Case No: ZE18P00836

IN THE EAST LONDON FAMILY COURT

11, Westferry Circus,
LONDON,
E14 4HD

Date: 5th December 2018

Before :

HER HONOUR JUDGE CAROL ATKINSON

- -

Between :

MR A	**Appellant**
- and -	
MS C	**Respondent**

- -
- -

Ms Baker for the Appellant father
Mr Alleyne -Brown for the Respondent mother

Hearing dates: 6th & 7th November 2018

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JUDGMENT

HER HONOUR JUDGE CAROL ATKINSON :

Introduction

1. David is a boy who will soon be 4 years of age. His father and mother separated in February of this year (2018). The mother moved out of the family home into separate accommodation. Both parents work full time.

2. Following their separation, they made shared care arrangements for the care of David, splitting his time between them virtually equally. However, in May 2018 the mother issued an application for a child arrangements order. She expressed concern that the shared care arrangements were not conducive to David's welfare and that he needed a base. Before he received her application, the mother made the father aware that it was her view that David's base should be with her, and he should see his father on alternate weekends and in the middle of the week between. This arrangement is considerably different to the arrangements in place following separation and the father did not agree with this division of time.

3. The mother's application was not received by the father until mid-June 2018. In that application the mother made unparticularised allegations that she had been the victim of abuse and suggested that the father's contact with David should be supervised. Nevertheless, the arrangements for shared care continued until the end of July 2018, when the mother collected David from the father earlier than usual and later messaged him that she intended to keep him with her until an order was made.
".... I will keep him for now until an order is made as it's best for David to have a consistent home".

4. The FHDRA hearing in the mother's application was heard by DJ Coonan prior to the unilateral changes in the care arrangements visited upon the family by her. These proposed changes to the arrangements were not foreshadowed by the mother or her legal representative at that hearing. DJ Coonan had to consider the mother's general allegation that she was the victim of domestic abuse. She decided that there needed to be a fact- finding hearing and she ordered the filing of schedules of findings. The CAFCASS safeguarding letter made clear that there was no imminent risk to David and was balanced in its approach to the issue of ongoing contact, highlighting the likely impact upon David of a significant change in his living arrangements. Of course, it was unnecessary for DJ Coonan to consider the issue of interim contact at that hearing because at that time the arrangements for shared care were, it was assumed, to continue.

5. At the second directions hearing before DJ Coonan on 6 August 2018, listed for 20 mins to consider the schedules of findings, the learned DJ:

    a. refused an invitation from the father to reconsider whether a separate fact-finding hearing (listed almost 6 months away) was necessary;
    b. declined to make any child arrangements order in respect of interim contact between David and his father, listing the issue of interim contact for hearing in late October (10 weeks away).

    It is these two case management decisions which the father seeks to challenge by his appeal.

6. It is the father's case that in directing a fact finding in this case and refusing to make an order for interim contact the DJ misapplied the revised Practice Direction 12J, which came into force on 2 October 2017. The respondent contends that the decisions made by the DJ were in her discretion. She exercised that discretion by properly applying PD12J. She was right to order a fact-finding hearing and whilst she made no order for contact, she did not refuse to do so she simply listed the case for hearing. Neither decision, says the respondent, can be said to be wrong.

7. In addition, in a 20-page skeleton argument drafted by leading Counsel, the Appellant has sought to argue that pursuant to Practice Direction 30A, paragraph 2.1 of the Family Procedure Rules 2010, this appeal raises fundamental issues with the application of the revised Practice Direction 12J ("PD12J revised") to interim child arrangements orders and directions for fact-finding hearings. The appellant argues that the apparent frequency with which, on the making of ANY allegation of domestic abuse by one of the parties (usually the mother), a fact finding is ordered and pending a determination of those facts contact is suspended is troubling and PD12J has created a presumption against interim contact where allegations of abuse are raised. This is inconsistent with the Children Act 1989, ECHR and domestic precedent and further guidance from a High Court Judge – *'perhaps even Mr Justice Cobb, the chief architect of PD12J'* is called for.

Decision

8. At an earlier case management hearing, I indicated my preliminary view was that there was no basis for a transfer of this matter to the High Court to be heard by a full Judge of the division. As a result, the application was withdrawn. What was needed, in the interests of this child, was a decision on the merits. I have commented on this 'point of principle' below.

9. Having considered the two grounds of appeal, as I announced earlier, my decision is to dismiss the appeal on both grounds after giving permission only on the second ground. Let me explain why.

The Law

10. Appeals in family proceedings are governed by FPR Part 30. In summary:
    a. The Appellant needs permission to pursue this appeal.
    b. The test for permission is set out in FPR 2010 Rule 30.3(7) which reads, *'Permission to appeal may be given only where a) the court considers that the appeal would have a real prospect of success, or b) there is some other compelling reason why the appeal should be heard.'*
    c. To be successful an appellant must demonstrate that: *'the decision of the Lower Court was a) wrong; or b) unjust because of a serious procedural or other irregularity in the proceedings in the Lower Court.'*
    d. An appeal is a review and not a rehearing.
    e. In ***Re B (A Child) [2013] UKSC 3***, the Supreme Court held unanimously that where the appellate court is asked to review a first instance decision, the question is simply whether or not the Judge was wrong – as opposed to 'plainly wrong'.

The Judgment and the hearing before the District Judge

11. I have a complete transcript of the hearing before DJ Coonan. Within that transcript there are a couple of paragraphs right at the end where she summarises her reasons for refusing to revisit the decision regarding fact finding and seemingly for refusing to make an interim child arrangements order. She does so because she is pressed by Counsel for the father to give a *'judgment'* on these issues. The first observation that I would make is that this application was listed for a 20-minute directions hearing. It was a case management hearing. It was squeezed into an already full to bursting list by DJ Coonan for the express purpose of readying the case for the fact finding. In a situation like this there is no time to give a full Judgment. Accordingly, I have examined all the exchanges that took place during that hearing in order to determine what she took account of in addition to the matters mentioned when pressed. What is important is that her reasons for making the decisions are discernible.

12. Next, we should set this 20-minute hearing into context. It is important to remember that at the hearing on 6th August it was anticipated that the generalised allegations set out by the mother on a previous occasion would be particularised on a schedule. At the earlier hearing

DJ Coonan made detailed directions concerning the way that the schedule should be set out, though she did not limit the number of those allegations.

13. The hearing lasts for 50 minutes though some of that time was spent on the phone as the Judge seeks listing dates. The transcript is 22 pages long. I have no other timings to assist. I can summarise the way in which the hearing proceeds. At the beginning of the hearing the Judge is told that there is an application by the father for interim contact which has not yet been issued. The unissued C2 was handed to her. She has the statement in support emailed to her whilst in court as there was only a digital copy. We learn later that the mother's representative has not read the statement and I see nowhere an opportunity for the Judge to read it.

14. The Judge reminds everyone that this is a 20-minute hearing *'to determine that all the evidence is in place ready for a fact-finding hearing'* and turns to consider the schedule of 77 allegations made by the mother and the father's response. She is invited then to reconsider the need for a fact finding and whilst she accepts that some of the allegations can be better described as welfare issues – for example, the suggestion that the father has returned the child late for an appointment – she points out that the first 8 allegations are of physical harm. She refuses the invitation to revisit the question of whether there should be a fact finding directing the reduction of the schedule to 10 allegations, specifically the first 8 under physical harm and 2 others. The Judge then seeks a listing only to be told that the first available 2-day slot before a DJ is in Jan/Feb 2019. There is insufficient time at this appointment to embark upon a closer examination of the evidence, so a 30-minute PTR is listed in October before the trial Judge.

15. The father's Counsel then returns to the issue of interim contact. The mother had indicated that she was only prepared to agree supervised contact. Father did not simply want contact, he wanted resumption of the status quo – in other words resumption of the shared care arrangement pending the determination of issues of domestic abuse which were, by definition, potentially relevant to contact. The Judge was not taken to PD12J until page 17 of the 22-page Judgment – well over the time slot by now but likely to be during the last 10-15 mins of the hearing. The mother's solicitor who had not yet been able to read the father's lengthy statement submitted that this application needed to be listed. Finding favour in this suggestion, the DJ sought a listing date for a 1-hour appointment. That date happened to be 27th Oct – some 10 weeks hence. It is at this point that Counsel asks the Judge to give a judgment on each issue.

16. On the necessity to have a fact finding the Judge simply states that:

> *'the fact finding goes ahead because on the mother's allegations, the first eight....identify behaviour which it is said to be used to harm, punish or frighten the victim, and behaviour which is controlling designed to make a [person] subordinate. For that reason the fact finding is going ahead...'*

17. On the issue of interim contact, the Judge says this:

> *'...I am not making an interim order today....there is a hearing at which* [sic] *can be dealt with on 27th Oct....because to use the words of paragraph 25, the burden is going to be on the applicant....that it is in the interests of this child to make an interim contact order...and he will have to satisfy the court that the order that he is seeking would not expose the child, or the other parent to an unmanageable risk of harm, bearing in mind the impact that the allegations that have been made by the mother against the father and whether that could have an effect on the emotional wellbeing of this child....'*

It was immediately pointed out by Counsel that the Judge had not mentioned the welfare checklist and the Judge says this in response:

> *'I will do that when I have the application. I haven't got an application in front of me....I'm not going to consider an oral application for an interim child arrangements order. It will be made and considered on the evidence.....'.*

The first ground of appeal

18. Referring to PD12J, the appellant highlights that when considering whether a fact-finding is necessary para 17 sets out a list of factors for consideration. The appellant relied upon the last two:

> *"(g) whether the nature and extent of the allegations, if proved, would be **relevant** to the issue before the court; and*
> *(h) whether a separate fact-finding hearing would be **necessary and proportionate** in all the circumstances of the case."*

19. The appellant argues that PD12J invites the Court to consider domestic abuse through the prism of its: *"**relevance** to any decision of the court relating to the welfare of the child, and specifically whether the child and/or parent would be at risk of harm in the making of any child arrangements order."* That is correct.

20. I also agree with the appellant that the task of the judge determining whether to direct a fact-finding hearing is as follows:

    a. to identify what the allegations are;
    b. to identify how (if at all) those allegations **might** be relevant to determining child arrangements for David;
    c. to consider whether, in all of the circumstances, a fact-finding is necessary and proportionate.

21. The appellant then goes on to suggest that whilst DJ Coonan describes the first eight allegations as *"behaviour which can be said to harm […]*," she does not identify how the allegations made by the mother are relevant to the time David spends with his father and merely identifying harm is not enough. Further support for this failure to identify relevance is identified in the apparent failure to consider the allegations against the background of a shared care arrangement within which no concerns regarding the father's care of David have been raised by any third parties (child minders, nursery staff etc).

22. I do not agree that the Judge's decision on this issue can be said to be wrong. This was a matter for the swift exercise of discretion applying the principles of PD12J. DJ Coonan does just that.

23. Let us not lose sight of the enormity of that task in this particular case. The mother attended the hearing with an un-numbered schedule containing no fewer than 77 allegations across numerous categories – physical, verbal, control. I have read this schedule and would agree that many of the allegations are hopelessly general and do not amount to examples of domestic abuse; most are undated. However, I have had the luxury of two days to examine the schedule. DJ Coonan had 20 minutes before she started her main list. Doing the best she could she quickly identified that the first 8 in particular contained allegations of physical harm and they amounted to domestic abuse if true. She also recognised the possibility that allegations under some of the other headings – such as verbal abuse or coercive control – might have amounted to domestic abuse and so permitted the addition of a further two allegations.

24. The father argues the Judge did not consider relevance, but I am satisfied that whilst not spelling it out in those precise terms, she did highlight the serious nature of some allegations and points out that they fell into the category of allegation identified by Jackson LJ in *L v F [2017] EWCA Civ 2121* as *'behaviour used to harm, punish and frighten, or to subordinate*

the individual'. That was, in my view, enough given that this was a 20-minute directions hearing.

25. We are all very well aware that in circumstances in which there are proven allegations of domestic abuse – whether physical harm or control – that behaviour has the potential to be relevant to contact between a father and child. It may raise no risk of harm directly to the child but it may raise a risk in handover situations and contact between the parents. Does a District Judge need to spell out, at this stage, precisely how each of the allegations might be relevant? I think not, and in this particular case, how could she when she had barely enough time to read them all? The precise nature of the risk will be considered during the fact finding. In my view, the father himself acknowledges the potential risk by seeking to arrange contact so that the parents never come into contact with each other.

26. Finally, a great deal of emphasis is placed upon the length of time that this father will have to await the determination of these issues. I wholeheartedly endorse his dismay. As DFJ for East London I am concerned and sometimes horrified at the length of time that litigants wait for a hearing because of the enormous burdens placed upon the system. I have absolutely no doubt that this is something that DJ Coonan faces daily. It is argued that had the judge conducted the exercise as she should have she would have concluded that a fact-finding hearing would be unnecessary and disproportionate, *'especially in light of the real delay in the Court being able to hear the same'.*

27. Again, I do not agree. The impact on the child of delay in making decisions as to his welfare is one factor which must be borne in mind. It is not the only factor. There is an issue as to domestic abuse here that needs to be tried. To suggest that the unfortunate delay in being able to list that hearing means that a more proportionate approach is to abandon the need for that issue to be determined at all is simply not right.

28. On this ground I refuse permission to appeal. I see no reasonable prospect of success in challenging this decision on fact finding and there is no other compelling reason on this ground why the appeal should be permitted to proceed.

Second ground of appeal

29. It is the father's position that DJ Coonan's decision not to make an interim child arrangements order is fundamentally flawed and inconsistent with the principles of the Children Act 1989, the Court's obligations under the Human Rights Act 1998, and the weight of the evidence before her.

30. Despite what is described as the 'rebuttable **presumption**' against interim contact created by PD12J, the appellant sets out the process that DJ Coonan should have followed and argues that she failed to do so. It is argued that she did not identify any specific alleged risk of harm to either to David or the mother, she did not proceed to determine whether that alleged harm was capable of being managed or determine whether an interim order would be in David's best interests. The appellant criticises the Judge commenting that *'notably absent from DJ Coonan's judgment is any reference to the Welfare Checklist, let alone what might constitute an evaluation of the same in respect of David.'*

31. At first blush I considered that there was some merit in that argument which is why on this ground I considered it appropriate to grant permission to appeal. Welfare is always in issue when the court has before it proceedings concerning the upbringing of children. So, whilst there was no formal application before the Judge for contact, DJ Coonan was duty bound to consider how best to deal with the oral application.

32. However, when I sat down to write these reasons, I began to see that I was in danger of replacing DJ Coonan's decision with my own. Further, my assessment of the situation, is made in wholly different circumstances to that of DJ Coonan. In the first place, I have had the luxury of time to read through the evidence that was filed in support of that application. DJ Coonan did not. I have the benefit of hindsight in that I know that the agreement that the mother made to supervised contact was subsequently reneged upon, leaving the father with nothing to enforce as he had no order. That was not the situation before the Judge on 6th August. It is not my role to replace DJ Coonan's decision with mine unless I can say that it was wrong and after further consideration, I do not consider that her decision can be said to be wrong. Let me explain why.

33. In the first place, she was not deciding the interim contact application on its merits. Despite the reference made to PD12J and her comments as to the approach that the father would have to take, to which I shall return, she was clear that she had no application before her and she declined to consider an application made orally, preferring to list it for a proper hearing before another Judge. That was her decision and that cannot be said to be wrong given the time constraints.

34. The validity of this decision becomes clearer when bearing in mind what she was being asked to decide. The father was seeking the resumption of a shared care arrangement terminated by the mother in circumstances in which she was alleging abuse. There are powerful arguments

on the father's side as to why that arrangement should be continued – not least the impact upon David of these sudden and unilateral changes in his day to day living experiences, the apparent absence of evidence that he has suffered harm in the shared care arrangement and the possibility that the situation could be managed so that the mother and father do not meet. All these factors have become apparent to me having had the luxury of being able to read all the evidence in the case. Not something that DJ Coonan had the time for in an appointment listed to deal predominantly with another issue and only 20 mins long.

35. This issue required proper consideration and in circumstances in which she had insufficient time to give proper consideration it is my clear view that there was nothing wrong in her decision to list the matter for a hearing. That is especially so in cases in which there are allegations made which have yet to be resolved.

36. I accept that the comment made by the Judge – when pressed at the end of the hearing – that *"the burden is going to be on the applicant father, that it is in the interests of the child to make an interim contact order"* does not amount to an accurate summary of the approach to be taken on an interim contact application where abuse is alleged. However, that was not the basis upon which she made her decision. She was NOT deciding the merits. She was deciding that it needed to be heard. As she said shortly after this – I will consider the welfare checklist when I consider an application.

37. So, all things considered whilst I am prepared to give permission on this ground, conceding that there was an argument on the merits, I nevertheless dismiss the appeal for the reasons given.

POINT OF PRINCIPLE

38. The Appellant argued that this appeal raised fundamental issues with the application of PD12J. He asks whether the 'rebuttable presumption' created by PD12J revised is consistent with the Children Act 1989, the ECHR and *Re C (Direct Contact: Suspension)* [2011] 2 FLR 912 and goes on to suggest that the presumption results in a demonstrable difference in approach to the issue of interim contact in private law matters, where there are allegations of abuse, to when children are subject to public law proceedings.

39. The answer to that is quite simply that PD12J does not create a presumption of no contact.

40. When PD12J first came into operation, many of the press headlines suggested that the new PD12J was intended to ensure that the courts would prevent the abusive parent from having contact. Practitioners in this field, however, knew that this is NOT what PD12J said or did.

41. Paragraph 25 contains what the appellant here describes as the presumption against contact:

25. Where the court gives directions for a fact-finding hearing, or where disputed allegations of domestic abuse are otherwise undetermined, ***the court should not make an interim child arrangements order unless it is satisfied that it is in the interests of the child to do so and that the order would not expose the child or the other parent to an unmanageable risk of harm*** *(bearing in mind the impact which domestic abuse against a parent can have on the emotional well-being of the child, the safety of the other parent and the need to protect against domestic abuse including controlling or coercive behaviour).*

42. However, when read together with the whole of PD12J, and set against the essential statutory landscape, it clearly does not raise such a presumption. It is neither necessary nor appropriate for me to offer any further 'guidance' on PD12J. However, forgive me for making the following rather obvious points:
    a. PD12J is a practice direction. It is guidance offered by the President of the Family Division on the handling of cases in which domestic abuse is raised.
    b. Like all practice directions it does not change the law.
    c. The statutory regime for the determination of welfare issues in relation to children is Children Act 1989.
    d. The welfare of the child subject to the application remains paramount and the statutory presumption of parental involvement added to s.11 Children Act 1989 by the Children and Families Act 2014 is neither diminished nor over ridden by PD12J.

43. The comments made by the Judge in this case as to how the father would have to proceed in the light of para 25 PD12J are not correct and I suspect that she knows that they are not. She was not applying the principles and had she been asked to do so I have every confidence that she would have stepped back to examine the welfare issues applying the statute and being guided by PD12J and not driven by one paragraph of it.

44. One more observation, if I may. During the hearing before DJ Coonan, an application was made orally to transfer this case to CFC where it was suggested there are many more Judges available to list the case more quickly. This is simply not correct. It is unnecessary for me to explain why, but it is, I feel, necessary for me to make clear that there is a process for the

allocation of private law work in London which cannot be over ridden because of a false hope that a hearing might get a sooner listing elsewhere.

45. The allocation of private law cases in London as between the three family centres – East, Central and West - is determined by postcode. The allocation of judicial resources as between the three London Centre's is determined according to the volume of work in that region. What that means is that East, Central and West are each supposed to have sufficient judicial resources to meet their respective share of the London work. The London courts are therefore under equal pressure and each of the centres has no more capability to hear cases from one of the other centres than any of the others. Cases are transferred between the three regions but usually for a specific reason such as judicial continuity or when the child is living in a different region to the applicant. Further, any transfer should, as a matter of courtesy and good practice, be approved by the receiving court.