



[2022] JMSC Civ 116

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV03852

BETWEEN TIMAR DALE STEPHENSON CLAIMANT
AND ORNELLA LATOYA WHYTE STEPHENSON DEFENDANT

IN CHAMBERS

Ms Schana Johnson instructed by SNJ Attorneys-at-Law for the Claimant who was present.

Ms Marjorie Shaw instructed by Brown and Shaw for the Defendant who was absent.

Heard: July 12, 2022

Custody Application; Claimant migrating; Order to have children medically examined; children named as non-accompanying family members

Barnes J (Ag)

The Application

[1] The matter came before the court on July 12, 2022, for a determination to be made on order #6 of the Fixed Date Claim form filed on September 9, 2021. The Order seeks:

That the relevant children are to be taken to doctor's appointment, along with passport for application as non-accompanying dependents for permanent resident to Canada.

[2] The Claimant, the father of the two minor children, is in the process of applying for permanent resident status in Canada. He has filed an application for Joint custody of his daughters, born in 2018 and 2019 respectively; access to the said children via video calls; visits with him in Canada or Jamaica during the holiday periods; maintenance as well as the specific order as above.

[3] When the matter came before the court on May 17, 2022, the Claimant's Attorney indicated that her client's application for status in Canada was far advanced and that the medical examination of his daughters were to be done in August 2022 as they had to be documented. On that basis, three orders were made in relation to this application:

1. The matter is adjourned to 12th June 2022 at 3:00 p.m. for one hour for the hearing of Order # 6 of the Fixed Date Claim Form filed on September 9, 2021
2. Applicant is to file and serve supporting documents in support of that application no later than June 10, 2022
3. Defendant is to file and serve an affidavit in response no later than June 24, 2022

Orders were also made for trial of the substantive matter as well as Pre-Trial Review date was set.

[4] The Claimant filed and served his affidavit with supporting documents on June 16, 2022 – some six days late. The Defendant filed no affidavit in response. Neither did she attend at this hearing.

[5] The Claimant's affidavit at paragraph 4, states "It is a prerequisite of my application for permanent residency that I declare all my dependents, that is, spouse and children. This requirement is in accordance with regulation 23 of the Immigration and Refugees Protection Regulations and Section 44 (1) of the Immigration and Refugee Protection Act." With that he exhibited three (3) documents;

1. **TDS34** – copy of operational bulletin 2 –Processing family members of the Family Class
2. **TDS35** – Regulation 23
3. **TDS36** – Section 44 of the Act

Also exhibited were:

4. **TDS37** – Regulation 29 of Immigration and Refugees Protection Regulations
5. **TDS38** – List of panel of physicians approved by the Canadian Embassy
6. **TDS 39, TDS 40, TDS 41** – copies of the relevant bulletins, act and the webpage of the Canadian Government’s immigration website.

Defendant’s Submissions

- [6] Miss Shaw’s oral submissions, were in strong objection to the documents filed, stating that there needed to be evidence from an expert as to exactly what was required under the Canadian law, as she did not have the expertise and could not interpret same.
- [7] Miss Shaw reiterated her position from May 17, 2022, that this Order ran with the substantive claim for Custody, maintenance and access and could not be determined until the matter was tried.
- [8] She also said that there would be no “invasive” or other medical and psychological examination of the girls with which the mother, a medical doctor, would agree. It was also her position that said medical meant that the father was applying for the girls to migrate with him and the mother is not in agreement with any such arrangement.

Claimant's Submissions

- [9] Ms Johnson, for the Claimant, stated that there was no intention of the father to move the children out of the jurisdiction, but these procedures were necessary in his application for status in Canada, as otherwise he would be presenting false statements on his immigration documents as per his dependents. She said if the children were to visit with him in Canada, or later even migrate there, this would easily facilitate that process.
- [10] She also said that the mother/Defendant, a medical doctor, could accompany the children to oversee the medical examinations and to ensure that her children were not violated or examined in any way with which she disagreed.

Court's Ruling and Orders

- [11] The court noted that the 2nd child was born in the United States of America. It was also noted that the documents exhibited by the Claimant spoke to "non-accompanying" dependents, there was nothing therein with reference to migration or permanent residency of the minor children. Neither is he saying in his affidavits that it is his intention to have the children migrate with him. To do otherwise, would mean that he presented false statements to this court.
- [12] It was also represented to the court that there was some "urgency" for this particular order, as the Claimant's immigration process was far advanced and would only be delayed/hampered if this order was not granted. And it was stated that the medicals would need to be done in August 2022.
- [13] The documents he exhibited set out the requirement to name family members, whether or not they were accompanying the immigrant. Family members not declared, cannot be sponsored at a later date, and would have deemed the immigrant's statement when seeking permanent status in Canada, a falsehood.

[14] Said documents, though late, were served upon the Defendant for some weeks and there was no Affidavit in Response. Neither was there any Requests for Information as allowed by Part 34 of the Civil Procedure Rules.

[15] The Court was satisfied that on the basis of the affidavits of the Claimant and his supporting documents, this order was indeed necessary and fell well within the wide powers of the Court's General Powers of Management as stated in Rule 26

(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any enactment

(2) Except where these rules provide, the court may –

(a)

(b)

(v) Take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective

That overriding objective under Rule 1.1 is inclusive of:

(2) Dealing justly with a case includes –

(a)

(d) Ensuring that it is dealt with expeditiously and fairly

[16] The Children (Guardianship and Custody) Act speaks to “having regard to the welfare of the child” [section 7(1)]. In this instance, the welfare of the children is not adversely affected by this medical examination. And even if so, the Court's order gives the mother the right to abort same, should she – as a medical doctor – deem it so. Even that “right” must be justifiable and reasonable.

[17] Having heard from both Counsel, and in particular the deemed “urgency” of the medical examination, the Claimant representing to this court that said examinations would have to be done in August 2022, the following orders were made:

1. Order granted in terms of paragraph 6 of Fixed Date Claim Form filed on September 9, 2021

That the relevant children are to be taken to doctor's appointment, along with passport for application as non-accompanying dependents for permanent resident to Canada.

2. The mother of the children (Defendant) or her nominee is to accompany the children to the medical examination which is to be done during the month of August 2022
3. Leave to appeal is granted to the Defendant.
4. The Claimant's Attorney-at-Law is to prepare, file and serve these orders.