



PUMP COURT

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**A new approach to resolving private children proceedings:
Final Orders at DRA, Pathfinder & Private DRAs
Victoria Ellis (Pump Court) & Heather Souter (Paris Smith)**



The ambit of this talk

- Final Orders at DRA
- The Pathfinder Protocol
- Pathfinder in Practice
- Private DRAs





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Re: A, B AND C (Child arrangements: final order at dispute resolution appointment)

[2025] EWCA Civ 55

- At a final hearing in 2019 M withdrew her application to relocate to Ireland and an equal shared care order was made.
- 9 months later M applied to vary the Final Order. A further set of proceedings concluded in a 3-day contested hearing in 2021. The Judge dismissed M's second relocation application and maintained the existing CAO with minor variations.
- In May 2023, M filed a further application for variation of the CAO. F filed an application for a s.91(14) order. The DRA was listed before DDJ O'Leary who heard the contested final hearing in 2019. The Judge dismissed M's application at a 2-hour DRA without evidence and imposed a 3 year s.91(14) bar.



The first appeal

- M argued that the Judge was wrong to deal with the case summarily, and to make ‘findings’ against her, without M being put on notice or giving evidence. M also challenged the Judge’s refusal to order further investigation by way of a s7 report.
- The appeal was dismissed. The Judge had considered the evidence M relied upon, and assessed that the evidence provided did not establish a change of circumstances. There was nothing in the evidence to suggest that the DDJ’s analysis was wrong.
- The appeal judge considered that DDJ O’Leary had not made ‘findings’ in relation to M, but observations of M, noting that it was the role and duty of a judge to come to a view about the character of a case and witnesses.



The Second Appeal

- M appealed to the Court of Appeal, with her appeal centring on the summary determination at an early stage of proceedings with limited evidence. M stated:
 - (i) The children's circumstances had changed which necessitated a change to the arrangements;
 - (ii) Some of the children's challenges had been known prior to the last Final Hearing, but the extent of their difficulties had only become known post 2021;
 - (iii) Both Judges had failed to taken into account the developing needs of the children, and a fresh assessment was necessary;
 - (iv) It was wrong to deny a fresh assessment as to the children's wishes and feelings.



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The Court of Appeal held that, even where the parties are unable to reach an agreement, the court has the power to make a Final Order / bring proceedings to an end at a DRA, if it is satisfied that such a course is consistent with the welfare of the children.

The DDJ was entitled to rely on extensive written evidence and previous findings.

This decision is an important reminder of the wide discretion that judges have when dealing with these cases and controlling evidence.



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Sir James Munby in *Re C (Children) (Residence Order: Application being dismissed at the Fact Finding Stage)* [2012] EWCA Civ 1489, stated:

'...a judge exercising the family jurisdiction has a much broader discretion than he would in the civil jurisdiction to determine the way in which an application of the kind being made by the father should be pursued. In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter...'



Wider Application?

- M's application was narrow –she was seeking to reduce F's time from 7/14 day to 4/14.
- Unusually extensive written evidence.
- The DDJ was familiar with the case and had heard previous evidence from the parties.
- There had been two recent investigations, and the children's wishes and feelings had recently been obtained.
- The court noted there is a limit to the circumstances in which the court can properly and fairly proceed in a summary way.



P v F [2023] EWHC 2730 (Fam)

- F successfully challenged a decision by HHJ Tolson KC, where he made a final child arrangements order for indirect contact only between the father and the children, and a s.91(14) bar at a DRA.
- The matter originated as F's enforcement application, in relation to a 2021 order that provided for the children to spend overnight time with him on alternate weekends and during the holidays.
- M did not attend and F was a litigant in person.



The Cafcass Report

1. F was very difficult to work with; sending excessive communication which was abusive and threatening.
2. Father had historic convictions. Further allegations had been made, albeit no charges were brought.
3. There was a restraining order preventing him from contacting the mother and her partner and from going to their address.
4. M made allegations of ongoing abusive behaviour.
5. The children did not want to see F, saying he would get angry for no reason, drunk, and place them under pressure by accusing them of not loving him. They both reported that F had physically hurt M.

The Recommendation

1. The children should continue to live with M.
2. The current order should be varied to provide for indirect contact only between the father and the children, in line with their wishes and feelings.
3. The mother should provide written updates to the father every three months.
4. Consideration to be given to a prohibited steps order (“PSO”).
5. Consideration of an order under s.91(14) CA 1989 preventing the father from making further applications to the court.



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- F's position was that M had alienated & brainwashed the children into believing that he was dangerous. He ultimately wanted to spend time with them on alternate weekends and for half of the school holidays.
- The CAFCASS officer considered that F lacked insight and that there was no evidence that M had influenced the children against F, citing her as a protective parent.
- HHJ Tolson KC made a final order in line with the Cafcass recommendations



The Appeal: the making of a Final Order

- The Judge erred in making a Final Order at a DRA, given that F was clearly not agreeing to a Final Order being made, wished to challenge the Cafcass report, and sought direct contact.
- A Judge is required to consider whether any issues can be resolved at a DRA, and can provide frank indications as to the merits of an argument.
- However, if one or both of the parties seek a contested hearing, then the appropriate way forward is effective case management.



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- The Judge's decision to impose a Final Order at the DRA prevented F from being able to challenge the Cafcass report, and other evidence which underpinned the Court's Decision.
- As such F's rights under Article 6 and 8 ECHR were breached.



The Appeal: the making of a s.91(14) order

- The imposition of a s.91(14) order for 2 years was inappropriate, where none of the procedural requirements had been followed. This was particularly so where F was a litigant in person.
- The Court was critical that the Judge had not given a judgment in support of making the order.
- The Judge only mentioned a s.91(14) order once, when referring to the Cafcass recommendations. There was no discussion of whether this should be made, or of F's position.



The Law

- FPR PD12B at paragraph 11.2 requires the court to have regard to the Overriding Objective (the need to ensure the case is dealt with expeditiously and fairly and to ensure that the parties are on an equal footing).
- Article 6 and 8 ECHR.
- FPR 2010 PD12B and PD12Q for guidance on s.91(14) order. The Court's wide discretion has been expanded by section 91A. The Court can make an order of its own motion.
- Part 3 of PD12Q contains the procedure to be adopted when a s.91(14) order is being considered.



- **Re A(Supervised Contact) (S91(14)) [2021]EWCA Civ 1749:** guidance as to the imposition of a s.91(14) order.
- **Re T (A Child) (Suspension of contact) (S91(14) ChA 1989) [2016] 1 FLR 916:** factors the court must consider and be satisfied about prior to making such an order.
- ***Re C (Litigant in Person: s 91(14)Order)* [2009] 2 FLR 1461:** the duties and obligations of a court when considering making such an order and one or both of the parties are a LIP.



Pathfinder – what is it?

- Pilot programme for private children law reform
- Aim: improve court experience & outcomes
- Roots: Harm Report



Pathfinder – why?

To enable family courts to protect children and adult victims consistently and effectively from further harm, comprehensive changes are needed to address these barriers, as set out in Figure 1:





Pathfinder – why?

- Delay
- Hampshire average under CAP = was 50 weeks
- National average = 58 weeks
- Dorset (CAP) = 38 weeks
- Dorset (Pathfinder) = 27 weeks





Pathfinder – purpose

- **2.1** *The purpose of the Pilot Scheme is to assess the use of new practices and procedures to allow for applications specified in paragraph 1.3(a) of this Practice Direction to follow a revised court process. The revised process has been designed for all court users, but with a particular focus on improving the experience of the family court and outcomes for survivors of domestic abuse, including children and litigants in person. The pilot seeks to test a more investigative approach, featuring earlier gatekeeping and information gathering to enable earlier triaging decisions and to front-load engagement with parties rather than engaging through multiple hearings. The court will also seek to hear the voice of the child more clearly through each case in this pilot, with the aim that appropriate engagement and communication are considered throughout proceedings. A more holistic, multi-agency approach is planned, with the court engaging and developing positive working relationships with key local partners such as mediators and local authorities.*





How? Practice Direction 36Z

- CAP/PD12B suspended
- Introduction of PD36Z
- Be aware: pre-action protocol





Pathfinder – stage 1

- Initial gatekeeping
- Information gathering & assessment
- Child Impact Report (CIR)
- Further gatekeeping
- Allocation – 2014 guidance





Pathfinder – stage 2

- Interventions or decision hearing
- Aim: bring the case to a conclusion





Pathfinder in Hampshire

- Go live: 6 January 2025
- Now: Blitz courts and legacy cases
- Local Implementation Group
- Progress updates
- What to expect?





- Mediation
- ENE
- Roundtables
- Arbitration
- pDRA

ADR



**“Just to get the negotiation off on the right foot,
I don’t intend to concede anything.”**



Private Dispute Resolution Appointments

- Following on the success of pFDRs, pDRAs address the need for a non-court based space with a specialist in the field.
- Avoid stress, delay, unpredictability & cost of lengthy court proceedings.
- The parties will have a full day to conduct the Private DRA ‘hearing’, and to continue their discussions and negotiations, rather than the one-hour slot conventionally allocated at court.
- The ‘judge’ will have prepared thoroughly & will continue to assist the parties throughout the course of the day until an agreement is reached.



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- A suitable venue can be chosen which allows for a bespoke process, with refreshments and space for private discussions.
- There is no delay – the Private DRA can be arranged before court proceedings have been started, at any stage of those proceedings.
- A pDRA can also be arranged at short notice.
- If further time is needed on a different day, the parties can elect to continue the Private DRA without being reliant upon court listing.



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- Our panel of Private DRA specialists adhere to our own Chambers standards of excellence, which contains very specific criteria, i.e., members who show real commitment to dispute resolution (i.e., they are arbitrators or mediators), sit in a Judicial capacity, conduct Private FDRs and/or who are private children experts.
- Not all cases will be suitable for Private DRA, particularly if there are allegations of domestic abuse. If you are unsure about whether your case is appropriate for Private DRA, please make enquiries with the clerks.

Practicalities

- **Choosing the mediator/ENE/DRA facilitator.**
The value of specific expertise.
- **Remote / Hybrid**
As with private FDRs and other family mediations. These hearings can be just as effective as “in person” hearings, if not better, because they might be conducted from the comfort of the litigant’s own home thus reducing the burden of stress and anxiety which can itself act as a barrier to settlement.
- **Who pays the costs?**
The standard practice is that each party pays their own costs and a half share of the common costs (Judge/premises).

Drawing up the agreement

- This almost always takes twice as long as you expect – the devil is in the detail. Prepare if possible.
- Better not to let the Judge go until agreed. Can go back for further help if you get stuck.
- Be aware if there is a set time after which the Judge will charge more.
- Sometimes it is not possible to draw up a full agreement