
> at risk of harm.
>
> (3) In the case of a child or other individual who has reached the age of eighteen, the reference in 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 of circumstances since the order was made."

45. 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.

47. Turning then to the judge's approach in the present case. The judge took into account that an order under s91(14) is one which is to be used sparingly but as she had set out in the body of her judgment there had, in the present case, been numerous applications. Further, the judge emphasised that either parent would still be able to apply to the court for enforcement of the contact order she intended to make. Somewhat unusually, the bar on applications without leave for a period of two years was ordered to apply to both parents and not only to the mother. This was an approach on the part of the judge which, in my view, demonstrates her even handed and welfare focused approach to this intractable case.

48. In considering whether it was appropriate to make an order under s91(14) it was accepted on behalf of the mother by Ms Scotland that the judge had not fallen into the trap of either using the order to provide 'breathing space' whilst contact settles down: *Re G (Residence: Restriction on Further Applications)* [2008] EWCA Civ 1468; [2009] 1 FLR 894, or of making future leave conditional (for example upon the mother having treatment): *Re S (Permission to Seek Relief)* [2006] EWCA Civ 1190; [2007] 1 FLR 482. Ms Scotland accepted that whilst the expert evidence was that therapy provided the best route to enable the mother to have unsupervised contact in the future, the judge had not made therapy a condition for the granting of leave to make an application when she made the order under s91(14).

49. Ms Scotland submitted that it was the imposition of the s91(14) order together with an order that contact should be supervised, which was wrong in law, as such a combination would for a period of two years prohibit progress towards a more natural unsupervised relationship between mother and child.

50. In my judgment there was no error of law or principle on the part of the judge. Of importance when considering the effect of an order under s91(14) is the need to have in mind that it is only a filter. If a time comes within the next two years that credible evidence becomes available to support an application by either the father or the mother which would have the potential substantially to change the extent or form of contact, then permission to make the application will be given. In the meantime, A will have the protection from further litigation and as Butler-Sloss LJ said at p38 of *Re P*:

> "…On an application for leave, the applicant must persuade the judge that he has an arguable case with some chance of success. That is not a formidable hurdle to surmount. If the application is hopeless and refused the other parties and the child will have been protected from unnecessary involvement in the proposed proceedings and unwarranted investigations into the present circumstances of the child."

51. The judge summed up her conclusions in support of her decision to impose a s91(14) order as follows:

> "[139] Whilst it is important that either parent is able to apply to the court for enforcement if orders are not complied with, the court cannot continue to micro-manage every aspect of [A]'s life...The parents must learn to negotiate difference of opinion and be able to co-parent their daughter without the court's intervention. [A] must have a period of time when she is settled and is able to learn, grow and develop like any other six-year-old. I consider that her welfare demands that she is given a period of respite, and that a section 91.14 order is warranted in this case."

52. In my judgment, the judge's analysis was unimpeachable and, on the facts as she found them to be, this was a paradigm example of a case where it was overwhelmingly in A's best interests not only for contact to be supervised but for an order under s91(14) to be made.

Conclusion

53. In my judgment the submission made by Ms Scotland that the making of the s91(14) order in addition to an order for supervised contact is wrong in principle, is without merit. It goes without saying that in the same way that leave to make an application following the making of a s91(14) order cannot be conditional, equally s91(14) cannot be used as some sort of fetter designed to prevent supervised contact progressing to unsupervised contact for the duration of the order.

54. Every case must turn on its own unique facts but what has to be borne in mind is that whilst a court can make both a supervision order and an order under s91(14) in any individual case, each has to be considered separately on their merits; that is not however to say that, as here, the same facts and features of a case may not lead a judge to order both supervision of contact and a s91(14) order.

55. The orders made by this judge far from acting as a fetter on the establishment of a more natural relationship, facilitate contact in circumstances where absent supervision, A's welfare would have necessitated indirect contact only. Quite separately, the s91(14) order was essential in order to give A and her father much needed respite from the mother's unremitting campaign of harassment.

56. It follows that, if my Lords agree, I would dismiss this appeal.

Lord Justice Newey:

57. I agree.

Lord Justice Arnold:

58. I also agree.