Neutral Citation Number: [2025] CA (Bda) 8 Civ

Civil Appeal No. 6 of 2025

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. ASSISTANT JUSTICE HUGH SOUTHEY
CASE NUMBER 2024: No. 251

Sessions House
Hamilton, Bermuda HM 12

Date: 04/04/2025

Before:

JUSTICE OF APPEAL THE HON IAN KAWALEY
JUSTICE OF APPEAL THE HON NARINDER HARGUN
and
JUSTICE OF APPEAL THE RT HON SIR GARY HICKINBOTTOM

- -

Between:

BHD

Applicant

- and -

IAH

Respondent

Appearances:
The Applicant appeared as Litigant in Person
Mr Adam Richards of Richards Limited for the Respondent

Hearing date: 21st March 2025
Date of Reasons: 4th April 2025

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Leave to appeal an interim order of the Supreme Court concerning access

REASONS FOR THE RULING ON APPLICATION FOR LEAVE TO APPEAL

HARGUN JA:

1. These are the reasons for the Court's decision of 21 March 2025 refusing the Applicant mother's (**"the Mother"**) application for leave to appeal the Interim Orders of Assistant Justice Southey (**"the Judge"**) dated 23 December 2024 and 24 January 2025, dealing principally with issues of access. The application for leave to appeal to this Court followed refusal by the Judge to give leave to appeal on 24 January 2025. The Judge's reasons for refusal to give leave are set out in his written Ruling dated 12 February 2025 (**"the Ruling"**).

2. By his Interim Order dated 23 December 2024, the Judge granted the Respondent father (**"the Father"**) access to the three children of the family on an interim basis under section 12 of the Minors Act 1950. The interim arrangements were designed to last until the determination of the final order on the Father's application for sole care and control or alternatively shared care and control of the children. With regard to the substantive hearing of the application the Judge gave directions as to the filing of the affidavit evidence and directed that the matter be listed on 21 April 2025 for a four-day hearing to determine the allegations relating to the risk of harm to the children each party makes against the other.

3. Before considering the proposed grounds of appeal it is to be noted that this is not an appeal against a final order of the Judge but an interim order regulating access pending the determination of the final order following the hearing scheduled for 21 April 2025. The approach of this Court is to "*deprecate*" an appeal of an interim order in relation to access and custody matters unless it is "*extremely plain*" that there has been such a departure from the established principles so as to enable the Court to interfere. This was the approach adopted by Butler-Sloss LJ in *Re J (a minor) (Interim Custody: Appeal)* [1989] 2 FLR 304 at 308:

> *"I must say that I would deprecate the instant appeal of an interim order. We also had our attention drawn to the decision of this Court in Edwards v Edwards [1986] 1 FLR, particularly to the words of Purchas LJ at p. 209 where he said:*
>
> *"I venture to comment that appeals concerning a matter of care and control, in order to hold the position pending a full enquiry, are very difficult appeals to*

> *establish successfully. The reason for this is simple: it is a matter which is essentially in the discretion of the judge, who sees the parties (although in this case they did not give evidence before him) and who has a "feel" of the case, and, moreover, it is essentially a matter for him during the interim proceedings. But essentially in an interim order of this kind it must be difficult to establish such a departure from the principles to be applied in an interim decision so as to enable this court to interfere."*
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> *I would respectfully adopt those words of Purchas LJ and say that this is not the sort of case, unless it is extremely plain, in which there should be an appeal against the first part of an interim order made even prior to having the interim application fully litigated."*

4. As noted by Purchas LJ in *Edwards,* a decision in relation to issues of access and custody necessarily involves the exercise of discretion by a judge and it would be a rare case where this Court would consider it appropriate to interfere with such a decision. In *Bellenden (formerly Satterthwaite) v. Satterthwaite* [1948] 1 All E.R. 343, Asquith L.J., dealing with the issue when it may be appropriate for an appellate court to interfere with a discretionary decision in matrimonial proceedings, said, at p. 345:

> *"It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."*

Ground 1: Jurisdiction to make decisions concerning A

5. In advance of the hearing before the Judge to consider whether to make an interim order in relation to access on 23 December 2024, the Mother raised the issue of the Court's jurisdiction in relation to child A. Essentially the Mother contends that as A is the child of her previous marriage and the Father is not A's biological parent nor his legal guardian, there is no jurisdiction under the Minors Act 1950 for the court to grant access to the Father in relation to A. It is acknowledged that questions of jurisdiction as such do not involve the exercise of discretion by the Judge.

6. Whilst the issue of jurisdiction was raised as a potential matter by the Mother at the initial hearing on 23 December 2024, it was not pursued until a summons was filed two days before the hearing on 24 January 2025. As the Judge notes in his Ruling at para 6(c), no formal application was made by the Mother in relation to A on 23 December 2024 and there were no oral arguments regarding jurisdiction. However, the Judge formed the provisional

view that the Supreme Court had jurisdiction in relation to A on the basis that the Father had actual charge of A (when informal arrangements were made for contact) within the meaning of section 12(2) of the Minors Act 1950. The Judge also took the view that it was in the best interests of the children to grant access to the Father. Accordingly, the Interim Order dated 23 December 2024 provides the Father access to all three children including A.

7. The Judge further notes that during the hearing on 24 January 2025 it became clear that neither party was fully prepared for legal argument about jurisdiction. In the circumstances, a hearing was scheduled on 7 February 2025 for full argument on the issue of jurisdiction to grant the Interim Order dated 23 December 2024. However, late on 6 February 2025 a consent order was filed by the Mother adjourning the issue of jurisdiction *sine die* with liberty to restore. Accordingly, the Supreme Court has not made any final order in relation to the issue of jurisdiction. It remains open to the Mother to reinstate her application in relation to this issue and have it determined by the Supreme Court.

8. As the Judge notes at para 6(g)(iii) of the Ruling, the Mother essentially argues that the Judge should have discharged the Interim Order of 23 December 2024 in relation to A on the basis of a summons filed by her on 22 January 2025 seeking to challenge jurisdiction at short notice; and an application which the parties were not fully prepared to argue at the hearing on 24 January 2025.

9. Given the factual background outlined above, it seems to me that an appeal based on the argument that unless and until the Judge made a final determination on the issue of jurisdiction raised in the summons filed on 22 January 2025, he could make no interim provision for access in relation to A, is bound to fail. The Judge unarguably had the power to maintain the access arrangements which had pertained since the 23 December 2024 (which had not been appealed) pending full argument on the jurisdiction issue.

10. Furthermore, as Mr Richards for the Father points out, in her own divorce application, the Mother accepts that A is a child of the family as defined in the Matrimonial Causes Act 1974. As such, even if there was any argument about jurisdiction under the Minors Act 1950, there can be no such argument under the divorce legislation. Given that the Father is a party to the divorce, sections 45 and 46 require the Court to make decisions concerning the welfare of the child before final divorce order is made and thereafter until the child turns 18. Given that the Mother has issued and served divorce proceedings, the issue of jurisdiction under the Minors Act is academic, and any appeal based upon the lack of jurisdiction in relation to A is bound to fail.

Ground 2: Penal Notice

11. Paragraphs 7 to 11 of the Ruling show that (i) there was affidavit evidence before the Judge from which he could conclude that the Mother made a deliberate decision not to comply

with the Interim Order dated 23 December 2024 so far as it applies to A; (ii) the Father made it clear that he did not seek the committal of the Mother.

12. I agree that pursuant to Order 1A, rule 4 and RSC O.52 r. 5, the Court has broad powers to enforce orders including by adding a penal notice if appropriate. Accordingly, where there is a clear unwillingness to comply with an order of the Court, a judge may attach a penal notice designed to ensure compliance with an order of the Court. The Court is not bound by any particular formalities before affixing a penal notice to an order of the Court.

13. Here, the Judge took the view that there was clear unwillingness on the part of the Mother to comply with an order of the Court and in those circumstances the Judge was plainly entitled to attach a penal notice to the Interim Order dated 23 December 2024. Any appeal based upon lack of jurisdiction of failure to follow any particular procedure is, in my view, bound to fail.

14. The Mother also complains that the committal proceedings should have been dismissed rather than withdrawn without prejudice. It is apparent that the decision to withdraw represented a practical solution in circumstances where the Court intended to add a penal notice to the Order to ensure compliance going forward. As the Judge notes in para 13 of the Ruling that in circumstances where the Father stated that he did not seek committal and where the Judge 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. In the circumstances any appeal based upon the assertion that the Judge should have determined and dismissed the committal application, as opposed to withdrawn without prejudice, is, in my view, bound to fail.

Ground 3: Ordering Access where there are welfare concerns

15. It is said by the Mother that the Judge erred in law and procedure by ordering access in circumstances where welfare concerns were raised. She contends that it was wrong in principle for the Judge to order access prior to the hearing of fact in relation to domestic abuse allegations listed for a four-day hearing on 21 April 2025.

16. As the Judge notes in paragraph 16 of his Ruling, access was in fact granted by the Order dated 23 December 2024. Cases such as *Re D (Contact: Interim Order)* [1995] 1 FLR 495 and *Father v Mother (Travel Prohibition Application)* [2024] SC (Bda) 50 Civ) accept that even where the principle of contact is in issue (such as where there are allegations of abuse) the test remains the welfare test and *interim* orders for contact can be made in such cases. Furthermore, these cases emphasise that greatest care must be taken before such an order is made to ensure (a) that on the facts as they currently present themselves it is truly in the interests of the child in question; and (b) that the order does not prejudge matters to be determined during the fact-finding hearing (in this case scheduled for 21 April 2025).

17. Having regard to the facts in this case, the Judge considered that it was in the best interest of the children to provide access, and which he ordered under the terms of the Interim Order dated 23 December 2024. In the circumstances it appears to me that this ground of appeal is bound to fail.

Ground 4: Ordering the Mother to serve notice

18. The Mother complains that the Judge erred in law and procedure by ordering her to effect the service of Notice of Proceedings on the biological father of A.

19. As the Judge notes in paragraph 19 of the Ruling the Mother expressed concern that the biological father of A had not been served in these proceedings. There was no dispute that he should be served but the Father was not aware of how to contact the biological father. That meant, as the Judge notes, that effective service could only be effected by the Mother. In the circumstances the Judge ordered substituted service pursuant to RSC O.65 r.4 and directed that the service on the biological father of A be effected by the Mother.

20. Having regard to the circumstances set out in paragraph 19 above it appears to me that this ground of appeal is bound to fail.

Access to medical records history

21. The Mother contends that the Judge erred in law by ordering that the Father be allowed to apply to the Court to access the eldest daughter's medical and/or educational records.

22. As the Judge notes in paragraph 21 of the Ruling, the Court has issued directions that enable there to be argument as to whether permission should be granted for the Father to access the eldest daughter's medical and educational records. The Judge notes that it was acknowledged that issues of law had been raised that needed to be considered and that there is nothing in those directions that prevents the Mother from arguing that the Court has no jurisdiction to order access. In the circumstances, it appears to me that this ground of appeal is bound to fail.

23. It was for these reasons that at the hearing on 21 March 2025 the Court decided to refuse leave to appeal the Interim Orders of the Supreme Court dated 23 December 2024 and 24 January 2025.

HICKINBOTTOM JA:

24. I agree with the judgement of Hargun JA and would also associate myself with the additional observations of Kawaley JA.

KAWALEY JA:

25. I also agree.

26. I would merely like to very briefly explain why our Order of 21 March 2025 included a direction that the Department of Child and Family Services ("DCFS") should report to the Supreme Court if any concerns about the welfare of the children of the family are identified. The Mother raised what on their face were serious concerns about the risks the interim access arrangement had for the children. Mr. Richards pointed out that the father and the mother have each accused the other of serious misconduct in relation to the children. This Court was in no position to form even a superficial view of the merits of these complaints. It is, regretfully, not uncommon for unfounded allegations of child abuse to be made in family proceedings. Even valid allegations are, on the other hand, typically difficult to verify. We lacked visibility of precisely what reports the Judge may have ordered and received, and precisely what role DCFS is currently playing in relation to the children's welfare. These logistical concerns did not in my judgment justify this Court ignoring (or being seen to be ignoring) the serious concerns articulated by the Mother, in a passionate manner, and assuming that all was well.

27. Adopting a precautionary approach, I considered that it was important for this Court to eliminate any risk that DCFS might have concerns which ought to be reported to the Supreme Court but doubted their competence to do so on an unsolicited basis. The directions made in this regard were intended to do nothing more than to confirm this Court's view that the DCFS has the legal authority (by necessary implication under, *inter alia*, section 9 of the Children Act 1998) to bring to the Supreme Court's attention any concerns about a child's welfare arising from interim access without being requested by the Court to prepare a formal report.