

PRACTICE DIRECTION UPDATE: No. 4 of 2022

The amendments to existing Practice Directions, and the new Practice Direction, supplementing the Family Procedure Rules 2010 are made by the President of the Family Division under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and are approved by Victoria Atkins MP, Minister of State, Ministry of Justice.

The provisions in this Practice Direction Update come into force as follows:

Provision	Coming into force date
Amendments to: - Practice Direction 12B - Practice Direction 12J - Practice Direction 12B(Pilot), annexed to Practice Direction 36Z New Practice Direction 12Q	19 May 2022

Signed:

_____ Date: _____
Sir Andrew McFarlane
The President of the Family Division

Signed:

_____ Date: _____
Victoria Atkins MP
Minister of State, Ministry of Justice

PRACTICE DIRECTION 12B – CHILD ARRANGEMENTS PROGRAMME

(1) After paragraph 13 insert–

“13A Orders under section 91(14) of the Children Act 1989

13A.1 Under section 91(14) of the 1989 Act orders are available to prevent a person from making future applications under that Act without leave of the court. Section 91(14) leaves a discretion to the court to determine the circumstances in which an order should be made. These circumstances may be many and varied.

They include circumstances where an application would put the child concerned, or another individual, at risk of harm (as provided in section 91A), such as psychological or emotional harm. The welfare of the child is paramount.

13A.2 These circumstances can also include where one party has made repeated and unreasonable applications; where a period of respite is needed following litigation; where a period of time is needed for certain actions to be taken for the protection of the child or other person; or where a person's conduct overall is such that an order is merited to protect the welfare of the child directly, or indirectly due to damaging effects on a parent carer. Such conduct could include harassment, or other oppressive or distressing behaviour beyond or within the proceedings including via social media and e-mail, and via third parties. Such conduct might also constitute domestic abuse. A future application could also be part of a pattern of coercive or controlling behaviour or other domestic abuse toward the victim, such that a section 91(14) order is also merited due to the risk of harm to the child or other individual.

13A.4 In proceedings in which domestic abuse is alleged or proven, or in which there are allegations or evidence of other harm to a child or other individual, the court should give early and ongoing consideration to whether it would be appropriate to make a section 91(14) order on disposal of the application, even if an application for such an order has not been made (since the court may make an order of its own motion – see section 91A(5)).

13A.5 Section 91(14) orders are a protective filter – not a bar on applications – and there is considerable scope for their use in appropriate cases. The court should refer to Practice Direction 12Q for guidance on section 91(14) applications and orders.”.

(2) After paragraph 20.1 insert-

“20.2 Where there is an application for a section 91(14) order, the court should consider whether any particular findings of fact will be needed in order to determine the section 91(14) application.”.

PRACTICE DIRECTION 12J – CHILD ARRANGEMENTS AND CONTACT ORDERS: DOMESTIC ABUSE AND HARM

(1) After paragraph 4 insert –

“4A Orders under section 91(14) of the Children Act 1989

4A.1 Under section 91(14) of the 1989 Act orders are available to prevent a person from making an application under that Act without leave of the court. Section 91(14) leaves a discretion to the court to determine the circumstances in which an order should be made, which may therefore be many and varied. However, section 91A specifies certain circumstances “among others” in which the court may make

an order. These circumstances include where an application would put the child concerned, or another individual at risk of harm. This would include, but not be limited to, a risk of harm arising where an application could be used to carry out or continue domestic abuse. A future application could be part of a pattern of coercive or controlling behaviour or other domestic abuse toward the victim, such that a section 91(14) order is merited due to the risk of harm to the child or other individual.

4A.2 Where allegations of domestic abuse are alleged or proven, the court should consider whether a section 91(14) order might be appropriate even if an application for such an order has not been made. (Section 91A(5) of the 1989 Act specifies who can make an application, and provides that the court can make an order of its own motion.)

4A.3 The court should refer to Practice Direction 12Q for guidance on section 91(14) applications and orders.”

(2) In paragraph 21(2), after “matters relating to the welfare of the child,” insert “including matters relating to whether a section 91(14) order would be appropriate (see Practice Direction 12Q)”.

(3) After paragraph 37 insert –

“37A Orders under section 91(14) of the Children Act 1989

37A.1 In every case where a finding or admission of domestic abuse is made, or where domestic abuse is otherwise established, the court should consider whether an order under section 91(14) of the Children Act 1989 would be appropriate, even if an application for such an order has not been made. Section 91(14) orders are available to protect a victim of domestic abuse where a further application would constitute or continue domestic abuse. A future application could be part of a pattern of coercive or controlling behaviour or other domestic abuse toward the victim, such that a section 91(14) order is merited due to the risk of harm to the child or other individual. The court should refer to Practice Direction 12Q for direction on section 91(14) applications and orders.”.

PRACTICE DIRECTION 12B (PILOT), ANNEXED TO PRACTICE DIRECTION 36Z – PILOT SCHEME: PRIVATE LAW REFORM: INVESTIGATIVE APPROACH

(1) In paragraph 13.1(e), after “case management of the case,” insert “which could include whether a section 91(14) order would be appropriate upon disposal of the proceedings (see paragraph 24A and Practice Direction 12Q)”.

(2) After paragraph 13.4(h), insert-
“(ha) consideration of any risk of harm from future applications, and whether a section 91(14) order would be appropriate (see paragraph 24A and Practice Direction 12Q);”.

(3) After paragraph 14.2(b), insert-

“(ba) Has an application been made for an order under section 91(14) of the Children Act 1989, or might such an order be appropriate? Are any specific findings of fact necessary? (See paragraph 24A and Practice Direction 12Q.)”.

(4) In paragraph 15.2(b), after “the application,”, insert “including a section 91(14) order if appropriate (see paragraph 24A and Practice Direction 12Q);”.

(5) After paragraph 24.2, insert –

“24A Orders under section 91(14) of the Children Act 1989

24A.1 Under section 91(14) of the Children Act 1989, orders are available to prevent a person from making an application under that Act without leave of the court. Section 91(14) leaves a discretion to the court to determine the circumstances in which an order should be made, which may therefore be many and varied. They include circumstances where an application would put the child concerned, or another individual, at risk of harm (as provided in section 91A), such as psychological or emotional harm. The welfare of the child is paramount.

24A.2 These circumstances can also include where one party has made repeated and unreasonable applications; where a period of respite is needed following litigation; where a period of time is needed for certain actions to be taken for the protection of the child or other person; or where a person’s conduct overall is such that an order is merited to protect the welfare of the child directly, or indirectly due to damaging effects on a parent carer. Such conduct could include harassment, or other oppressive or distressing behaviour beyond or within the proceedings including via social media and e-mail, and via third parties. Such conduct might also constitute domestic abuse.

24A.3 A future application could be part of a pattern of coercive or controlling behaviour or other domestic abuse toward the victim, such that a section 91(14) order is also merited due to the risk of harm to the child or other individual.

24A.4 In proceedings in which domestic abuse is alleged or proven, or in which there are allegations or evidence of other harm to a child or other individual, the court should give early and ongoing consideration to whether it would be appropriate to make a section 91(14) order on disposal of the application, even if an application for such an order has not been made (since the court may make an order of its own motion – see section 91A(5)).

24A.5 Section 91(14) orders are a protective filter – not a bar on applications – and there is considerable scope for their use in appropriate cases.”

(6) In the Annex – Explanation of terms, in the table, after the row beginning with “Section 7 report”-

(a) in the first column, insert “Section 91(14) order”;

(b) in the second column, insert “An order made under section 91(14) of the Children Act 1989 which requires a person to seek the court’s permission before making a further application”.

NEW PRACTICE DIRECTION 12Q – ORDERS UNDER SECTION 91(14) OF THE CHILDREN ACT 1989

(1) After Practice Direction 12P insert new Practice Direction 12Q as set out in the Annex to this Practice Direction Update.

ANNEX: NEW PRACTICE DIRECTION 12Q TO BE INSERTED AFTER PRACTICE DIRECTION 12P:

PRACTICE DIRECTION 12Q- ORDERS UNDER SECTION 91(14) OF THE CHILDREN ACT 1989

This Practice Direction supplements Part 12 and Part 18.

1 Definitions

1.1 In this Practice Direction –

“2021 Act” means the Domestic Abuse Act 2021;

“child concerned” has the same meaning as in section 91A(6) of the 1989 Act;

“domestic abuse” has the same meaning as in Practice Direction 12J;

“harm” has the same meaning as in Practice Direction 12J subject to sections 31(9) and 91A(3) of the 1989 Act;

“victim of domestic abuse” has the same meaning as in Practice Direction 12J; and

“named person” means the person named in a section 91(14) order who must seek the court’s leave before making a specified application.

2 Key principles

2.1 Section 91(14) orders are available to prevent a person from making future applications under the 1989 Act without leave of the court. They are a protective filter made by the court, in the interests of children.

2.2 The court has a discretion to determine the circumstances in which an order would be appropriate. These circumstances may be many and varied. They include circumstances where an application would put the child concerned, or another individual, at risk of harm (as provided in section 91A), such as psychological or emotional harm. The welfare of the child is paramount.

2.3 These circumstances can also include where one party has made repeated and unreasonable applications; where a period of respite is needed following litigation; where a period of time is needed for certain actions to be taken for the protection of the child or other person; or where a person’s conduct overall is such that an order is merited to protect the welfare of the child directly, or indirectly due to damaging effects on a parent carer. Such conduct could include harassment, or other oppressive or distressing behaviour beyond or within the proceedings including via social media and e-mail, and via third parties. Such conduct might also constitute domestic abuse.

2.4 A future application could also be part of a pattern of coercive or controlling behaviour or other domestic abuse toward the victim, such that a section 91(14) order is also merited due to the risk of harm to the child or other individual.

2.5 There is no definition in section 91A of who the other individual could be that could be put at risk of harm. However, it is most likely to be, but is not limited to, another person who has parental responsibility for the child and/or is living with or has contact with the child, or any other individual who would be a prospective respondent to a future application.

2.6 In proceedings in which domestic abuse is alleged or proven, or in which there are allegations or evidence of other harm to a child or other individual, the court should give early and ongoing consideration to whether it would be appropriate to make a section 91(14) order on disposal of the application, even if an application for such an order has not been made (since the court may make an order of its own motion – see section 91A(5)).

2.7 Section 91(14) orders are a protective filter – not a bar on applications – and there is considerable scope for their use in appropriate cases. Proceedings under the 1989 Act should not be used as a means of harassment or coercive control, or further abuse against a victim of domestic abuse or other person, and the court should therefore give due consideration to whether a future application would have such an impact.

2.8 The court should consider case law for further guidance and relevant principles, bearing in mind Parliament’s insertion via the 2021 Act of section 91A into the 1989 Act.

3 Procedure

3.1 Under section 91A, a section 91(14) order may be made by the court of its own motion. If at any stage of the proceedings the court is considering making such an order of its own motion, it should record this fact in an order, together with any related directions (see, for example, paragraph 3.5).

3.2 An application for such an order may also be made by an individual who alleges a risk of harm from a future application, or by or on behalf of the child to whom the application would relate, or by another party to the application being disposed of.

3.3 If an application is made, the Part 18 procedure should be used. The application may be made in writing using Form C2, or orally during the hearing.

3.4 Under section 91(14), an order may only be made when disposing of another application under the Act, but section 91(14) is silent on when an application for such an order may be made. In proceedings in which risk of harm is alleged or proven, including but not limited to domestic abuse, the court should therefore give early and ongoing consideration to the question of whether a section 91(14) order might be appropriate on disposal of the application, and to whether any particular findings of fact will be needed to determine the section 91(14) application.

3.5 If an application is made, or the court is considering making an order of its own motion, the court should also consider what opportunity for representations should be provided to the parties. Courts should look to case law for further guidance and principles.

3.6 If the court decides to make a section 91(14) order, the court should give consideration as to the following matters:

- a. the duration of the order (see section 4);
- b. whether the order should cover all or only certain types of application under the 1989 Act;
- c. whether service of any subsequent application for leave should be prohibited until the court has made an initial determination of the merits of such an application

(see section 6). Such an order delaying service would help to ensure that the very harm or other protective function that the order is intended to address, is not undermined; and

d. whether upon any subsequent application for leave, the court should make an initial determination of the merits of the application without an oral hearing (see section 6).

4 Duration

4.1 Sections 91(14) and 91A are silent on the duration of a section 91(14) order. The court therefore has a discretion as to the appropriate duration of the order. Any time limit imposed should be proportionate to the harm it is seeking to avoid. If the court decides to make a section 91(14) order, the court should explain its reasons for the duration ordered.

5 Types of application

5.1 Sections 91(14) and 91A give a discretion to the court as to the types of application under the 1989 Act that can be made subject to permission from the court. If the court decides to make a section 91(14) order, the court should consider which types of application should be specified in the order, and it should explain its reasons.

6 Application for leave

6.1 If, once a section 91(14) order has been made, the named person wishes to seek the court's leave to make a specified application, the Part 18 procedure applies subject to the following directions.

6.2 The application for leave must be made using Form C2, with two attachments: (i) a draft of the application for which permission is sought; and (ii) a witness statement setting out the grounds on which permission is sought, including whether there has been a material change of circumstances since the court made the section 91(14) order.

6.3 If the named person applies for leave, the Part 18 service rules apply, unless the court, when it made the section 91(14) order, prohibited service until initial determination of the merits of the application for leave (see section 3 above). In that case, the named person or court officer, as the case may be, must await that determination, and any directions from the court, before serving the respondent(s).

6.4 In determining any application for leave, the court has a discretion as to the circumstances in which leave should be granted. Section 91A(4) requires the court to consider whether there has been a material change of circumstances since the section 91(14) order was made. In other words, a material change of circumstances is not necessarily required in order for leave to be granted, but the question of whether there has been such a change, is something that the court must consider.

6.5 In determining any application for leave, the court should not ordinarily direct a report to be prepared under section 7 of the 1989 Act, in particular since, if leave were granted and the specified application were made, the court would then consider such a direction if appropriate.

6.6 The court may make an initial determination, without an oral hearing, of the merits of the application for leave. If the court does so, the applicant may, within 7 days of receipt of notice of the court's decision, request an oral hearing. If the court receives such a request, it must make directions as to service of the application and any other documents on the respondent, including the possibility that the respondent would not be served, and as to any representations or other matters in relation to the oral hearing.
