4 Paper Buildings
Temple, London
EC4Y 7EX
T: 020 7427 5200
E: clerks@4pb.com
W: 4pb.com

Re M-D (A Child) (2014)

[2014] EWCA Civ 1363

19/08/2014

Barristers
Paul Hepher
Michael Gration

Court
Court of Appeal (Civil Division)

Practice Areas
International Children Law

Summary
A judge had erred when making an order under the Children Act 1989 s.91(14) by imposing or appearing to impose preconditions to the making of an application by a father for leave under that subsection to apply for contact with his daughter. Fixing the period of a s.91(14) order was better described as an evaluation than an exercise of discretion, and the judge had not erred in his evaluation of the relevant factors in fixing the period.

Facts
The appellant father (F) appealed against a decision ([2014] EWHC 302 (Fam)) to make an order under the Children Act 1989 s.91(14) preventing him from applying for contact with his daughter (D) without the court's leave until she reached the age of 16.

F and D's mother (M) had separated acrimoniously within two years of D's birth. There had been reprehensible conduct on both sides. They were then living in Spain. Two years later M moved to the United Kingdom with D with the permission of the Spanish courts. F had regular contact with D until in 2010 D alleged that F had sexually abused her. Contact then stopped and M obtained a non-molestation order. F applied for contact and the judge conducted a fact-finding hearing and decided that there had been sexual abuse and that F had harassed M. At a further hearing another judge decided that F should have no direct or indirect contact with D until she attained the age of 18 and ordered under s.91(14) that no application for contact should be made by F without the court's leave until D was 16. In para.69 of his judgment the judge stated that in order for the father to succeed in an application for leave to apply for a contact order he "must (a) accept the findings of fact made against him; (b) successfully undertake the psychotherapeutic intervention recommended …; and (c) demonstrate that he is consistently able to put [D]'s welfare best interest to the fore and to recognise the beneficial role of [M] in [D]'s life."

F submitted that the judge had erred in (1) imposing conditions on the making of an application for leave under s.91(14); (2) making the s.91(14) order for too long a period.

Held

(1) It was clear that a s.91(14) order could not be subject to absolute conditions, but could give guidance as to the elements that had to be in place for a successful application, S (Children) (Permission to Seek Relief), Re [2006] EWCA Civ 1190, [2007] 1 F.L.R. 482 followed. F complained that the practical effect of the terms of the order was to slam the door in his face. However, on a fair reading of the judgment as a whole, it was clear that the judge was only indicating what F needed to show in order to open the door to a successful application. The use of the word "must" was unhelpful. It should be replaced by the word "should" or the words "would be well advised to". F further complained that the requirement in para.69(c) of the judgment was impossible to meet in practice. The judge had set out in para.60 his reasons for disallowing all contact. It was clear that what para.69(c) referred to was the perceived need for F to change his attitude or mindset, to accept the findings of fact against him and to reverse his rigid and inappropriate stance. It could not be said that the judge was requiring something impossible or that a successful s.91(14) application was unlikely if F did successfully undergo therapy. The appeal was allowed to the extent of replacing the word "must" with the word "should" in para.69. (2) Fixing the period of a s.91(14) order was better described as an evaluation of the relevant factors than an exercise of broad discretion, S v S [2006] EWCA Civ 1617, [2006] 3 F.C.R. 604 considered. The judge had not erred in his evaluation. It was clear that time would be necessary to reverse F's attitude and that M and D were entitled to a period of respite after five years of litigation. A s.91(14) order was not a total bar on access to justice. (3) Any application for leave should be heard, if possible, by one of the two judges who had already heard and seen the witnesses and were familiar with the issues.

Appeal allowed in part

A judge had erred when making an order under the Children Act 1989 s.91(14) by imposing or appearing to impose preconditions to the making of an application by a father for leave under that subsection to apply for contact with his daughter. Fixing the period of a s.91(14) order was better described as an evaluation than an exercise of discretion, and the judge had not erred in his evaluation of the relevant factors in fixing the period.

Permission

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