Neutral Citation Number: [2021] EWHC 1577 (Fam)

Case No: FD19P00246, FD19P00380
FD19F05020 and FD19F00064

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2021

Before :

THE PRESIDENT OF THE FAMILY DIVISION

- -

Re AL M

- -
- -

Mr Charles Geekie QC, **Mr Timothy Otty QC** and **Ms Sharon Segal** (instructed by **Payne Hicks Beach**) for the **Applicant Mother**
Lord Pannick QC, **Ms Deborah Eaton QC**, **Mr Richard Spearman QC**, **Mr Godwin Busuttil**, **Mr Daniel Bentham** and **Mr Stephen Jarmain** (instructed by **Harbottle & Lewis**) for the **Respondent Father**
Ms Deirdre Fottrell QC and **Mr Tom Wilson** (instructed by **Cafcass**) for the **Children's Guardian**
Hearing date: 25th May 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE PRESIDENT OF THE FAMILY DIVISION

Sir Andrew McFarlane P:

1. The purpose of this short judgment is to determine a single issue that has arisen in the course of long-running wardship proceedings, the background to which is well known and need not be repeated here. The issue is whether the mother of the two wards should now be granted a 'child arrangements order' under Children Act 1989, s 8 ['CA 1989'], within the wardship, identifying her as the person 'with whom [each] child is to live' [a 'lives with order']. The application is strongly opposed by the children's father, but firmly supported by the children's guardian.

2. The application is made in circumstances where the fact that the children live with, have always lived with and will continue to live with their mother has been established, agreed and accepted since the early stages of the proceedings some two years ago. On 31 July 2019 the court made an order, with the agreement of all parties, expressly prohibiting any person from removing the children from the care and control of their mother. That order remains in force and there is no suggestion that it should be altered or revoked. In his witness statement of 4 October 2019 the father acknowledged that the mother 'is and will continue to be the parent with whom the children live'. On 8 October 2019, the father consented to an order in those terms and recording that that state of affairs could be communicated to the children. More recently, in an order of 15 July 2020, it is stated that 'the children will live with the mother and attend school in England'.

3. At the final welfare hearing, which is now planned for September 2021, there is no issue over the plan for the children to continue to have their home with their mother and for her to be their sole carer.

4. The mother's application for a 'lives with' order under CA 1989, s 8 was made as long ago as 17 September 2019. At earlier hearings the court has declined to make a s 8 order on the basis that to do so was not necessary. In particular on 8 October 2019 I rejected the proposal that a s 8 order should be made, preferring the arrangements to be recorded within the wardship.

5. Matters have now, however, come to a head and, despite there being no dispute about the living arrangements, despite the final welfare hearing being only a few months away and despite it being accepted that the wardship will continue at least in the medium term, the mother seeks to persuade the court to grant her a 'lives with' order at this hearing.

The mother's application for a 'lives with order'

6. In order to understand the context within which the mother makes this application, it is necessary to rehearse some of the recent history and to note what the mother says about the impact that it has had on her. The recent history, of course, itself sits within the overall background to these proceedings which is characterised by coercive and controlling behaviour of a high order by the children's father and which is marked by the serious findings made by the court in the main fact-finding judgment dated 11 December 2019 [2019] EWHC 3415 (Fam). Those findings, which included holding that the father had arranged for the forced abduction and, thereafter, house arrest of two of his adult children, established that the mother had fled to England from Dubai as a result of threats of violence to her and that since arrival in this jurisdiction she had been

subjected to a sustained campaign of intimidation and threat orchestrated by the father and those acting on his behalf.

7. More recently, the father, through a family trust, has attempted to purchase the 70 acre estate immediately abutting the mother's home in Berkshire. Despite negotiations for this purchase having been ongoing for some two years, and despite the mother's lawyers, over a period of many months, persistently and directly asking the father, through his English lawyers, to confirm that he was not engaged in purchasing property near to hers, the father did not reveal details of the proposed purchase until the court required a straight answer to the question.

8. At around the same time, in August 2020, the mother and her English lawyers became aware that her mobile phone and those of some members of her security staff and her solicitors had been the target of hacking by a highly sophisticated software programme that is only available for use by nation states. The father firmly denied that any of the phones had been hacked and claimed that, if they had, then he had no knowledge of or involvement in the hacking. In order to marshal and then evaluate the evidence relating to this complex and highly technical issue, the court was involved in an extensive case management process which culminated in a full fact-finding hearing, during which, at every stage, the father deployed the very considerable legal resources at his disposal to challenge and contest the mother's prosecution of her case. In the event, in a judgment handed down on 5 May 2021 [2021] EWHC 1162 (Fam), the court concluded that the hacking allegations were proved and that the father had indeed orchestrated or permitted those acting for him to use bespoke covert surveillance software licensed for the use of the State of the UAE to target the phones of the mother and five other individuals connected to her.

9. In her recent statement to the court, the mother has described the impact that being the focus of the father's actions over the past 2½ years has had upon her.

> 'Since July 2020, the pressures on me have dramatically increased. I have felt my health and my strength deteriorate slowly and progressively under the strain of the harassment of me, both through the litigation and otherwise. However much I have tried to shield the children from Sheikh Mohammed and his agents' relentless attack, I have little doubt that the children have seen the toll that these proceedings have taken on me. Every time I think a resolution may be in sight, the ground shifts again, and the finish line recedes further into the distance. At times, I am exhausted by trying to keep my balance and a level head in the face of the magnitude of what I face.'

Her statement describes the impact that the father's behaviour and the proceedings have had on her health. She also describes the effect of having to live with the children in 'confinement and isolation' for over two years. She sees the father's action in attempting to purchase the neighbouring estate as being 'part of a multi-faceted plan aimed ultimately at the abduction of the children and causing harm to me.' Later she states:

> 'All in all, since my last updating statement I have been beset by threats and pressures: the ongoing tragedies of Sheikhas Latifa and Shamsa, the constant security threats, the spectre of the hacking allegations, the physical threat and financial power of the move to purchase Parkwood, defamation and intrusion in the global press, misrepresentation

of the case in the Arab press, Sheikh Mohammed's violent and threatening poetry, and the heavyweight arrival of the UAE Government, and NSO.

As this list makes clear, some of the threats and pressures come from within the litigation, some external to it. I wish the Court to understand that from my perspective they are all linked.'

And later:

'I do not feel that I can freely move forward as things stand now, while I am and feel hunted all the time, and I am forced to look over my shoulder at every moment of the day.'

10. It is against that background that the mother describes her concern over what would happen to the children if she were to die. If no adult is available to stand in her place, although the children would remain wards of court, they would have to take her 'place in that instance in having to defend themselves until their minority ends'. This is a concern that, she says, keeps her awake at night and that it would give her 'immeasurable peace in my own daily life to know that I had done all I can possibly do to ensure that they have a bright and stable future, with or without me'. She therefore seeks a 'lives with order' because, on her understanding and on the advice of her lawyers, such an order would mean that the appointment of a person nominated by her as the guardian for her children would take immediate effect on her death, as opposed to the current position where such a nomination would not take effect until the death of both parents.

11. The application is therefore made on two, albeit connected, bases. Firstly, to ensure that the appointment of her nominated guardian will take effect on her death. Secondly, to achieve a degree of reassurance from knowing that those arrangements were in place where the issue is playing on her mind in circumstances where she believes, and the court's findings establish, that her life may be in imminent danger as a result of the actions of the father or those who are, or may believe they are, acting in his interests, and where she is, in any event, being constantly assailed by the multiple stresses and threats as she describes.

The father's opposition to a 'lives with' order

12. The father, through submissions made by Deborah Eaton QC, strenuously opposes the application for a 'lives with' order. He does so on a number of grounds. The first ground is based in law. Ms Eaton submits that, contrary to the interpretation upon which the mother relies, a 'lives with' order will not lead to the appointment of a guardian nominated by her taking effect immediately on her death if the father, as the other parent with parental responsibility, is still alive. Analysis of the competing legal submissions on this point will follow, but, Ms Eaton submits, if the father's interpretation is correct it removes the sole justification that the mother has put forward for making an order and her application should therefore be dismissed.

13. More generally, and irrespective of the primary legal point that is taken, the following submissions are made on the father's behalf against the application:

a) There is no justification for making such an order at an interim stage, and particularly so when the final welfare hearing is only a few months away;

b) There is already complete clarity as to the living arrangements for the children and there is therefore no need for a 'lives with' order;

c) The court and the father must be told the identity of the individual who the mother wishes to have appointed as testamentary guardian for the children. In the case of the father he has a 'right' to know the identity of the person that the mother wishes to appoint. To conceal the identity of the proposed guardian is, in any event, illogical as the father will come to know the identity in any event if the mother were to predecease him and, contrary to his legal arguments, the appointment takes effect;

d) Making an order under CA 1989, s 8 determining with whom a child is to live sits uncomfortably with the continuing wardship proceedings;

e) The appointment of a testamentary guardian is a very significant step to take (particularly if the father is not to be told of the identity). As such the mother should not make any appointment without the leave of the court and the court should not grant leave without being told of the identity of the appointee. Not to insist on disclosure risks the identity of the guardian only becoming known in the fraught circumstances that will immediately follow the mother's death in a manner that is unlikely to be compatible with the children's welfare interests;

f) The mother may appoint someone who is unsuitable or who, for example, may claim immunity from the jurisdiction of the court; and

g) The father would agree to the court order recording that, in the event of the death of either parent, the wardship court will, at all times, retain ultimate decision-making responsibility for the children and, in the event of the mother's death, the children would not be removed from her home or from their schools pending the decision of the wardship court.

14. The father would consent to a 'lives with' order, if the mother is insistent on applying for one, but only on two conditions. Firstly, that the order spells out the legal position on the basis of the father's submissions. Secondly, that the identity of any testamentary guardian is disclosed to the father and to the court.

The position of the children's guardian

15. The children's guardian expressed significant concern at the situation that the mother describes in her recent statement and, in particular, the pervasive feeling of being 'hunted' that is recorded there. The guardian, from the perspective of the children's welfare, understands and is concerned by the degree of sustained pressure that the mother appears to be under.

16. Ms Deirdre Fottrell QC, for the guardian, submitted that a 'lives with' order would simply reflect the practical reality and it was, in the circumstances, 'highly regrettable'

that the father is arguing against it. There is, in Ms Fottrell's submission, nothing unusual in a CA 1989, s 8 order being made within wardship proceedings.

17. Ms Fottrell did not agree with the father's interpretation of the underlying legal position (to which I will now turn), but, in any event, she submitted that if a testamentary guardian were to be appointed there would be no disadvantage to the father.

18. In all the circumstances, if the children's welfare is afforded paramount consideration as it must be [CA 1989, s 1(1)], the mother's circumstances and her description of their impact upon her, render it necessary that her application be granted and that a 'lives with' order is made at this hearing.

The legal effect of a CA 1989, s 8 'lives with' order on the appointment of a testamentary guardian

19. The issue between the parties is whether the appointment of a testamentary guardian nominated by a parent who, at the time of their death, has a s 8 'lives with' order in their favour, takes effect on the death of that parent (as the mother and the children's guardian contend), or (as the father contends) only on the subsequent death of any other parent with parental responsibility (or if there is no such other parent alive, when the 'lives with' order parent dies).

20. A testamentary guardian may only be appointed in accordance with CA 1989, s 5, the relevant parts of which are:

> **'5 Appointment of guardians.**
>
> (1) Where an application with respect to a child is made to the court by any individual, the court may by order appoint that individual to be the child's guardian if—
>
> (a) the child has no parent with parental responsibility for him; or
>
> (b) a parent, guardian or special guardian of the child's was named in a child arrangements order as a person with whom the child was to live and has died while the order was in force; or
>
> (c) paragraph (b) does not apply, and the child's only or last surviving special guardian dies.
>
> (2) …
>
> (3) A parent who has parental responsibility for his child may appoint another individual to be the child's guardian in the event of his death.
>
> (4) …
>
> (5) …
>
> (6) A person appointed as a child's guardian under this section shall have parental responsibility for the child concerned.

(7) Where—

(a) on the death of any person making an appointment under subsection (3) or (4), the child concerned has no parent with parental responsibility for him; or

(b) immediately before the death of any person making such an appointment, a child arrangements order was in force in which the person was named as a person with whom the child was to live or the person was the child's only (or last surviving) special guardian,

the appointment shall take effect on the death of that person.

(8) Where, on the death of any person making an appointment under subsection (3) or (4)—

(a) the child concerned has a parent with parental responsibility for him; and

(b) subsection (7)(b) does not apply,

the appointment shall take effect when the child no longer has a parent who has parental responsibility for him.

(9) Subsections (1) and (7) do not apply if the child arrangements order referred to in paragraph (b) of those subsections also named a surviving parent of the child as a person with whom the child was to live.

(10) …

(11) …

(12) …

(13) A guardian of a child may only be appointed in accordance with the provisions of this section.'

21. For the mother, Mr Charles Geekie QC submits that, where a parent has a current 'lives with' order in their favour at the time of their death, the appointment of a testamentary guardian takes effect on their death under s 5(7)(b) in the following manner:

a) s 5(3) establishes the right of a parent with parental responsibility to appoint another individual to be their child's guardian in the event of their death;

b) there is no requirement for the fact of the appointment, or the identity of the individual, to be communicated to or agreed with any other parent;

c) s 5(7)(a) provides that, where on the death of the appointing parent, the child has no parent with parental responsibility for him or her, the guardian's appointment shall take effect on the death of that parent;

d) s 5(7)(b) provides that, where immediately before the death of any person making an appointment under s 5(3), a child arrangements order was in force in which the person was named as a person with whom the child was to live, the guardian's appointment shall take effect on the death of that person;

e) conversely, under s 5(8), where on the death of the appointing parent the child concerned has a parent with parental responsibility (who is still living) and s 5(7)(b) does not apply (meaning that there was no 'lives with' order in favour of the appointing parent at the time of death), the appointment only takes effect when the child no longer has a parent who has parental responsibility for him; and

f) by s 5(6) a person appointed as a child's guardian will have parental responsibility for the child (once the appointment takes effect).

22. Presenting the argument to the contrary, Ms Eaton QC submits that the 'person' referred to in s 5(7)(b) in the phrase 'a child arrangements order was in force in which the person was named as a person with whom the child was to live' [emphasis added] is a reference to the person appointed to be the guardian and not to the deceased person referred to in the phrase 'immediately before the death of any person making such an appointment'.

23. In this regard, reliance is placed upon the judgment of King LJ in *Re E-R (Child Arrangements Order)* [2015] EWCA Civ 405. *Re E-R* arose from tragic circumstances in which a mother, who had terminal cancer and who was living with a couple who progressively took over the care of her 5 year old child (T) as the cancer took hold, sought to establish SJH's (the female carer) position, as against that of the child's father, in two ways. Firstly, a without notice s 8 'lives with' order had been made in favour of SJH as the mother's condition deteriorated. Secondly, the mother had appointed SJH and her husband as her child's testamentary guardians. The mother subsequently died and there were contested proceedings in the respect of the care of the child between her father and SJH and her husband. The appeal turned on whether the judge had been correct to afford a priority to the claim of a natural parent in such circumstances. In the course of her judgment, however, King LJ considered the impact of the mother's attempt to ensure that T would be looked after by SJH and her husband following her death by appointing them as guardians under CA 1989, s 5(3). Applying the provisions in s 5, that appointment had not taken effect on the mother's death, as she had hoped, and caused King LJ (paragraph 36) to describe it as something 'which may trap the unwary'.

24. The paragraph relied upon by Ms Eaton is paragraph 37:

> "37. By s 5(6) CA 1989, a person appointed as a child's guardian has parental responsibility. However where as here, the child has a surviving parent with parental responsibility and there is no child arrangements order directing that T is to live with the named guardian, (here SJH and her husband), the appointment of SJH and her husband as T's guardians does not take effect for so long as the father is alive and has parental responsibility (s 5(7) and (8) CA 1989). It follows therefore that SJH derives her parental responsibility in respect of T from the order made by the judge in August 2014, and not by virtue of her having been named by the mother as testamentary guardian." [emphasis added]

25. Ms Eaton's submission is that paragraph 37 of *Re E-R* establishes that the making of a 'lives with' order would not have the effect contended for by the mother, namely that any appointment of a guardian would have effect on her death were she, the mother, to have a 'lives with' order in force in her favour at that time. Ms Eaton particularly relies upon the passage in paragraph 37 that is emphasised above. She submits that King LJ must be taken to be interpreting s 5(7)(b) as applying where the 'lives with' order referred to in s 5(7)(b) is one 'directing that [the child] is to live with the named guardian', and not, as Mr Geekie submits, where the person named in the 'lives with' order was the recently deceased parent.

26. I can deal with this point shortly.

27. The only people who are entitled to appoint a testamentary guardian are 'a parent with parental responsibility' [s 5(3)] or a guardian who has already been appointed [s 5(4)].

28. It follows that, in s 5(7)(b), the phrase 'immediately before the death of any person making such an appointment' can only refer to a person who is either a parent with parental responsibility or an existing guardian. Where, in the remainder of the sub-sub section there is reference to 'a child arrangements order which was in force in which the person was named as a person with whom the child was to live' [emphasis added], 'the' person must be the appointing parent or guardian. To hold otherwise would not explain the use of the definite article to define 'person'.

29. Further, s 5(7)(b) when describing the 'lives with' order uses the past tense: 'was in force' and 'was to live'. Such use again clearly ties the order and its terms to the person who has died who, I repeat, is the person making the testamentary guardian appointment and is therefore a parent with parental responsibility.

30. Thirdly, there would be no purpose in the enactment of s 5(7)(b) if the child arrangements order referred to was one naming the nominated guardian. If such an order were in force at the death of the child's parent it would continue in force, be unaffected by the death, and the named person would continue to have parental responsibility.

31. Fourthly, s 5(7)(b) plainly establishes an exception from the ordinary position where one parent's (or guardian's) appointment of a testamentary guardian does not take effect on their death, unless at that time there is no other living parent with parental responsibility [s 5(7)(a)]. Where there is a living parent with parental responsibility and the exception in s 5(7)(b) does not apply, the appointment made by the first deceased parent will only take effect on the death of the second parent [s 5(8)]. The exception is therefore to give priority to the appointment of a guardian when it has been made by a parent whom a court has determined should have the child living with them. In some cases both parents may have a 'lives with' order and, in each case, the guardian appointed by a deceased parent would take effect on the death of the appointing parent.

32. Despite the firmness of Ms Eaton's submissions, they are without substance on this point. Firstly, the father's interpretation is on the basis that a parent, who does not have a 'lives with' order in their favour, but who has appointed X as a guardian, dies and, if there is a 'lives with' child arrangements order in force naming X at that time, then the appointment of X as guardian will take effect on that parent's death. It is difficult to discern what purpose Parliament had in mind in enacting the provision if that is its meaning. Such circumstances are likely to be extremely rare.

33. For the reasons that I have already given, the father's case does not accord with the plain and ordinary meaning of the words. It involves holding that 'the' person referred to was not the deceased appointing parent, which is an interpretation that is unsustainable on the wording and which ignores the use of the past tense. If X is still living and the 'lives with' order remains in force, why would Parliament refer to X as 'the person [who] was named' or X as being the 'person with whom the child was to live', when the wording of s 8(1) refers to a person 'with whom a child is to live'.

34. Further, the reference to paragraph 37 of King LJ's judgment in *Re E-R* is not relevant to the issue in this case and does not therefore assist the father's case. In *Re E-R* the deceased mother did not have a 'lives with' order in her favour at the time of her death and, therefore, as King LJ described, 'the appointment of SJH and her husband as T's guardians does not take effect for so long as the father is alive and has parental responsibility'. SJH had parental responsibility for T, but that was afforded under the earlier 'lives with' order and not because the guardianship had taken effect. If the deceased mother had had a 'lives with' order in her favour at the time of her death, then the guardianship appointment would have taken effect at that time. It is this latter situation that the mother in the present cases is seeking to achieve.

35. I therefore hold that the interpretation put forward on behalf of the mother, and supported by the children's guardian, is correct and, if the mother has a 'lives with' order in her favour at the time of her death, then any guardianship appointment made by her under s 5(3) will take effect then, and not on the subsequent death of the father, if that is the case.

Welfare Analysis

36. In determining this application, the court must afford the welfare of each of the children paramount consideration and only make an order if it considers that doing so would be better for the child than making no order at all [CA 1989, s 1(1) and (5)]. Whilst the 'welfare checklist' in s 1(3) must be considered, in circumstances where there is no dispute about the living arrangements for the children, many of the elements in the list are not of any active relevance. The exception is the 'physical, emotional and educational' needs of the children [s 1(3)(b)]. In that regard, it is very much in the children's interests for their mother's wellbeing and emotional viability to be supported where possible. Despite her best efforts, the impact on her life of the events that she describes is such that any reasonable step that the court can take to reassure her and meet her emotional needs as a parent and as the children's primary carer is likely to be justified in the extreme and unusual circumstances of this case.

37. Whilst the mother herself does not push this issue to the forefront, I share, and certainly do not disagree with, the guardian's concern about her wellbeing. I also agree that granting a 'lives with' order, which is not an exceptional course in wardship proceedings, to reinforce further the message that the present arrangements are firmly fixed, is in the children's best interests.

38. The express purpose that the mother does present as the primary justification is that a 'lives with' order will entitle her to nominate a guardian whose appointment would take effect on her death. A parent may nominate a testamentary guardian at any time. Each of these two parents may or may not have already done so. Whilst possibly having consequences for the children in time to come in the event that both of their parents

were to die during their minority, I do not agree with Ms Eaton that the act of nomination itself is a step in the child's life that is of sufficient importance to require the permission of the wardship court. I do, however, agree with Ms Eaton that the making of a 'lives with' order which, if granted would prioritise the mother's choice of guardian by engaging the s 5(7)(b) exception, is an important step in the child's life and, of course, the court will only grant a 'lives with' order if to do so is in the best interests of the child having taken account of this and all other relevant factors.

39. Ms Eaton's submission goes further and describes the actual choice of individual guardian that the mother proposes to make as being, itself, an important step and therefore one which requires the court being told who it is who is to be appointed. The baseline for this submission is that, contrary to the father's case, a parent in his position does not have a 'right' to be told the identity of a nominated guardian. In some families it is a joint choice, or there will be discussion between parents; but it is not required by the law.

40. Here, the mother has established a strong case against informing the father of the identity of the individual she appoints. In short she is confident that the father would, once the information is known, seek to target that individual and expose them to the force of his influence in a way that would be wholly contrary to the mother's wishes and intentions, and in a way that would simply compound her feeling of being controlled and undermined at every turn by the actions of the father and those who do his bidding.

41. In some cases it may be justified for a court in wardship to require disclosure of the identity of a nominee for guardianship. The wardship jurisdiction is wide and I am certainly not holding that the court has no power to require disclosure. I am, however, clear that in the present case it would be entirely contrary to the children's welfare to require the mother to disclose the identity of her nominee. To do so would in many ways defeat the very purpose of her application and, were the identity to be known and were the father to turn his attention to that individual in a negative manner, which I am satisfied is a legitimate concern on the evidence and findings made, then that development, rather than enhancing the mother's emotional wellbeing, would be likely to have the converse effect.

42. All that the court has read and heard about this mother, from her statements and from the appraisals of both the former and the current guardian, indicates that she is entirely focussed on meeting the needs of her children and that she succeeds in doing so, albeit within the straitened circumstances in which they are all forced to live. There is no basis for contemplating that she would choose someone unsuitable for the role of guardian; on the contrary I am satisfied that she will be anxious to choose someone who is best suited for stepping into her shoes if the need arose.

43. In all the circumstances, I am satisfied that it is both in the children's interests for a s 8 'lives with' order to be made and for that to be done now at this late interim stage. I make the order on the basis that, as the mother has with full openness described, she will appoint a testamentary guardian for the children (if she has not already done so). Insofar as the court may have power to require her to disclose to the court the identity of her nominee, I decline to exercise that power.

44. In all the circumstances, I grant the mother's application and will make an order under CA 1989, s 8 forthwith providing for the two children to live with their mother.