Case management and FPR 2010, PD 12J (A v C)

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Family analysis: Olivia Magennis, barrister at 1GC Family Law, considers the decision in A v C and the application of Family Procedure Rules 2010 (FPR 2010), Practice Direction 12J (PD 12J) to interim contact decisions in cases involving allegations of domestic abuse.

A v C [2018] Lexis Citation 116, [2018] All ER (D) 88 (Dec)

What are the practical implications?

In his judgment in *A v C,* HHJ Atkinson is obviously correct—no 'rebuttable presumption' is created by FPR 2010, PD 12J (Child Arrangements and Contact Orders: Domestic Violence and Harm) as to interim contact in cases where there are allegations of domestic abuse, as was submitted by the appellant in this case. The extent to which the revised FPR 2010, PD 12J has increased the number of fact-finding hearings, or interfered with interim contact, has yet to be formally assessed. Anecdotally, experiences seem to vary widely—there are those who consider that FPR 2010, PD 12J has re-shaped the landscape and that fact-findings (previously rare in private law proceedings) are back in town. Others report no difference whatsoever in the approach of the court. It may be helpful in cases where domestic abuse is raised, however vaguely, to ensure that any documents prepared for early hearings address the relevant issues, such as:

• the need for a fact-finding
• the relevance to the child of the allegations
• interim contact and the interests of the child
• whether the order would expose the child or the other parent to an unmanageable risk of harm

What is the background?

HHJ Atkinson heard an appeal from a district judge's determination of the need for a fact-finding hearing and a refusal to order interim contact between a father and son pending a hearing on the issue.

The parents separated in February 2018 and made shared care arrangements for their son, splitting his time between them 'virtually equally'. In May 2018 the mother issued an application for a child arrangements order (CAO) with a proposal that he spend alternate weekends and one night each week with the father. Within the mother's application were unparticularised allegations of abuse and a suggestion that the father's contact with the son should be supervised. The mother's application was received by the father in mid-June 2018 and the shared care arrangements continued until the end of July 2018 (after the first hearing dispute resolution appointment (FHDRA)), when the mother refused to permit contact until an order was made.

At the FHDRA, the mother made no reference to the imminent cessation of shared care. The safeguarding letter made it clear that there was no imminent risk to the son and highlighted the likely impact upon him of a significant change. The district judge decided that a fact-finding hearing was necessary and ordered schedules of findings be filed.

By the time of the next hearing on 6 August 2018, it appears that the mother had stopped all contact. The hearing was listed for 20 minutes to consider the schedules, and the district judge refused an invitation from the father to reconsider whether a separate fact-finding hearing (listed nearly six months away) was necessary and also declined to make any CAO in respect of interim contact, listing a contested interim contact hearing in October 2018 (ten weeks away).

The father sought to challenge these two case management decisions on appeal to HHJ Atkinson, complaining that the district judge had misapplied the revised FPR 2010, PD 12J.

What did the court decide?

Whether a fact-finding hearing was necessary

When considering the father's criticisms of the district judge, HHJ Atkinson was keen to ensure that the decisions made at the 6 August 2018 hearing were seen in context. The hearing was listed for 20 minutes in an already 'full to bursting list'. The mother's schedule was un-numbered and contained 77 allegations, many of which were hopelessly general. However, the first eight allegations were of physical harm and they amounted to domestic abuse if true. The father criticised the district judge for failing to identify how the allegations made by the mother were relevant to the time the son spent with his father. The judge on appeal disagreed, noting that 'this was a matter for the swift exercise of discretion applying the principles of PD 12J'—the district judge did just that and the precise nature of the risk could be considered during the fact-finding hearing. The father placed a great deal of emphasis on the length of time he would have to wait until these issues were determined. HHJ Atkinson 'wholeheartedly endorse[d]' his dismay, but was absolutely clear that delay did not mean that the issue of domestic abuse did not need to be tried.

Refusal to make an interim CAO

The father argued that the district judge's decision not to make an interim order was fundamentally flawed, inconsistent with the principles of the Children Act 1989 (ChA 1989) and the court's obligations under the Human Rights Act 1998 and the weight of the evidence before her. In particular, the father criticised the district judge for failing to identify any specific alleged risk of harm—and whether that harm could be managed or whether an interim order would be in the child's best interests. The district judge's judgment made no reference to the welfare checklist.

HHJ Atkinson referred to the 'powerful arguments' on the father's side as to why the shared care arrangement should have continued. However, the judge was at pains to note that these arguments are apparent when considering all the evidence in the case—not something the district judge had the opportunity to do during a 20-minute hearing which was listed for the purpose of considering a different issue.

Point of principle

The appellant made an argument as to what he said was 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 determination, contact suspended, what he described as troubling. He further argued that FPR 2010, PD 12J has created a presumption against interim contact where allegations of abuse are raised, which is inconsistent with the ChA 1989, the European Convention on Human Rights and domestic precedent.

FPR 2010, PD 12J, para 25 contains what was described by the father as the 'presumption against contact', ie:

> '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…'

HHJ Atkinson's view on this point was very clear, that 'PD 12J does not create a presumption of no contact', but that while it was neither necessary nor appropriate to offer any further 'guidance' on FPR 2010, PD 12J, the following 'rather obvious' points were made:

• FPR 2010, PD 12J 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
• like all practice directions, FPR 2010, PD 12J does not change the law
• the statutory regime for the determination of welfare issues in relation to children is ChA 1989
• the welfare of the child subject to the application remains paramount and the statutory presumption of parental involvement added to ChA 1989, s 11 by the Children and Families Act 2014 is neither diminished nor overridden by FPR 2010, PD 12J

Interviewed by Alex Heshmaty.

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