



Neutral Citation Number: [2024] EWHC 3486 (Fam)

Case No: WR24P00026

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10 July 2024

**Before:**

**MRS JUSTICE LIEVEN**

**Between:**

**HK**

**Applicant**

**- and -**

**(1) PB**

**(2) EB**

**Respondents**

Hearing date: 8, 9 & 10 July 2024

**APPROVED JUDGMENT**

**THE HONOURABLE MRS JUSTICE LIEVEN**

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**Mrs Justice Lieven:**

1. This is an application in respect of E a girl aged 7, by her aunt HK (“the Aunt”), for a Special Guardianship Order and a deemed application for a Child Arrangements Order by the Father. The Mother sadly died in South Africa in December 2019 and E has lived with her aunt since.
2. The Applicant has been represented by Mr Cameron. The Father appears in person. The Guardian is represented by Ms Asif.

**The background**

3. The Mother and Father started a relationship in June 2016. The Mother was a South African citizen and the Father is British. At all material times the Father lived in a village outside Hereford. The Mother had two older children P and J. The parents had known each other, as I understand it, in the past, but became reacquainted in 2016. The Father was previously married, and he has an adult son. His previous marriage failed, and he and his son have been estranged since.
4. The Mother together with J and P moved to Hereford to live with the Father. E was born in July 2016. It is apparent that the parents’ relationship had significant difficulties and the Mother approached Women’s Aid for advice in relation to domestic abuse. Around this time the Father left the family home.
5. There were considerable frictions between the Father and J and P. Both J and P have put in witness statements in support of the Applicant. Both say how much they disliked living with the Father and how he was overbearing and at times inappropriate. It is impossible for me to get to the bottom of these allegations and they have little relevance to the issues before me.
6. I am content to adopt the summary of the analysis of the Guardian in her report which states *“The [Father] in interview conceded that his relationship with [the Mother] was sometimes difficult and that arguments escalated in its closing stages. He accepts that there were verbal insults during arguments which he regrets but says were on both sides. He denies abuse towards or from [the Mother] or there being a controlling*

*dynamic on either side. Considering the information available, I would assess that [the Father] did behave in an abusive and threatening manner in [E]’s presence on at least the one occasion of the referral incident. This would have caused [E] confusion and emotional distress, and certainly disturbed her sleep. It is relevant that this appears to have been fuelled by alcohol use, as it occurred when both adults were returning from the pub.”* It seems to me that is a fair summary of the evidence.

7. What is clear is that the Father and Mother drank a good deal and this is an issue I will return to.
8. Tragically in April 2019 the Mother was diagnosed with colorectal cancer and commenced chemotherapy. At around that time the Father moved back into the house and at times was caring for the Mother and E. Although he had been living separately before that, it seems undisputed he had very considerable contact with E.
9. On 5 September 2019 the parents and E travelled to South Africa for further medical treatment. At this stage the Father had agreed to E going to South Africa, but on the assumption E would return to the UK. The issue of consent was fully dealt with by the South African Constitutional Court.
10. Since October 2019 or perhaps September 2019, E has been living at the house of her aunt. I understand the Mother lived for much of the time at the Aunt’s house but at some point also with her own mother, but was seeing E regularly.
11. On 2 October 2019 the Father returned to the UK as planned.
12. In March 2020 the Father applied to the South African Court under the 1980 Hague Convention for E to be returned to the UK. He said he made this application at that date because he was advised he needed to act promptly, even though by this point the Mother was dying of terminal cancer. I understand and do not criticise the Father, but the application must have made both the Aunt and the Mother somewhat traumatised.
13. There were periods after this when the Father had fairly regular Zoom contact with E.
14. Very sadly, the Mother died three days after the first South African Court judgment was handed down, finding in favour of the Father’s application. The Father went to

South Africa on 21 December 2020, to collect E and whilst in South Africa he had some scheduled contact with E.

15. There are throughout this case mutual recriminations about whose fault it is that there was not more contact and consistent disagreements over contact, the quality, how the Father acted and how E responded. It is extremely easy to see the visit in late 2020/2021 was emotionally charged. The Aunt had lost her sister, E had lost her mother, the Father wanted E to return to the UK. Neither the Aunt nor the Father seemed capable of understanding the pain of the other.
16. The Aunt appealed the first judgment in South Africa and that appeal was ultimately granted, there being an interim stay on the order for return.
17. The Father left South Africa on 21 March 2021. He had been there for about 3 months. There is then a long period until June 2022 when E had limited video contact with the Father. The Aunt sent regular email updates about E's life to the Father but there was very little Zoom contact. The Father says that the Aunt prevented contact. The Aunt says there were constant problems with power outages in Cape Town and it was very difficult to arrange contact around E's daily routine. I have very little doubt that the Aunt did not prioritise E's relationship with the Father and did not make much effort to ensure there was regular Zoom contact. The problems in respect of the power outages were capable of being resolved, by shifting the times of calls. Equally the Father was unprepared to engage with contact unless it was on his terms and he did not send video clips, cards or presents to E.
18. In April 2022 South African Supreme Court ruled in the Aunt's favour. The Father then appealed that decision.
19. The Father returned to South Africa on 2 June 2022. He had regular contact with E during this trip, but that contact was always supervised. A number of expert advisers were engaged, some for the proceedings and some for E's benefit and they advised that the Father should only have supervised contact. I say that in my view that was a mistake. It would have been better to build up E's trust in her Father and hopefully that of the Aunt as well. The Father then returned to UK and there was no remote contact between him and E. There were again mutual recriminations.

20. In November 2023, the South African Constitutional Court handed down its judgment finding in the Father's favour by a majority. This judgment turned on the Hague Convention and the need to abide by its terms. The court was clear that it was returning E to England and Wales so this court could decide what was in E's best interest. It was not a decision by the South African Constitutional Court that it was in E's best interest to remain in England and Wales, let alone that it would be in her best interests to live with the Father.
21. Remote contact recommenced in December 2023. In or about January 2024, E overheard an argument between the Father and the contact supervisor about contact that might take place in the UK. It is clear from all the evidence that E does have some knowledge of why she is in the UK and of the conflicts between the adults. Although it so often said that children should not be exposed to adult disputes, I don't think it realistic on facts of this case that E could be kept completely in the dark about what has been happening between the adults.
22. I turn to E's life in South Africa. There is no dispute that E's life in South Africa has been a good and happy one. She lives with her aunt and she is very close to her grandmother. The Aunt has a circle of friends, who E is well integrated with. She has one close friend in school although I note children at this age can change friendships. Overall, she is a happy and well settled child. She has had support from professionals, for example, she has regular play therapy to support her. This is important because there are clear but unsurprising indicators of the impact of the Mother's death on E. There are some reports of E having anger issues and quite a few references to E suffering from anxiety and hyper vigilance.
23. E has been in school in South Africa since early 2022. I have reports from the school that suggest she is generally doing well and is bright. There is one report with a strange level of hostility which I find odd but it is not repeated in other reports.
24. E and her aunt came to the UK pursuant to the South African Constitutional Court's order in January 2024 and the matter first came before me, as Family Presiding Judge for the Midlands.

25. I ordered a build-up of direct contact initially in a contact centre and then building to overnight. It has not progressed seamlessly, but the contact notes have been very positive. E is affectionate and is pleased to see the Father. The Father has been appropriate and child focussed. The Guardian, who has observed contact, comments on E's ability to bond with the Father and his setting her appropriate boundaries and being very good with her.
26. There was a contact on 22 June when E said she did not want to stay with the Father and became upset. The Father says this is because the Aunt told E she had the choice to go with the Aunt and friend from South Africa rather than stay at contact. In any event E became very upset and the Aunt, who was outside the door, took her away.
27. The Aunt says E becomes somewhat upset and dysregulated after contact. The Guardian suggests this is evidence of the Aunt not supporting contact between E and the Father. From E's viewpoint, she may be happy to see and spend time with the Father but becomes upset when she goes back with the Aunt. Whatever efforts the adults are making, E knows there are great tensions and knows the Father wants E to live with him. That she finds this time confusing and sometimes upsetting is hardly surprising.
28. E has only had one overnight with the Father. Unfortunately, a large part of this was taken up by travel. The Father said this was at least in part because the Aunt would not agree to an alternative handover and longer than 24 hours. But in any event the contact seems to have gone well. The father says that E had bonded well with his partner.
29. Turning to the evidence. I heard evidence from the Aunt, P, the Father and the Guardian with written statements provided and I have a detailed report from the Guardian.
30. The Aunt has raised very great concerns about the Father. I will go through each area of concern in respect of both the Aunt and the Father and the evidence on both sides and responses, and indeed P. They all recounted events and actions very much from their own perspective. The Aunt plainly adores E. She sees herself as her primary carer and protector. The Aunt put in a number of references that refer to their close relationship and the quality of the Aunt's care for E. I accept, with the Guardian, that the Aunt struggles to truly acknowledge the Father's importance in E's life. There is an element of duty - such as sending weekly updates rather than truly acknowledging his

role as E's father. I have no doubt that if she had genuinely valued the Father's role she would have done more to encourage the relationship. She says there were constant power outages in Cape Town, but with good will and intent I am sure the calls could have worked. Equally, insisting on taking E all the way to North London from the South Coast so the Father then had to drive from Herefordshire and back thus prolonging E's journey for the weekend hardly promoted the best quality contact with E and her father. Although I accept the Aunt thought she was doing her best.

31. I suspect, although I cannot know, that she is deeply suspicious of the Father in part because of what she was told, accurately or not, by the Mother; and in part because of the animosity that has grown since the Aunt Mother died and the Father has fought the Aunt through the courts.
32. The Father equally adores E and desperately wants her to live with him and for him to have a full role in her life. He feels excluded by the Aunt. His evidence was heartfelt. I was very conscious of the fact that he was not represented and some deficiencies in his evidence were largely down to that fact. However, as I will expand below, whilst many of the Father's statements were full of good intent and heartfelt, they showed a lack of insight and full consideration of future issues which I found somewhat troubling.
33. The Father lives with his partner of three years, B. She has two older children who live fairly close. I note I have no statement from B. This is not a safeguarding issue but it is clear that if E moves to F's care, B will become a critical figure in her life. Neither I nor the Guardian know much about her. There is virtually no evidence of any support network for the Father if E lives with him.
34. The Aunt places weight on reports prepared in the South African proceedings, particularly from educational psychologist, Ms Pettigrew. As Ms Asif points out these were not formally admitted, there was no application under Part 25 of the Family Procedure Rules and none of them were appointed as single joint experts. I have read them, but I put very little weight on them. Ms Pettigrew's report does not tell me anything I could not have worked out for myself about the potential impact on E of moving to live with her father.
35. The Aunt also raises a number of specific concerns about the Father.

36. Firstly, is the issue around parents' relationship and the Father's behaviour at that time. To a significant degree this is a matter of history and has little relevance to what happens to E now. Plainly family relations before the parents went to South Africa were at times extremely difficult. The Father says he spent much of the time as E's primary carer and M entirely trusted him in this regard. The only point I find that raises real concern about E's best interests relates to the Father's alcohol issue.
37. That is second area of concern. The Father accepts he has drunk alcohol to excess at times over the last 6 years. It is quite hard to calibrate the level of the issue over the entire period but there are two agreed points. When the Father and the Mother lived together the Father accepts he drank heavily. P said in their oral evidence that F drank to excess becoming inebriated about once a week and drank to a point of losing the ability to function once per month. The F accepted this in oral evidence. He said he and the Mother drank together and drank to excess.
38. As part of these proceedings, I ordered hair strand testing. The Father's hair is short so it was only possible to test for 4 months. That showed chronic excessive alcohol consumption Between December 2023 to March 2024. Chronic alcohol consumption is more than 6 units a day. The Father now largely accepts this, but seeks to minimise it, by saying he largely drank over Christmas. That is not what the hair strand test shows.
39. The Father said he has given up alcohol since March 2024. He says he is largely a social drinker whose social life seems to resolve around the village pub. He is friends with the landlady, and she now has zero alcohol cider which he drinks. About 3 weeks ago he engaged with a local organisation, Turning Point, at the Guardian's suggestion, to engage with longer term measures to stop drinking.
40. I find the Father's alcohol consumption deeply troubling. There is a long history, at least 6 years, of excessive alcohol consumption. There are texts between him and the Mother which shows he was both drunk and high on cannabis when caring for E. He said took cannabis for pain relief and that may well be the case. There are records from the GP suggesting he cut down on alcohol, but the evidence suggests that he did not do so. I accept this was a period of very high stress, but I am not convinced that the fact the Father resorts to heavy drinking when stressed gives me much comfort.



41. The father has been fighting to get E in his care for 3 years. By late 2023 he knew E was coming back to the UK and he wanted to care for her, but that did not stop his excessive alcohol consumption. Nor did his partner apparently persuade him to do so. He in truth only stopped when the hair strand test revealed beyond doubt the extent of the problem. His engagement with Turning Point is very recent and only happened at suggestion of the Guardian.
42. The father says he drinks when he is stressed. I am seriously concerned that if E was sent to live with him permanently and she became, perhaps for much of the time at least at first, very distressed and perhaps angry, that will be an extremely stressful time.
43. I note the Guardian acknowledges this concern in her report and her recommendation is conditional upon returning alcohol test results confirming his account and maintaining such changes. It is not clear how this conditionality is supposed to work. If E moves to F's care and he starts drinking again, the Guardian says Children Services could get involved. I find that of very little comfort. The Guardian accepted that the Father's eschewing of alcohol was a "work in progress" and she accepted she was not "particularly confident" about how his ceasing alcohol would progress.
44. The third area of concern is the Father's failure and perhaps inability to think in advance how E will cope and what he will do if or when she struggles to cope. He says there is a school place in the village, but there is no letter from the school. I am relatively relaxed about this, given it is a small local school, I accept there will be a place. What is more troubling is the lack of thought about what support the Father will find if, as is highly likely to be the case, E is confused, unhappy and angry about being taken out her old life to live with the Father and B against her wishes. In terms of professional support, the Father blithely said he would get support from the LA and CAMHS although he did not know their name. He mentioned having a friend who worked for the local authority. From my knowledge of Herefordshire Children's Services and the local CAMHS I think it is exceptionally unlikely that he would be offered support unless E was in crisis. The Father has made no real effort to find out about relevant services. The Guardian said it will be difficult to get local services to engage before E is there and that is undoubtedly true. My concern is that the Father has not even begun to think through the realities of the situation he wants to put E in.

45. Even more worrying was his failure to think about strategies to help E if she becomes distressed. His immediate response when I asked him was that he would let her phone her aunt. This troubled me for two reasons. He didn't think speaking to her aunt might distress E even more. E will have been taken away from her primary carer (the Aunt) and using her aunt as support may make E miss her even more. Further, the Father's response is simply to put the responsibility back on the Aunt. There is some suggestion in the evidence that E already blames her aunt in some sense for what is going on. It is very probable she will feel that her aunt has deserted her. If the Father is pressing this course on E (and indeed the Court) , then he is the one who needs to take responsibility and think about the impact on E and how he will deal with this.
46. I accept as the Guardian suggested that some people find it much more difficult to plan for emotions in advance than do others. But the Father showed a real lack of insight or forethought about the incredibly difficult and emotionally fraught situation for E he wishes me for order. To put it very colloquially, her father's love is not going to be enough for E, she needs some concrete planning and support. I am not convinced the Father will be able meet E's emotional needs through what will undoubtedly be an exceptionally difficult time.
47. The Guardian has met E twice and has seen her once in contact. Her recommendation is that E moves to live with the Father and goes to South Africa once a year on holiday.
48. She accepts that it is E's clearly expressed wish to return to South Africa and to live with her aunt. When she wrote her report the Guardian said: *Although as described above, [E] has not explicitly shared her views with me, from my interactions with her and the evidence before me, I regard [E]'s ascertainable wishes and feelings to be that she wants to remain in the aunt's care and return to RSA, which she considers her home. I also infer from her obvious enjoyment of family time with [the Father], that she would wish to continue to spend time with him throughout her childhood.*" But it became apparent through an answer to my questions that she had met E again after her report was written. I have been sent a note and I quote *"he wants me to live there and I don't want to I want to live with [the Aunt] in South Africa'. Although I have ascertained that this is what [E] wants, this is the first time it was expressed to me so clearly."*

49. I should note that I find it very surprising that this meeting was not alluded to in the Guardian's evidence in chief and Ms Asif made no reference to it when the Guardian was called to give evidence.
50. The Guardian points to the fact that E is only 7 and limited weight should be attached to her wishes and feelings.
51. The Guardian accepted that E was happy and well settled in South Africa, that she was doing well at school, and has a close unit of extended family and friends.
52. She says that E has quickly struck up a very good relationship with the Father and the Father is very good with her in contact. She feels reassured that this shows E bonds easily and she will be able to build a strong relationship with her Father relatively easily.
53. The Guardian accepts that in the short term if she moves to live with her father in Herefordshire E will be upset. The language of this varied but the Guardian accepted that she is likely to be very upset but thinks that will only be for a short term.
54. The Guardian feels the Aunt is incapable of promoting a positive relationship with E's father. She feels that unless E moves to F's care she will not have a full relationship with her father. In her oral evidence she was extremely critical of the Aunt. When I asked the Guardian about whether putting clear orders in place would be a more proportionate way of meeting her concerns, she made it clear she did not think the Aunt would comply. But in her written report she said, "*It is to her credit that despite these concerns, she is compliant with court orders and gives E the encouragement she reportedly needs – there have been no concerns about the aunt's facilitation of the spending time arrangements.*"

## **Conclusions**

55. I analyse this case through the prism of section 1 of the Children Act 1989 and the welfare checklist. I also have also had close regard to s1 (2A) of the Children Act 1989. Ms Asif referred me to a relatively old Court of Appeal judgment; *Re M (Contact: Welfare Test)* [1995] 1 FLR 274 at page 278 where the Court of Appeal referred to the welfare checklist and to ask whether the fundamental emotional need of every child to

have an enduring relationship with both his parents is outweighed by the depth of the harm. In my view that reference gives no support to a principle that a child should live with their parent.

56. E is only 7 and I accept her wishes and feeling have limited weight. They are however very clearly expressed and to state the obvious it is her life. Article 12 of the United Nations states: *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
57. In my view it is important even with a 7-year-old to think carefully about what they want, particularly where wishes are both rooted in strong objective factors and where all acknowledge that to go against her wishes and feelings will cause her very considerable distress. It goes without saying that a 7-year-old is neither competent nor should be given the responsibility for making decisions. But it also goes without saying that their own clearly expressed wishes should be carefully considered.
58. The Guardian says the harm will only be in the short term, but I am far from confident that this is case. E has a happy life in South Africa where she is doing well at school and lives in a highly supportive local community of family and friends. Very little mention has been made on the effect of removing E from her grandmother whom she is close to.
59. Most importantly E has been brought up by her aunt for most of the last 4 and a half years. The Aunt is E's main attachment figure. This is a child whose mother died when she was three and will undoubtedly have emotional vulnerabilities because of that. The Aunt has done an excellent job of getting E through that life changing trauma, outwardly at least relatively unscathed. But I do not need a psychologist to tell me that a child who lost her mother at the age of 3 is likely to be vulnerable, and to feel that she is at risk of further abandonment. I accept that to take E away from her aunt may exacerbate those issues for E.

60. The Guardian says this will be short term trauma and she feels E will easily or relatively easily attach or bond with the Father. She feels that the benefits to E of living with her F and having a close relationship with him outweigh that short term harm. She seems to base this optimism on the successful contact sessions with the Father. I do not share her optimism that the impact on E will be short term. The fact that E and the Father are developing a good relationship is great. But it is a massive step to say E will accept him as her primary carer in face of the huge disruption to her life. There is a risk, which in my view is impossible to quantify, that E will be angry and confused by why she has been forced to move from South Africa, and that anger may be turned both on the father and the Aunt. There is a risk that she will feel let down by the adults in her life and that will have lifelong consequences for her.
61. It is not possible to know what E's longer-term responses will be. But I am necessarily cautious about inflicting known and serious (and accepted) short term harm on a particularly vulnerable child, in the hope of long term and very speculative benefit. There is some truth in the aphorism that a bird in the hand is worth two in the bush.
62. The Guardian's concern is that E will lose, or not ever really gain, the relationship with her father. I accept, as have set out above, that the Aunt does not really accept or support this relationship. S.1(2A) of the Children Act 1989 says the Court should presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.
63. But this is not a case where E will not know her father and where the relationship cannot be promoted in a far less damaging way. The Guardian says in her report that the Aunt has been compliant with court orders and there have been no concerns about the Aunt's facilitation of spending time arrangements.
64. The obvious and in my view far more proportionate solution consistent with E's wishes and feelings and her best interests is to promote the relationship through contact, provided for in clear and unequivocal orders.
65. Quite apart from the accepted and likely distress to E of the move, at least in the short term, is the risk factor of the Father's alcohol consumption. He has a history of alcohol

abuse, and the evidence suggests this continued till very recently. Even the Guardian says this is a risk factor.

66. I have no doubt that the Father genuinely intends to give up alcohol but that is not so easy to do at the age of 58 and with quite a long history, and the Father is at a very early stage. He is 3 months into significantly reducing/stopping his alcohol consumption and started engaging with Turning Point 3 weeks ago. This is extremely worrying given that he has had plentiful opportunity to plan for E's return and deal with his alcohol issues.
67. I am also troubled that there is virtually no evidence of a support network for the Father, no extended family, no aunts, uncles, cousins to step in and help. One child from whom he is estranged.
68. In my view this case is clear-cut. There is no justification in taking E from a loving home where she is thriving to place her with her Father and create the risk of long term harm. In the balance between E's best interests under welfare checklist and the benefits of furthering the paternal relationship, there is a clear answer.
69. E will return to South Africa in the care of the Aunt. I want a schedule of E's contact with her Father, including the following principles:
  - a. Weekly zoom calls at a time to be agreed and if not agreed with scheduled alternatives.
  - b. The Father agrees a two-week trip to South Africa as soon as he can manage.
  - c. The Aunt agrees that E should come to the UK within the next 12 months for at least a two-week holiday.
  - d. The Aunt to use her best endeavours to promote the relationship.
  - e. Supervision of contact is not necessary.
  - f. Before E leaves UK, she is to have three-night overnight contacts with the Father and B, so she can spend some proper time with them.
  - g. The Guardian is to explain this arrangement to E so that she is clear and can trust what is happening.
  - h. If it would be helpful, I will write E a short letter in child friendly language so again she can understand what is happening.