In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 251

BETWEEN:

IAH

Applicant

and

BHD

Respondent

RULING ON LEAVE TO APPEAL
(Ex Parte – On the Papers)

RULING of Southey, AJ

1. The Respondent has sought leave to appeal against rulings given on 24 January 2025. I have been provided with a notice of appeal. This sets out the issues that the Respondent seeks to raise on an appeal.

2. I understand that the applicable test for leave to appeal is whether the appeal is arguable and/or raises a novel question of importance upon which further argument and a decision of the Court of Appeal would be to public advantage. The standard to apply when deciding whether an appeal is arguable is whether the appeal is 'doomed to fail' (*American Patriot Insurance Agency Inc v Mutual Holdings (Bermuda) Ltd* [2004] Bda LR 55). I have applied that test below.

3. I am satisfied that I can deal with this application for leave to appeal fairly without an oral hearing.

Merits of an appeal

4. The Respondent raises a number of potential grounds of appeal. I will deal with each in turn.

*Ground 1: (Jurisdiction re **A**) Failure to Cease Making a Decision where there is no Jurisdiction*

5. Essentially it is argued that I erred by concluding that I had jurisdiction to make an interim order regarding one of the children while at the same time setting a date for full argument regarding jurisdiction.

6. The notice of appeal does not set out the background to the decision/order challenged. That background is important. In summary:

   (a) Section 12(2) of the Minors Act 1950 states that*:*

   The court upon the application of

   (d) any person for the time being having actual charge of a minor

   …

   may make such orders as it may think fit in relation to the guardianship, custody or maintenance of the minor and the right of access thereto and the control and management of any property of the minor, having regard to the welfare of the minor and to the conduct and to the wishes or representations of either parent or of any guardian or of any person having the actual charge of the minor.

   (b) In advance of the hearing that took place on 23 December 2024 considering whether to make an interim order, the Respondent raised the issue of the Court's jurisdiction in relation to A. In particular, the position statement stated that:

"The Summons issued by the Applicant includes A in the application, however the Respondent will be seeking that he is not a subject of these proceedings or any further proceedings involving the Applicant."

(c) On 23 December 2024 no formal application was made in relation to A and there were no oral arguments regarding jurisdiction. Jurisdiction appeared to be accepted.

(d) On 22 January 2025 a summons was issued seeking to remove A from the proceedings. That was 2 days before contempt proceedings were due to be heard regarding an alleged failure to comply with provisions of the order issued on 23 December providing for access.

(e) During the hearing on 24 January it became clear that neither party was fully prepared for legal argument about jurisdiction. Reference was made to legal authority that was not properly identified and not available to me. On the basis of the arguments I heard I was satisfied that I had jurisdiction. It appeared to me that the Applicant had actual charge of A when informal arrangements were made for contact. However, it also appeared to me that the importance of the issues meant that I should make arrangements for further argument if necessary.

(f) A hearing was scheduled for argument about jurisdiction on 7 February. Late on 6 February a consent order was agreed adjourning the issue of jurisdiction sine die with liberty to restore. The liberty to restore provision means that the issue of jurisdiction can be argued if there is some basis for believing that I reached the wrong conclusions.

(g) It appears to me that in light of the matters above an appeal raising this ground is bound to fail:

i. It has not been explained why I reached the wrong conclusion about jurisdiction. It is merely said that I should have waited for full argument. On the material before me, there is no reason to believe I reached the wrong conclusion about

jurisdiction. If I reached the correct conclusion, I had jurisdiction to make the interim order.

ii. Further, arrangements were made to hear further argument about jurisdiction. The Respondent did not take advantage of these arrangements. Instead she agreed an adjournment of the hearing sine die. That again suggests that there is no reason to believe that I erred regarding jurisdiction.

iii. The Respondent essentially argues that I should have discharged the order in relation to A on the basis of an application made to challenge jurisdiction that was made at such short notice that the parties were not fully prepared. It appears to me that the argument that I should have discharged the order is inconsistent with the principle that the welfare of the child is a first and paramount consideration (Minors Act 1950, section 6). I had already concluded that the interim order I made was in the best interests of A. On the arguments that I had heard I was also of the opinion that I had jurisdiction. In those circumstances, it appears to me that it is impossible to see how it would have been consistent with the best interests of A to have discharged the interim order on the basis that I might hear further argument that persuaded me to change my interim conclusions regarding jurisdiction.

Ground 2: Attaching a Penal Clause to an Order not yet finalised or sealed and without the leave of the Court.

7. The parties were present at the hearing in December and so were aware of the order made in December that resulted in an application being made for the committal of the Respondent for contempt. While there was a dispute about the exact terms of the order, that did not appear relevant to the contempt application.

8. In response to the application for committal for contempt, the Respondent did not deny knowledge of the terms of the order. Instead she stated in affidavit evidence that:

> [18] *"It is ludicrous that I am being forced to send a child to access against his will. …*
>
> [22] *"I refuse to send a child to be used and abused for his personal gain, this is textbook narcissism and vexations litigation."*

This appeared to me to demonstrate a deliberate decision not to comply with the order made in December so far as it applied to A.

9. The Applicant made it clear that he did not seek the committal of the Respondent.

10. By reason of Order 1A, rule 4 of the Rules of Supreme Court 1985, the Court is required to actively case manage cases. Consistent with this, Order 52, rule 5 enables the Court to commit a person without an application. I am satisfied that these rules demonstrate clearly that this Court has broad powers to enforce orders including by adding penal notices if appropriate. Consistent with that there is no rule that I am aware of that requires any particular formalities before the Court adds a penal notice (and none is identified in the appeal notice).

11. In circumstances where there was a clear unwillingness to comply with an order of the Court, it appears to me that this ground of appeal is bound to fail. Failing to attach a penal notice risked continuing failure to comply with the order of the Court. There is no basis for arguing that I exercised my powers unlawfully.

Ground 3: Hearing of and withdrawing of Committal Application that should've been dismissed

12. As noted above, the Court has broad case management powers. In particular, Order 1A, rule 4 of the Rules of Supreme Court 1985 makes clear that active case management includes:

> *"… (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*

(d) deciding the order in which issues are to be resolved; …"

This makes it clear that I have and had powers to determine whether and when issues are resolved.

13. In circumstances where the Applicant had made it clear that he did not seek committal and where I was making an order to ensure compliance with the order in issue, it would clearly have been a waste of court time and resources to determine the committal application. The appeal notice does not explain what purpose would have been served by determining the committal application.

14. No application was made for costs. The order provided for costs reserved allowing the Respondent to make whatever application she wishes to make regard with costs at a later point in time.

15. In light of the matters above, it appears to me that this ground of appeal is bound to fail.

Ground 4: Ordering Access where there are welfare concerns

16. It appears to me that this is essentially an appeal against my order dated 23 December 2024 as that is when I ordered access. As a consequence, it is apparently out of time (Order 2, rule 3 of the Rules of the Court of Appeal). No application has been made to extend time.

17. Even if I am wrong in concluding that this application to appeal on ground 4 is out of time, *Re D (Contact: Interim Order)* [1995] 1 FLR 495 (applied in this jurisdiction in *Father and Mother (Travel Prohibition Application)* [2024] SC (Bda) 50 Civ) makes it clear that the Court should not prejudge matters to be determined during fact finding when making an interim order. That means that I should not assume allegations made by the Respondent (or the Applicant) are correct. That demonstrates that it would have been wrong for me to refuse to make orders because allegations had been made. What I did was carefully consider the welfare checklist. What was critical was that welfare concerns had not

prevented consensual contact for a significant period. That suggested that contact could continue on terms previously agreed.

18. In light of the matters above, it appears to me that this ground of appeal is bound to fail. I applied principles well established in previous judgments that were essentially not in dispute.

Ground 5: Ordering the Respondent to serve Notice of Proceedings on A's biological father

19. The Respondent's affidavit dated 22 January 2025 expressed a concern that the biological father had not been served in these proceedings. There appeared to be no dispute that he should be served. The Applicant was not aware of how to contact the biological father. That meant that effective service could only be effected by the Respondent. The Court has wide powers to order substituted service (Order 65, rule 4 of the Rules of Supreme Court 1985) and so could order service be effected by the Respondent. Unless service was to be effected by the Respondent, there was no reason to believe it would be effective.

20. In light of the matters above, it appears to me that this ground of appeal is bound to fail.

Ground 6: Allowing the Applicant to apply to the Court for permission to access B's medical and educational records

21. The Court has issued directions that enable there to be argument as to whether permission should be granted for the Applicant to access B's medical and educational records. It was acknowledged that issues of law had been raised that needed to be considered. There is nothing in those directions that prevents the Respondent arguing that the Court has no jurisdiction to order access. Indeed it was expressly acknowledged that this issue was likely to be addressed by the parties.

22. It is also relevant that the issue arose because the Respondent's summons issued on 22 January 2025 sought an order that:

The Applicant be prohibited from obtaining or attempting to obtain private therapy information or notes, counselling notes, medical records and information relating to A's education and ongoing work with Endeavour, until such time as the proceedings relating to care and control and custody are concluded.

As a consequence, it was the Respondent who first sought an order that required the Court to consider what powers it had in relation to A's medical and educational records and how it should exercise those powers.

23. In light of the matters above, it is impossible to see what the Court could have done other than order legal argument.

24. In light of the matters above, it appears to me that this ground of appeal is bound to fail.

Novel question of importance

25. In light of the matters above, it appears to me that none of the issues raise a novel question of importance upon which further argument and a decision of the Court of Appeal would be to public advantage. It appears to me that the relevant law is clear. In addition, many of the issues are unlikely to arise in other cases. The issues are fact specific.

Dated this 12th day of February 2025

THE HON. HUGH SOUTHEY
ASSISTANT JUSTICE