**Neutral Citation Number: [2009] EWCA Civ 1548**
Case No: B4/2009/2360

**IN THE SENIOR COURTS OF ENGLAND AND WALES**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE NOTTINGHAM COUNTY COURT**
**(HER HONOUR JUDGE BUTLER QC)**
**LOWER COURT NO: NG09P01193**

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Monday 14th December 2009

**Before:**
**LADY JUSTICE SMITH**
**and**
**LORD JUSTICE WILSON**

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**In the matter of A ( A child )**

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**The Appellant Father appeared in person assisted by his McKenzie Friend, Mr Ian Julian.**
**Miss Maria Mulrennan (instructed by Rothera Dowson) appeared on behalf of the Respondent Mother.**

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**Judgment**
(As Approved by the Court)




**Lord Justice Wilson:**

1. A father, assisted (indeed very greatly assisted) by Mr Julian, his McKenzie friend, applies for permission to appeal against orders made under the Children Act 1989 ("the Act") by HHJ Butler QC in the Nottingham County Court on 28 September 2009. Wall LJ directed that the application be heard on notice to the mother and on the basis that, were permission granted, the substantive appeal would follow forthwith.

2. The child at the centre of the proceedings is a boy, K, who was born on 6 May 2005 and who is thus now aged four years and seven months. The parents were never married but the father's name was entered on his birth certificate with the result that the father now shares parental responsibility for him with the mother. K lives with the mother, her partner and her teenage daughter by a previous relationship near Nottingham. But at all material times K has had substantial contact with the father, who lives with his wife and her children near Derby.

3. Much of the judge's order dated 28 September 2009, made during a brief hearing at which both parties were represented by solicitors, reflected consensual arrangements for the father's contact with K, being indeed arrangements largely based on the provisions of an order made between the parties by the family proceedings court in Nottingham on 13 August 2008. The arrangements for contact made by the judge were that the father should have contact with K on alternate weekends from Friday evenings to Sunday evenings; each Monday from 3pm to 6.30pm even during school holidays; for two additional nights in each of the three half-terms; from 6pm on Christmas Eve to 6pm on Christmas Day this year (2009) and (I infer) in alternate years thereafter and from 6pm on Christmas Day to 6pm on Boxing Day next year (2010) and (I infer) in alternate years thereafter; from 6pm on New Year's Day to 6pm on 2 January beginning in this imminent new year 2010 and (I infer) in alternate years thereafter and from 6pm on New Year's Eve to 6pm on New Years Day next year (2010/11) and (I infer) in alternate years thereafter; for part of K's birthday on 6 May each year; for one week during the Easter school holidays; and for two separate weeks during each summer school holidays.

4. There are, however, three aspects of the judge's order dated 28 September 2009 to which the father objects.

5. The first is the residence order which the judge invested in the mother. We have a transcript of the entire proceedings before the judge on 28 September and it shows how short and summary they were. It is clear from the transcript that at a late stage the solicitor representing the father objected to the investment in the mother of a residence order on the basis that it would not be better for K to make that order than to make no residence order at all and thus that, by virtue of s.1(5) of the Act, the judge should not make it. The judge overruled that objection.

6. The second relates to two provisions of the contact order. The transcript displays only a complaint by the father's solicitor that the mother had not agreed to attempt in 2010 a renegotiation, leading (as the father no doubt hoped) to an enlargement, of his contact with K. The judge inevitably commented that such was beyond her power to order. The father tells us, however, that there was a particular proposal relating to the arrangements for his contact this coming Christmas about which he was not in agreement. In that the arrangements proposed by the mother and adopted by the judge provided for the father to have contact with K from 6pm on Christmas Eve to 6pm on Christmas Day and immediately thereafter, without a break, for him to have his regular alternate weekend

contact with K, which happens to fall from 6pm on Christmas Day (being a Friday) to 6pm on Sunday 27 December, one might think that the arrangements for Christmas contact were far from unfavourable to the father. Apparently, however, the father's family has arranged a substantial party on Monday 28 December to mark the golden wedding anniversary of K's paternal grandparents, with the result that the father would have preferred K to attend the party with him and with the result that, for example, he had offered to the mother that, instead of his returning K to her at 6pm on Sunday 27 December, he would do so at 6pm on Saturday 26 December and be compensated for that day forgone by having further contact with him from 10am on 28 December until 10am on 29 December so that they could attend the party together. The father also tells us of his sense of grievance that certain provisions of the order of the family proceedings court to which I have referred, by which he was to have additional contact with K, were not replicated in the order dated 28 September 2009. Albeit not in very clear terms, the magistrates had provided for K to stay overnight with the father on additional occasions for the purpose of "special family events" and the father's complaint is that the failure of the order dated 28 September to repeat that provision has unfairly resulted in a loss of contact on his part with K.

7. The third is an order under s.91(14) of the Act barring the making of further applications without leave. It reads only that "there be a s.91(14) order for a period of 18 months from the date of this order".

8. The relevant history, briefly stated, begins with the separation of the parents in May 2007. On the face of it the mother has always been amenable to the father's enjoyment of substantial contact with K. The basic charge levelled by the father against her is, however, that, underneath a veneer of cooperation, the mother has consistently been obstructive in relation to the detail of contact arrangements. The basic charge levelled by the mother against the father, by contrast, is that he has never remained content with whatever she has offered or has been agreed or indeed has been ordered and has been so persistent in his demands for increases in contact as in effect thereby to have harassed and beleaguered her. Although, at the short hearing on 28 September 2009, the judge purported to uphold the mother's basic charge, which had been briefly hinted at in a Case Summary placed before her on behalf of the mother but not adverted to orally by her solicitor, the judge heard no evidence and could not properly have reached any conclusion about the validity either of the mother's basic charge against the father or, for that matter, of the father's basic charge against the mother. As I will show, the judge's view represented no more than her instinct and, although it is of course possible that her instinct was well- directed, such is not the basis upon which judicial decisions may be cast.

9. In the months following the separation the father enjoyed substantial contact with K, then aged only two, on a consensual basis. But difficulties arose and in March 2008 in the county court he issued an application for a contact order. A district judge transferred it to the family proceedings court which, on 13 August 2008, made the detailed order for

contact to which I have referred. The father was dissatisfied with aspects of the magistrates' order and filed an appeal to the county court. At that time, however, appeals from the family proceedings court lay to the High Court, Family Division. In April 2009 the outstanding appeal, unfortunately left in limbo, was in effect overtaken by an application on the part of the mother to the family proceedings court for a residence order in respect of K and for a variation of its contact order. The father cross-applied for a residence order and, curiously, he explained his aspiration as being that he should have sole residence of K on an interim basis and that thereafter K's residence should be shared. The father also sought a variation of the contact order and a prohibited steps order. On 19 June 2009 the family proceedings court transferred the matter to the county court and on 30 June HHJ Butler QC herself, at a hearing at which the father was again represented, accepted what appeared to be a consensual disposal of all matters other than the issue of residence and directed that the cross-applications in respect of residence should be adjourned to be heard on 28 September 2009, with a time estimate of 30 minutes. Soon afterwards, however, further issues in relation to contact arose.

10. Both firms of solicitors in Nottingham representing the parties, namely Rothera Dowson for the mother and Nelsons for the father, appear to have made a fine attempt to bring the parties to consensus. On 22 September 2009 they arranged a round-table meeting between the parties and themselves. Issues were then narrowed but not eliminated. On 28 September, being the day of the hearing before the judge, the mother's solicitors filed the case summary, to which they attached a draft order; but they do not appear to have served it on the father or his solicitor prior to the beginning of the hearing. In the case summary they explained that there remained an issue in relation to residence; but, although they referred to the mother's concern about the continued litigation and the emotional effect which it might have on K, there was no suggestion that the mother intended to ask the court to make an order under s. 91(14) barring the making of further applications without leave.

11. The hearing began as follows.

    The solicitor for the mother:

    "Good morning your Honour. First of all can I apologise for handing in the case summary so late. I had a meeting with my client on Friday and unfortunately I was before this court and not able to deal with it prior to that."

    The judge (apparently forgetful of her order dated 30 June 2009):

    "It is very difficult to tell from a file, which is not always in the best of order and there is no bundle, what exactly you are here for. This is a case which has come before these courts far too often when presumably they are reasonably intelligent people who should be able to deal with one child and contact without resorting to [court] every other minute."

The solicitor for the mother:

"Yes, your Honour. It is hoped that today -- the other party has had sight of my case summary and also the draft order. We have entered into discussions and there are really just two small points, if you would be minded to allow us perhaps ten or 15 minutes, that we believe we could iron out."

The judge:

"Yes. I really do expect there to be consent in this case and I am going to say that this matter should not come back before the court without leave.
…
But it sounds as though you are making progress so I will let you continue. "

12. Following an adjournment, the parties and their solicitors returned to court. The mother's solicitor explained that some matters still remained in issue. She referred to one issue as being in relation to contact during the forthcoming Christmas and explained that the mother's proposal was that the father should have contact from 24 until 27 December. But before the mother's solicitor had proceeded to explain the precise issue and before the father's solicitor had said a word, the judge indicated that she was not minded to interfere with that proposal. Then the mother's solicitor explained the father's aspiration that the mother should commit herself to a future renegotiation of contact and the judge correctly explained that such was beyond her power to order. Following a short dialogue, in which the father's solicitor participated, the judge invited the solicitors to draft the orders to be made on that day and to e-mail them to the court. The parties and their solicitors thereupon withdrew for that purpose.

13. In the afternoon, however, the solicitors and the father again returned to court. The mother's solicitor explained that the mother, understanding that the only remaining task was for the solicitors to draft the orders, had left court. The father's solicitor explained that the father now objected to the investment in the mother of a residence order on the basis that it could not be said to be better for K for such an order to be made than for no such order to be made. Unsurprisingly, in my view, the judge expressed some irritation in that regard. She pointed out that, during the two short hearings during that morning, the father's solicitor had not indicated that the objection to a residence order was pursued. The father's solicitor tried to explain that, during the morning, the father had been minded to concede that a residence order be made in favour of the mother only if other points, in the event not conceded by the mother, had been conceded. In my view the judge was entitled to be brisk in overruling the newly articulated objection to the residence order. There was nothing, said the judge, to substantiate the father's alleged concern that the investment in the mother of a residence order would be misused by her as a trophy. During the short dialogue the judge revealed her overall views about the father's approach to the litigation, by then fuelled perhaps by the unreasonable stance being displayed in relation to the residence order. "Every time an order is made", said

the judge, "he goes back to court two minutes later". Later the judge added that "she is a perfectly … good mother and she has continually had to come to court because of the father". Finally the mother's solicitor enquired about the judge's intended duration of the order under s. 91(14). The judge's response was as follows:

"18 months. All that means is that there has to be leave.. It does [not] mean that it stops the father making an application but there must be leave and the reason for that is that there have been too many applications to court, spurious matters, and it must be very unsettling for everybody and it is potentially upsetting for [K] and that is why the court puts them on".

14. I would refuse the father's application for permission to appeal against the residence order. Belatedly instructed to oppose it on the basis that it was unnecessary, the father's solicitor did her best. The fact, however, that the father had been prepared to concede that the residence order be made if concessions were made by the mother on other aspects in itself betrayed a lack of integrity in the father's ultimate opposition to it. Today the father complains that his solicitor's submissions in relation to the issue were summary and that the judge's determination of it was equally summary. But in my experience there is often little for an advocate to say in amplification of a submission which invokes the "no order" principle in s.1(5) of the Act. Where the parents have been cooperating well without such an order, the advocate has greater argument to deploy. In this case, however, the reverse was true. In my view the judge was not only entitled but, as it happens, correct to conclude that it was high time that the court registered its view that K's home should, for the foreseeable future, be with the mother. Indeed the curious cross-application of the father that, prior to shared residence of K, he should have sole interim residence of him in my view merited the categorical rejection of it which the judge's investment in the mother of the order for residence of K represented.

15. I would also refuse permission to appeal against each of the two provisions of the contact order to which I have referred. Brisk and cursory though the judge's treatment of the hearing was, I cannot accept the submission of the father that his solicitor had no opportunity to raise with the judge his concern about the absence of contact on 28 December 2009 and, indeed, his concern about the failure of the proposals for contact made by the mother to replicate the ambiguous arrangements made by the magistrates for special events. Indeed, as he has demonstrated today, the father is highly intelligent and, sitting behind or alongside his solicitor, he would have been perfectly well able to remind her to raise those points even before a judge who, probably because of the pressure of that day's list, seemed to be less than enthusiastic in helping to resolve small issues. Although this court is a demonstrably inappropriate forum for the ventilation of such issues, we have, in the course of today's hearing, chosen to invite Miss Mulrennan, who appears today on behalf of the mother, to address us upon the two provisions of the contact order which have caused the father concern. In relation to the father's wish to have contact with K on 28 December, instead of (so he suggested) 27 December, the mother says, through Miss Mulrennan, that, in the light of K's absence from the mother's

home on Christmas Day and Boxing Day, some or all of the Christmas festivities of thematernal family have been rearranged to take place on 28 December. Although it is a pity that K will miss the big party with the father and his family, the basis of the mother's opposition to the rearrangement for which he would contend seems to me to be understandable. In relation to the father's complaint of a reduction in contact from that directed by the magistrates, reflected in the failure to replicate the provision for special events, Miss Mulrennan points, for example, to the fact that the order dated 28 September provides for contact over two weeks in each summer holidays beginning in 2010, whereas the order of the magistrates provided for contact only for one week in each summer holidays beginning in that year. Thus Miss Mulrennan rejects the suggestion that the father has suffered a net loss of time with K under the new order. Nevertheless the mother does today offer the father two additional occasions of contact each year for special events, each occasion to last no more than 24 hours and the dates thereof to be submitted by the father to the mother in writing at least 28 days in advance and not to be rejected by her save for very good reason. That gesture on the part of the mother today, made at a point when it would have been reasonably clear to her that we were not minded to grant permission to the father to appeal against the contact order, is very welcome; as is the father's unprompted expression of gratitude to her for it. Perhaps on that small foundation the parties can try slowly to rebuild their former facility for sensible dialogue in relation to arrangements for K.

16. In relation to the proposed appeal against the order under s.91(14) of the Act, I would grant permission, allow the appeal and set aside the order. There is a view among some family lawyers that the requirement of leave to make an application is a reasonable feature of many branches of the law and may be particularly valuable in family proceedings and that it casts no undue hardship upon a parent (or other person) to berequired to show to the court an arguable case in support of a proposed application under the Act before being permitted to make it. Indeed I myself might, in other circumstances, have had some sympathy for that view. But that view is, as all we family lawyers know, emphatically not the view taken in our jurisprudence about the circumstances in which it is appropriate to make an order under s.91(14) of the Act. Ever since the enunciation by Butler-Sloss LJ of 11 guidelines in Re P (s.91(14)) (Residence and Religious Heritage) [1999] 2 FLR 573 at 592H to 593F, we have known that the power to make such an order is, pursuant to her fourth guideline, to be used with great care and sparingly and is, pursuant to her fifth guideline, generally to be seen as a weapon of last resort in cases of repeated and unreasonable applications.

17. In this court today Miss Mulrennan has, in my view rightly, felt unable to defend the imposition by the judge of the order under s.91(14). It was, with respect, quite out of order for the judge, after explaining that she had no bundle and that she was unaware exactly why the parties were appearing before her, to have stated that she intended to order a bar under s.91(14). Neither party had made application for it; it had not even been suggested in the mother's case summary. The father had issued two applications under the Act and, other than in relation to his application for residence, there is nothing

to indicate that they had been unreasonable. What was the evidence upon which the judge felt entitled to announce at the outset, prior to the receipt of any submissions on the point, that an order under s.91(14) was appropriate? At the very least she should have invited submissions from each solicitor about the propriety of making the order: see the decision of this court dated 23 April 2009 in Re C (Litigant in Person: Section 91(14) Order) [2009] EWCA Civ 674, [2009] 2 FLR 1461, per Wall LJ at [13(3)]. The subsection provides for the court to order "that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court". But there is no specificity in the judge's order -- set out in [7] above -- of the kinds of application not to be made without leave; and there is no person named in the order. Did the judge intend that both parents be subject to the bar? Such might be the inference from her first exchanges with the mother's solicitor which I have quoted at [11] above. On the other hand the judge's final comments appear to indicate that she considered that it was the father who had behaved unreasonably in forensic terms and that it was he who was the target of her order. Understandable though it was, the judge's immediate reaction to the case, namely that it would be preferable for K if future litigation in relation to him were for a time to be controlled by order under s.91(14), was a wholly illegitimate foundation for the order in the light of the jurisprudence to which I have referred. I might add that this court spends a surprising and unfortunate amount of its time in reversing orders under s.91(14) made on the inappropriately summary basis here exemplified.

**Lady Justice Smith:**

18. I agree. Accordingly there will be an order that: (i) permission to appeal the judge's order in respect of residence and contact will be refused. (ii) In respect of the judge's order under s.91(14) of the Children Act, permission to appeal will be granted, the appeal will be allowed and the judge's order will be set aside. (iii) It will also be recorded that the judge's order dated 28 September 2009 will be amended to record that, by consent, with effect from 1 January 2010, there will be two additional occasions for contact in each year for "special events". Each contact will last no more than 24 hours. The father will give the mother at least 28 days' notice of each event and the mother will not refuse to allow such contact save for very good reason.